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SUPERIOR FEDERAL BANK *v.* George MACKEY and Jones & Mackey Construction Company, LLC

CA 02-1119 129 S.W.3d 324

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

[Petition for rehearing denied January 7, 2004.]

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Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Donald H. Henry*, *Lance R. Miller*, *John K. Baker*, and *Derrick W. Smith*, for appellant.

David M. Hargis, for appellees.

JOSEPHINE LINKER HART, Judge. This appeal arises from a lawsuit filed by appellees George Mackey and Jones & Mackey Construction Co., LLC, against appellant Superior Federal Bank for breach of contract, promissory estoppel, intentional interference with contractual relations, defamation, and punitive damages. Following a nine-day trial, the jury returned a verdict by interrogatories and awarded the following damages to the LLC: $411,000 for breach of contract, $210,000 for promissory estoppel, $175,000 for defamation, and $5,000,000 in punitive damages.[1] The trial court set aside the promissory-estoppel verdict and awarded the LLC postjudgment interest of 10% on the breach-of-contract count and 6.25% on the remaining counts.

[1] The jury found in favor of appellant on the intentional interference count and awarded no damages to George Mackey personally. Those findings are not at issue on appeal.

Appellant makes five arguments on appeal: 1) the trial court should have granted a directed verdict on the defamation count; 2) the trial court should have remitted the punitive-damage award; 3) the trial court should have granted a directed verdict on the breach-of-contract count; 4) the trial court erred in allowing jury members to question witnesses; 5) the trial court erred in instructing the jury on spoliation of evidence. The LLC makes two arguments on cross-appeal: 1) the trial court erred in awarding postjudgment interest at a rate of less than 10%; 2) the trial court erred in setting aside the promissory-estoppel award. On direct appeal, we affirm the compensatory damages for defamation, reverse the breach-of-contract award, and remand to the trial court for further consideration of the punitive-damage award. On cross-appeal, we affirm the award of postjudgment interest and reinstate the promissory-estoppel verdict.

Background Facts

George Mackey is the sole owner of Jones & Mackey Construction Co., LLC. His background is in accounting and banking, and he is a former vice president of the Arkansas Development Finance Authority. Testimony at trial showed that, prior to the incidents that led to this lawsuit, Mackey enjoyed a stellar reputation. Witnesses testified that his credibility was without question and that he had been successful in his endeavors. In early 1998, Mackey decided to pursue a career in the construction business. While still with the ADFA, he joined forces with Mr. Robert Jones, who had twenty-five years of building experience, and together they completed several residential building projects.

In late 1998, Jones and Mackey began to do business in Faulkner County. They constructed a home in Conway, which was financed by a construction loan through First Community Bank. Shortly thereafter, Mackey received a phone call from Rick Baney, one of appellant's loan officers. Baney told Mackey that appellant was trying to establish a greater presence in the Conway lending market and would like an opportunity to finance Mackey's next project. As a result, in early 1999, appellant financed appellees' purchase of two residential lots for approximately $122,000 and financed construction of a home for $316,000. At about this same time, Mackey became sole owner of the LLC.

In early 1999, Mackey developed a plan to purchase a piece of property near the hospital in Conway and to construct a medical-office building. In April 1999, the LLC obtained a $270,000 loan from appellant to purchase the land Mackey had selected. Mackey then began to develop the property and incur expenses, including demolition of a building on the property, hiring an architect, and hiring a project manager. However, on May 10, 1999, the University of Central Arkansas, which owned property adjacent to the LLC parcel, filed a petition in Faulkner County Circuit Court to prevent all work on the property, pending negotiations for it to acquire the property through eminent domain. Mackey resisted UCA's petition and called upon appellant's representatives to attend the hearing and testify that the LLC had received financing for a viable project on the property. Steve Bryan and Rick Baney attended the hearing on behalf of appellant but were never called to testify. Following a May 17, 1999 hearing, the circuit judge denied UCA's petition.

The next day, May 18, 1999, Rick Baney sent a letter to George Mackey. The letter stated that it served as "a conditional commitment for approval of a $1,800,000 construction financing" and set forth several conditions that the LLC would have to meet to obtain the loan. As we will discuss in greater detail *infra*, the LLC contends that this letter created a contract whereby appellant promised to provide construction financing for the medical-office building. Upon receiving this letter, Mackey tendered his resignation to the ADFA and began work on the building. However, on June 7, 1999, Mackey received a fax from Rick Baney. The fax implied that the construction financing had not yet been approved, and it included several conditions that had not been set out in the May 18 letter.

In an attempt to settle the matter and obtain his funding, Mackey met with Tom Wetzel, appellant's regional manager of commercial loans. He and Wetzel clashed immediately, and their relationship deteriorated to the point of outright hostility. Wetzel ultimately sent Mackey the following letter on August 24, 1999, declining appellees' request for construction financing:

> Please be advised that as of this date Superior Federal Bank is declining the above referenced loan request for $1,600,000 [sic] due to lack of capital injection on your part. Current financial statements both personal and business indicate an inability to fund your portion of the cash required.

According to appellees, this letter from appellant refusing to finance the construction on the medical-office building constituted a breach of the May 18 commitment letter.

In addition to the construction financing controversy, which would become the basis for the LLC's breach-of-contract and promissory-estoppel claims, five incidents took place between June and October of 1999 that would become the basis for appellees' defamation claims. We will set these incidences out in greater detail later in the opinion, but they generally involved: 1) appellant returning a series of checks drawn on the LLC account marked insufficient funds; 2) appellant's representation to the Gospel Temple church, which had hired the LLC to construct a sanctuary, that the LLC was not on appellant's approved contractors list; 3) Wetzel's statement to a Mr. Frank Waite, an officer at another bank, that appellant was no longer doing business with Mr. Mackey; 4) Wetzel's statement to a Mr. Bernard Veasley, who was trying to help Mackey secure financing, that Mackey was "f***ing up"; 5) Wetzel's statement to Veasley that Mackey was a "big, fat slob" and a "big, black gorilla." When the construction financing on the medical office building fell through, the LLC began to lose money rapidly and was unable to pay its bills or continue construction on other projects. Ultimately, numerous lawsuits would be filed against the LLC, and the company would lose a great deal of money. Further, Mackey's and the LLC's once excellent reputations were eroded to the point that Mackey was referred to by one witness as a pariah.

On May 1, 2000, appellees sued appellant in Pulaski County Circuit Court, alleging that they had committed substantial resources to the medical-building project in reliance on appellant's commitment to provide financing and suffered considerable financial losses when appellant failed to follow through. They also alleged that they were defamed by appellant, which caused further damage to their reputations and business interests. During the course of the trial, appellant moved for a directed verdict on the defamation, breach-of-contract, and promissory-estoppel counts, all of which the trial court denied. Judgment was ultimately entered for the LLC on the defamation and contract counts, and appellant now appeals from that judgment.

Defamation

For its first argument on appeal, appellant contends that the trial court erred in failing to grant a directed verdict on the defamation count. In reviewing a denial of a motion for a directed verdict, our task is to determine whether the jury's verdict is supported by substantial evidence. *Tricou v. ACI Mgmt., Inc.*, 37 Ark. App. 51, 823 S.W.2d 924 (1992). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without having to resort to speculation or conjecture. *J.B. Hunt Transp. v. Doss*, 320 Ark. 660, 899 S.W.2d 464 (1995). When determining the sufficiency of the evidence, the appellate courts review the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *Coca-Cola Bottling Co. v. Gill*, 352 Ark. 240, 100 S.W.3d 715 (2003).

The following elements must be proved to support a claim of defamation: (1) the defamatory nature of the statement of fact; (2) that statement's identification of or reference to the plaintiff; (3) publication of the statement by the defendant; (4) the defendant's fault in the publication; (5) the statement's falsity; (6) damages. *Addington v. Wal-Mart Stores, Inc.*, 81 Ark. App. 441, 105 S.W.3d 369 (2003). A viable action for defamation turns on whether the communication or publication tends or is reasonably calculated to cause harm to another's reputation. *Id.*

Appellees' claims for defamation were based on the five statements previously mentioned. For the moment, we put aside the last two statements, which were made about Mr. Mackey personally, and focus on those that directly pertain to the LLC. First, we look to appellant's statement that the LLC was not on its approved-contractors list. The events leading up to the statement are as follows. On August 27, 1999, the Gospel Temple Baptist Church obtained a $300,000 loan from appellant to build a new sanctuary. The church had previously entered into a contract with the LLC to construct the sanctuary, and it paid the LLC a deposit of $133,000. Thereafter, Mr. Paul Woolfolk, who served on the church building committee, communicated with at least one and possibly two of appellant's officers. Steve Griffen, the manager of appellant's construction lending department, testified that the church called him asking for consideration of a loan request, and

when the church indicated that the LLC would be the contractor, Griffin checked the approved builders list and told the church that the LLC was not on it. Loan officer Steve Bryan testified that he spoke with Woolfolk when the church was preparing to enter the construction phase of its project. Bryan said that, when he learned that the church had given the building contract to the LLC, he told Woolfolk that appellant could not be involved in the project due to "a conflict of interest," allegedly referencing the troubles that were beginning to surface between Mackey and appellant over construction financing for the medical building. Woolfolk testified that Bryan told him that appellant would not finance the project if the LLC was the contractor and that the LLC was not on appellant's list of approved contractors. As a result, Woolfolk said, the church attempted to secure financing with another institution, Regions Bank. Regions approved a $280,000 loan, contingent on, among other things, the LLC furnishing a performance bond. When the LLC could not obtain a bond, the church canceled its contract with the LLC and asked for a refund of the $133,000.

Appellant argues first that the statement that the LLC was not on the approved contractors list was true and that the truth of a statement is a complete defense to defamation. *See Wirges v. Brewer*, 239 Ark. 317, 389 S.W.2d 226 (1965). In our view, the truth of the statement was disputed because there was evidence that appellant did not actually maintain an approved contractors list. Although Steve Griffen testified as to the existence of the list, he could not produce a copy of it. Further, he testified in his deposition that there was no commercial contractors list, although there was a residential list. Rick Baney, appellant's loan officer, testified as follows:

> QUESTION: Insofar as you know today, as of August 1999, when you left the bank, there was no approved builders list existing at the bank?
>
> ANSWER: Not that I know of.
>
> QUESTION: So if somebody said that they can't do business with somebody because they're not on the approved builders list, that would be a false statement?
>
> ANSWER: As far as I know as of August of 1999.

Steve Bryan testified that he did not recall whether appellant had an approved contractors list. Finally, George Mackey, who had done business with appellant as a contractor, testified that he had never heard of an approved contractors list. Viewing this testimony in the light most favorable to appellees, we conclude that there was substantial evidence from which the jury could have found that the statement was false.

Appellant argues next that, even if the statement was false, the LLC did not prove that it sustained damages in connection with the statement. In order for liability for defamation to attach, there must be evidence that demonstrates a causal connection between defamatory statements made and the injury to reputation. *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.*

We believe there was substantial evidence that the LLC's relations with the Gospel Temple Church were detrimentally affected as the result of the statement. Paul Woolfolk testified that the church terminated the contract with the LLC in part because of appellant's statement. This caused the LLC to lose the money it would have made on the contract and to become liable for return of the $133,000. Further, it is clear that appellant's statement set in motion the series of events that led to the termination of the church's contract with the LLC. Had appellant not made the false statement, the LLC would not have been in the position of being required to meet the demands of another lending institution. Additionally, Steve Griffen testified in his deposition that customers often come to the bank for guidance regarding "who they are dealing with" and that a bank wants to make sure its customer is dealing with a reputable person. He responded affirmatively to counsel's question that the action of telling a customer that a builder was not on an approved list would imply that the person "was not of proper repute to do business with." Finally, although the church maintained the LLC as its contractor even after appellant made the statement about the list, there is evidence that the church did so because it had a contract with the LLC, not because it believed the LLC's reputation was untarnished. The combination of these factors leads us to conclude that there was

substantial evidence that the LLC sustained reputational damage as a result of appellant's statement. *See generally Northport Health Servs. v. Owens*, 82 Ark. App. 355, 107 S.W.3d 889 (2003).

For its final argument regarding this statement, appellant contends that the statement was privileged. A publication may be conditionally privileged if the circumstances induce a correct or reasonable belief that (1) there is information that affects a sufficiently important interest of the recipient or a third person; and (2) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct. *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002). However, the qualified privilege must be exercised in a reasonable manner and for a proper purpose. *Id.* The privilege may be lost if it is abused by excessive publication, if the statement is made with malice, or if the statement is made with a lack of grounds for belief in the truth of the statement. *Id.* The question of whether a particular statement falls outside the scope of the qualified privilege for one of these reasons is a question of fact for the jury. *Id.*

Appellant relies on *Pierce v. Bank One Franklin*, 618 N.E.2d 16 (Ind. Ct. App. 1993), and *West v. Peoples Bank & Trust Co.*, 14 Ohio App. 2d 69, 236 N.E.2d 679 (1967), for their holdings that a bank's defamatory statement to a third party may be privileged if the need exists for full and unrestricted communication on a subject in which both parties have a common interest or duty. We agree that, in many instances a bank must be free to impart information to its customers about third persons and that a bank may sometimes have a duty to do so. However, the bank may not exceed the scope of its privilege. Given the controversy in this case over whether an approved builders list actually existed, there is substantial evidence that appellant did not make the statement in good faith and lost any privilege it may have had by making the statement with a lack of grounds for belief in its truth.

Having determined that the jury's defamation verdict was supported by the above statement, it is not necessary that we analyze whether the verdict is supported by the remaining statements. The jury, in its answers to interrogatories, did not clearly indicate which statement or statements it found defamatory, only

that defamatory material was published and the LLC was damaged as a result. Thus, in the absence of a specific finding by the jury, we may affirm if any one statement served as substantial evidence of defamation. *See generally Elk Corp. of Ark. v. Jackson*, 291 Ark. 448, 725 S.W.2d 829 (1987) (affirming where the jury's verdict was supportable on any one of several theories presented). However, in the interest of providing a complete account of the events that occurred in this case, and because it may prove useful to the trial court's reconsideration of the punitive-damage issue, discussed *infra*, we will briefly address the other four statements that formed the basis of appellees' defamation claim.

The LLC also contended below that it was defamed by appellant returning some of its checks marked "NSF" (insufficient funds). George Mackey testified at trial that he had established a course of dealing with appellant concerning the LLC's checking account. He said that the LLC had a "controlled overdraft" account in which the bank would cover overdrafts up to a certain amount for a short period of time. Mackey testified that he was told not to let the overdraft amount on the LLC account exceed $25,000 to $40,000. Steve Griffen testified that, until November of 2001, the bank had a system whereby it could code certain accounts to permit short-term overdrafts of particular amounts, possibly up to $50,000, although he could not recall if the LLC had participated in that system. Appellant's officer Steve Park also confirmed the existence of such a practice.

In June of 1999, Mackey deposited a $65,000 check into the LLC account and immediately wrote $40,000 in checks thereon. As it happened, the $65,000 check was bad, and Mackey was notified of that fact. He very quickly deposited $40,000 to $50,000 to cover the checks the LLC had written. However, those checks were later returned marked NSF, and appellant accused Mackey of check kiting.

Appellant argues on appeal that the NSF designation cannot serve as a basis for a defamation action because the designation was true, *i.e.*, the LLC did not in fact have sufficient funds in its account to cover the checks it had written. Appellant relies on *Kiley v. First National Bank of Maryland*, 102 Md. App. 317, 649 A.2d 1145 (1994), in which the court held that a plaintiff's defamation action based on a bank's dishonor of a check must fail where plaintiff's funds were, in fact, insufficient to cover the checks.

The case before us has one important aspect that the *Kiley* case did not. Viewing the evidence in the light most favorable to appellees, there was a course of dealing between the LLC and appellant whereby appellant would cover any overdrafts for a short period of time.[2] It is possible that the jury, in light of the appellant's usual practice of accepting certain overdrafts as payable, could conclude that there were in actuality sufficient funds available to cover the LLC's checks when they were presented and that appellant's representation otherwise was false. Thus, there is substantial evidence to prove the element of falsity. However, the LLC presented virtually no evidence to establish that the NSF notation on the checks resulted in damage to the LLC's reputation. None of the payees of the checks testified, nor did anyone testify who had seen one of the checks. Therefore, despite our conviction that appellant's conduct in this instance was particularly egregious and seemingly calculated to do harm to the LLC by unexplainedly abandoning an established practice, we decline to hold that it supports the jury's defamation verdict.

The next statement was made by appellant's officer Tom Wetzel. Wetzel told Frank Waite of Regions Bank that appellant was no longer doing business with Mackey. This statement was made at the time Regions was considering the possibility of financing the Gospel Temple construction after appellant declined to do so. At some point, Wetzel told Waite that appellant wasn't "lending Mr. Mackey any more money" and that appellant was "no longer doing business with Mr. Mackey." On appeal, appellant argues that 1) the statement was true and 2) the LLC proved no reputational injury.

Appellant is correct that Wetzel's statement was true because it appears that the statement was made after appellant had declined the LLC's loan request. However, appellees contend that appellant told a half-truth and that the statement carried a derogatory implication that Mackey and the LLC were unfit to do business with. The concept of defamation by innuendo was considered in *Pritchard v. Times Southwest Broadcasting, Inc.*, 277 Ark. 458, 642 S.W.2d 877 (1982), where the court said, "The words to

[2] We note, as a matter of interest, that the Uniform Commercial Code provides that a bank may dishonor an item that would create an overdraft unless it has agreed to pay the overdraft. *See* Ark. Code Ann. § 4-4-402(a) (Repl. 2001).

be defamatory in such cases should be susceptible of two meanings, one defamatory and one harmless. In that regard, we read the words in their plain and natural meaning, as they would be interpreted by a reader of the newspaper considering the articles as a whole." *Id.* at 461, 642 S.W.2d at 878. The court also said that it would not strain to find a defamatory meaning in such instances. *Id.*

We believe that there is substantial evidence from which the jury could have found that the statement was damning enough to contain a defamatory implication. The statement was incomplete because it tended to imply that appellees were unworthy to loan money to when in fact appellant and appellees broke off relations over the construction-financing conflict. Further, the jury was not required to view the statement in a vacuum. In determining whether the statement carried a defamatory meaning or a harmless meaning, the jury could consider the fact that Tom Wetzel made other disparaging statements about appellees as well, which will be detailed shortly. However, as in the case of the insufficient-funds checks, appellees did not provide evidence to show that the communication of this statement to Frank Waite caused reputational damage. Waite testified that he had no problem with the LLC being the contractor on the Gospel Temple Construction. Therefore, we decline to uphold the jury's verdict on the basis of this statement.

Finally, we come to the two statements that Tom Wetzel made about George Mackey. These statements were made by Wetzel to Bernard Veasley, who was attempting to intercede with appellant and help Mackey obtain permanent financing for the medical building project. At Mackey's request, Veasley went to see Wetzel to assure him that he had a "take-out" lender who was prepared to take out the construction loan. When he arrived to see Wetzel, he overheard a phone conversation between Wetzel and Mackey on the speaker phone in which they were arguing over financing. Later, Wetzel told Veasey that Mackey was a "big, fat, damn slob" who was "f***ing up." Wetzel also called Mackey "a big, black gorilla."

There is no doubt that these statements are defamatory in nature. They carry a meaning that Mackey was incompetent in running his business and did not possess the human mental wherewithal to do so. Further, actual reputational damage was

caused. Veasely testified that he would no longer do business with Mackey after hearing that he was "messing up." However, appellant argues that these statements reference Mackey personally and so cannot be used to support a defamation verdict in favor of the LLC. We have found no Arkansas case on point and the parties have cited none, regarding whether a company may be defamed by statements made about one of its officers. Because we have already determined that the jury's defamation verdict is supported by substantial evidence, we decline to break new ground on this issue.[3] However, we take this opportunity to express our revulsion toward such malicious and hateful language uttered by a bank about its customer.

To conclude on this point, we affirm the trial court's decision to deny a directed verdict on the LLC's defamation claim and affirm the $175,000 verdict.

Punitive Damages

Appellant's argument on this point is twofold. First, it argues that there was not substantial evidence to support punitive damages. Second, it argues that the punitive-damage award was excessive.

Appellant is procedurally barred from raising the first argument. Appellant made no directed-verdict motion to dismiss appellees' claim for punitive damages, nor did it object to the jury being instructed on punitive damages. The first objection appeared in appellant's posttrial motion. In *Willis v. Elledge*, 242 Ark. 305, 308-09, 413 S.W.2d 636, 638 (1967), our supreme court stated:

> Appellant first argues that there was not enough evidence to submit the issue of punitive damages to the jury, but we cannot consider this question, since an instruction on punitive damages was given the jury without objection on the part of appellant. The failure to

[3] *But see Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562 (1986), which recognized that a corporation is not defamed by communications defamatory of its officers, agents, or stockholders unless the communications also reflect discredit upon the method by which the corporation conducts its business. The court also recognized that libel of an individual can cause injury to a corporation if they are so interconnected that a reasonable person would perceive harm to one as harm to another.

> object to an instruction operates as a waiver of any error that might be committed in giving it.

The supreme court has also recently held that an appellant waives its right to question the sufficiency of the evidence to support a punitive-damage award if it does not make the proper directed-verdict motions. *Advocat, Inc. v. Sauer*, 353 Ark. 29, 49, 111 S.W.3d 346, 357 (2003):

> Appellants' first argument that there was insufficient evidence to support the award of punitive damages in this case is not preserved for this court's review. Arkansas Rule of Civil Procedure 50(e) requires that where "there has been a trial by jury, the failure of a party to move for a directed verdict at the conclusion of all the evidence, because of insufficiency of the evidence will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict."
>
> . . . .
>
> Because the appellants failed to renew their motion for directed verdict following the conclusion of the Sauer Estate's rebuttal, they waived any question pertaining to the sufficiency of the evidence to support the jury's award of punitive damages.

In the case at bar, appellant made no directed-verdict motion regarding punitive damages. Further, appellant permitted the jury to be instructed on punitive damages without objection. Appellant's failure to preserve the issue at one of these stages precludes appellant from now raising the issue on appeal.

However, the same does not hold true for appellant's argument that the punitive-damage award was excessive, even though that argument was also made for the first time in a posttrial motion. Obviously, a party is unaware of the excessive nature of a verdict until that verdict is rendered. We therefore consider the merits of this argument.

[redacted] Ordinarily, we follow a two-step analysis in determining whether a punitive-damage award is excessive. First, we determine whether the award is excessive under state law. That entails an analysis of whether the jury's verdict is so great as to shock the conscience of the court. *See Advocat, supra.* It also entails

a consideration of 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. *Hudson v. Cook*, 82 Ark. App. 246, 105 S.W.3d 821 (2003). Second, we consider the award in light of the federal due process analysis in *BMW of North America v. Gore*, 517 U.S. 559 (1996). This involves an analysis of the degree of the defendant's reprehensibility or culpability; the relationship between the penalty and the harm; and the sanctions imposed in other cases for comparable misconduct. *Hudson v. Cook, supra.* The United States Supreme Court recently elaborated on the factors to be considered when assessing the degree of a defendant's reprehensibility: whether the harm caused was physical as opposed to economic; whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; whether the target of the conduct had financial vulnerability; whether the conduct involved repeated actions or was an isolated incident; and whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. *State Farm Mut. Ins. Co. v. Campbell,* 538 U.S. 408 (2003). The Court in that case also recognized that, in practice, few awards exceeding a single-digit ratio between compensatory and punitive damages will satisfy due process.

The *Campbell* case was handed down by the Supreme Court on April 7, 2003, while this appeal was pending. Thus, the trial court did not have the opportunity to consider it. It is apparent that the punitive-damage award in this case, which bears a 28.5-to-1 ratio to the compensatory award, should be reexamined in light of *Campbell.* While we recognize that we have the authority to conduct a *de novo* review of the punitive award, *see Advocat, supra,* we believe the better approach in this case is to remand the case to the trial court to reevaluate the award in light of the factors considered in the Supreme Court's recent holding in *Campbell.* We therefore remand for that purpose.

Breach of Contract

The LLC's breach-of-contract claim was based on the letter that Mackey received from appellant on May 18. The letter reads:

> Thank you for allowing Superior Federal Bank to participate in your medical building project at Western and College in Conway, AR. We have approved an interim loan in the amount of $272,000

> for the land acquisition for this project. This will serve as a conditional commitment for approval of a $1,800,000 construction financing. Before final construction financing can be approved, the following items are needed:
>
> — Loan value not to exceed 80% of the lower of cost or appraisal
>
> — 3-year projections accompanied by signed lease commitments of 60% - 75%
>
> —Tax returns on each principal of Jones & Mackey Construction Company, LLC

Appellant argues that the May 18 letter was not an enforceable contract because the parties did not agree on all essential terms. Therefore, appellant contends, the trial court should have granted a directed verdict on the breach-of-contract claim. We agree.

It is well settled that where all essential terms of a contract are not agreed upon, the contract is unenforceable. *Troutman Oil Co. v. Lone*, 75 Ark. App. 346, 57 S.W.3d 240 (2001); *Hunt v. McIlroy Bank & Trust Co.*, 2 Ark. App. 87, 616 S.W.2d 759 (1981). The *Hunt* case involved a situation that is somewhat similar to the case at bar. There, the Hunts alleged that McIlroy had orally promised to loan them an unspecified amount of money between $500,000 and $750,000. The alleged oral agreement contained no interest rate or repayment terms. The trial court held that no contract was created, and the supreme court agreed:

> After a study of the evidence presented at trial, we have no hesitancy in agreeing with the chancellor that the appellants failed to prove a contract existed between themselves and the appellee. Appellee's officer, Larkin, and appellant Ben Hunt initially discussed the financing of the expansion of the S.B.H. Farm operation, but the total amount of loan proceeds was never decided. Hunt said that at one time Larkin told him he could have up to $750,000. Larkin testified that the appellee was willing to loan in excess of $500,000, and it could have been $700,000. Both Larkin and Hunt agreed that no interest rate or repayment terms were ever agreed upon. There apparently was some discussion that long term permanent financing would be necessary, but the terms of such financing were left to future determination. Meanwhile, short term notes were signed by

> appellants for loan proceeds so the farm expansion could commence. Although Larkin and Hunt may have generally agreed on a course of action as to the need for financing the farm project, they never agreed on the essential, much less all of, the terms of a contract to loan monies. There is no way that a court could take the general terms discussed between Larkin and Hunt regarding an open-ended loan with no repayment provisions and be asked to enforce an agreement without filling in necessary terms essential to the formation of a contract. The subject matter of the proposed agreement was indefinite and the mutual assent and obligations were so vague as to be unenforceable.

Id. at 90, 616 S.W.2d at 761. Likewise, in the case at bar, a court could not enforce such an agreement without adding certain essential terms. Although the May 18 letter contains the amount of the loan, it does not contain a repayment schedule, a term of the loan, or an interest rate. These are essential terms of a loan commitment letter. Black's Law Dictionary defines a loan commitment as a:

> Commitment to borrower by lending institution that it will loan a specific amount at a certain rate on a particular piece of real estate. Such commitment is limited to a specified time period (e.g. four months), which is commonly based on the estimated time that it will take the borrower to construct or purchase the home contemplated by the loan.

Black's Law Dictionary at 844 (5th ed. 1986).

Appellees argue that testimony was presented at trial by several persons familiar with construction lending practices, and all of them testified that the May 18 letter was a "commitment letter" upon which a borrower could rely to begin his project. While such testimony may be relevant to the LLC's promissory-estoppel claim, discussed *infra*, it does not alter the fact that the letter does not contain the essential terms to establish a formal contract. Appellees also argue that there was evidence from which the term of the loan and the interest rate could be established by custom or usage. For example, there was testimony that the term of a construction loan would typically be the period of construction, which could vary, and that a standard range of short-term interest rates were available on construction loans. However, there was no evidence that a specific term or rate of interest was customary, nor was there any evidence that the parties reached an agreement as to

any rates or loan terms. There was also evidence that Mackey had prepared amortization schedules using specific interest rates and terms. However, these schedules were prepared during the negotiating process. There is nothing to show that, following negotiations, the parties ultimately agreed to any particular term or interest rate. In any event, the two amortization schedules referenced by appellees show different loan amounts, different interest rates, and different repayment schedules.

[redacted] Given the absence of essential terms, we hold that the May 18 letter does not constitute an enforceable contract. We also agree with appellant's argument that the May 18 letter lacks the mutuality required of a contract because it imposed no obligation on the LLC:

> A contract to be enforceable must impose mutual obligations on both of the parties thereto. The contract is based upon the mutual promises made by the parties; and if the promise made by either does not by its terms fix a real liability upon one party, then such promise does not form a consideration for the promise of the other party. ... "Mutuality of contract means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound." A contract, therefore, which leaves it entirely optional with one of the parties as to whether or not he will perform his promise would not be binding on the other.

Showmethemoney Check Cashers v. Williams, 342 Ark. 112, 120, 27 S.W.3d 361, 366 (2000) (quoting *Townsend v. Standard Indus., Inc.*, 235 Ark. 951, 363 S.W.2d 535 (1962)). In the case at bar, the LLC could have walked away from appellant and obtained financing at another institution, and appellant would have had no right to enforce any obligation. Thus, there was no mutuality of obligation. *See also Armstrong Business Servs. v. AmSouth Bank*, 817 So.2d 665 (Ala. 2001) (holding that where there was no showing that the prospective borrower gave or did anything for the benefit of the prospective lender, there was no consideration for the loan commitment).

For the reasons stated, we reverse the jury's breach-of-contract verdict of $411,000.

Juror Questioning of Witnesses

Throughout the trial, the judge invited jurors to ask questions of the witnesses and the jurors did so on numerous occasions. The procedure was that the jurors would submit written questions to the judge, who would preview the questions and pose them to the witnesses. Appellant contends on appeal that such questioning by jurors should be prohibited because it removes the jury from its position as fact-finder and improperly places it in an adversarial role. *See, e.g., Wharton v. State*, 734 So.2d 985 (Miss. 1998); *State v. Zima*, 237 Neb. 952, 468 N.W.2d 377 (1991); *Morrison v. State*, 845 S.W.2d 882 (Tex. Ct. App. 1992).

We first address appellees' contention that appellant has waived this argument by failing to object. We disagree. From the first time that a juror actually proposed a question, appellant objected and continued to object to the practice throughout the trial.

As for the merits, we note that the supreme court has approved the practice of juror questioning. *Nelson v. State*, 257 Ark. 1, 513 S.W.2d 496 (1974); *Ratton v. Busby*, 230 Ark. 667, 326 S.W.2d 889 (1959). Appellant urges this court to join those jurisdictions that ban juror questioning. However, we are without authority to overrule decisions made by the supreme court. *Dean v. Colonia Underwriters Ins. Co.*, 52 Ark. App. 91, 915 S.W.2d 728 (1996). Therefore, we affirm on this issue.[4]

Instructing the Jury on Spoliation of Evidence

Appellant's final argument is that the trial court erred in instructing the jury on spoliation of evidence. The jury was instructed as follows:

> If you find that a party intentionally destroyed, lost or suppressed documents in this case with the knowledge that their contents may be material to a pending claim, you may draw the inference that the content of the documents would be unfavorable to that party's defense. When I use the term "material" I mean evidence that could be a substantial factor in evaluating the merit of the claim in this case.

[4] Certification was attempted on this point and rejected by the supreme court.

Spoliation is the intentional destruction of evidence; when it is established, the fact-finder may draw an inference that the evidence destroyed was unfavorable to the party responsible for its spoliation. *Tomlin v. Wal-Mart Stores, Inc.*, 81 Ark. App. 198, 100 S.W.3d 57 (2003). An aggrieved party can request that a jury be instructed to draw a negative inference against the spoliator. *Id.*

A party is entitled to a jury instruction when it is a correct statement of the law and there is some basis in the evidence to support the giving of the instruction. *Id.* We believe there is sufficient evidence in this case to support the giving of an instruction on spoliation. During the course of trial, appellees questioned appellant about the whereabouts of the 1999 approved contractors list, personnel evaluations of Tom Wetzel, and loan committee minutes that would have referenced the initial land-acquisition loan. Although there was testimony that these items should have existed, none could be found and no credible explanation was given for their absence. We therefore hold that the trial court did not err in giving this instruction.

Cross-Appeal: Postjudgment Interest

The trial court imposed postjudgment interest at a rate of 6.25% on the noncontract damages. Appellees argue that, under Ark. Code Ann. § 16-65-114(a) (1987), a court must impose a 10% rate for postjudgment interest. That statute reads:

> Interest on any judgment entered by any court or magistrate on any contract shall bear interest at the rate provided by the contract or ten percent (10%) per annum, whichever is greater, and on any other judgment at ten percent (10%) per annum, but not more than the maximum rate permitted by the Arkansas Constitution, Article 19, Section 13, as amended.

The clear language of this statute is that, in the case of damages that are not awarded on a contract judgment, the court may award postjudgment interest of 10%, but not if 10% exceeds the maximum rate permitted by the Arkansas Constitution. The recent supreme court case of *Bank of America v. C.D. Smith Motor Co.*, 353 Ark. 228, 106 S.W.3d 425 (2003), clearly indicates that postjudgment interest in excess of the rate permitted by the Arkansas Constitution is prohibited. There is no evidence in the record before us as to what interest

rate the constitution would have permitted on the date that judgment was entered. However, it is not necessary that we have that information because appellees argue only that the trial court was required to award 10% interest. Based on the language of the statute and the recent supreme court holding, we reject that argument because 10% postjudgment interest is not awardable if it exceeds the amount allowed by the constitution.

Promissory Estoppel

The trial judge set aside the jury's $210,000 promissory-estoppel verdict because he determined it was incompatible with the jury's finding that a breach of contract had occurred. It is correct that promissory estoppel is a basis for recovery when formal contractual elements do not exist. *MDH Builders v. Nabholz*, 70 Ark. App. 284, 17 S.W.3d 97 (2000). However, our reversal of the breach-of-contract award renders that rationale moot and thus permits reinstatement of the promissory-estoppel verdict.

Appellant argues that, even if the promissory-estoppel verdict is reinstated, there was not sufficient evidence to support it. We disagree. According to *Kearney v. Shelter Insurance Co.*, 71 Ark. App. 302, 307-08, 29 S.W.3d 747, 750 (2000), the black-letter law on promissory estoppel is found in the *Restatement (Second) of Contracts*, § 90:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Whether there has been actual reliance and whether it was reasonable is a question for the trier of fact. *Kearney, supra.*

In the case at bar, Mackey testified that appellant orally promised to finance the construction of the medical-office building and, as a result, he incurred over $500,000 in expenses. The loan memorandum for the land purchase indicates that appellant expected to obtain repayment from lease proceeds of the medical-office building, which could indicate that appellant contemplated providing financing through the construction phase. There was also evidence that appellant may have seen a sign

in front of the building site which read that it was providing financing for the project, yet it did not remove or object to the sign. Finally, there was testimony from numerous witnesses that it was reasonable for a borrower to rely on a commitment letter such as the May 18 letter to incur expenses and begin preparation for construction. In light of this evidence, we uphold the jury's $210,000 verdict for promissory estoppel.

Appellees' Motions

Pending before us are appellees' motion to strike appellant's reply brief and motion for sanctions and costs in connection with alleged deficiencies in appellant's abstract and addendum. We deny the motions, except that we award appellees $500 for supplementation of the addendum, pursuant to Ark. R. Sup. Ct. 4-2(b)(1) (2003).

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

STROUD, C.J., and VAUGHT, J., agree.

AMERICAN TRANSPORTATION CORPORATION *v.* EXCHANGE CAPITAL CORPORATION

CA 03-266 129 S.W.3d 312

Court of Appeals of Arkansas
Division III
Opinion delivered November 19, 2003

Lax, Vaughn, Fortson, McKenzie & Rowe, P.A., by: *Roger D. Rowe*, for appellant.

Skokos, Bequette & Billingsley, P.A., by: *Jay Bequette*, for appellee.

JOHN B. ROBBINS, Judge. Appellant American Transportation Corporation (AmTran) appeals from a judgment awarding appellee Exchange Capital (Exchange), as assignee of two trucking companies, $76,846.04 for unpaid invoices, some of which were fraudulently created by the trucking companies. We reverse and remand.

AmTran operated a manufacturing plant in Conway, Arkansas, and engaged AFS Logistics, Inc. (AFS), under a logistics management contract, to handle all transportation of parts and materials to and from its plant. From time to time, AFS chose Thunder Transport, Inc. (Thunder), or Lightning Transportation (Lightning), to provide these trucking services. Exchange had entered into factoring contracts whereby it advanced funds to

Thunder and Lightning in exchange for assignment of accounts receivable, plus a fee from the payments collected.[1] The accounts receivable were to be evidenced by original invoices and standard shipping documents, such as bills of lading. John Coffey testified that appellee advanced eighty-five percent of each invoice. Exchange's practice was to review and accept these invoices, advance funds to Thunder or Lightning, then forward the invoices to AFS, eventually receiving a check from AFS in payment of the accounts.

Unbeknownst to the parties before August 1999, Thunder and Lighting were using a scheme whereby the trucking companies would use altered or duplicate backup documents to obtain multiple payments for the same load of freight. Jill Fagan, former director of accounting and order services for AmTran, testified that, in August 1999, she noticed that AmTran's transportation costs were running higher than expected, which prompted an investigation. As part of the investigation, she and employees under her supervision reviewed all of Thunder and Lightning invoices and the attached bills of lading. Upon discovery of the fraud, AmTran and AFS ceased making payments to Exchange.

Exchange sued AmTran and AFS seeking $90,407.11 for Thunder's unpaid accounts receivable. AmTran answered, denying that it was indebted to appellee and affirmatively pleading that Thunder's fraud barred collection against these invoices. AmTran filed a counterclaim against Exchange for restitution of payments made against the fraudulent invoices. AmTran also asserted a cross-claim against AFS seeking indemnification for any judgment entered against AmTran. Exchange denied the allegations of the counterclaim. In addition, AmTran filed suit against Thunder and Lightning for fraud and against AFS for failure to detect or prevent the fraud. Prior to trial, AmTran and AFS settled their dispute.

At trial, Exchange introduced its list of unpaid invoices, totaling $90,407.11, as proof of its contract damages. John Coffey testified that Exchange always dealt with AFS, not AmTran, and that AFS always considered a receipt or signature as proof of delivery. He also testified that AFS would sometimes accept a duplicate bill of lading instead of an original. He also testified that Exchange's contract with its factoring clients required the client to

[1] There was testimony from John Coffey, chief executive officer of Exchange, that Exchange's relationship with Lightning ended in October 1998.

submit original invoices and documentation to Exchange and that Exchange's personnel used due diligence to determine whether the supporting documentation was proper. Coffey also said that Exchange did not advance funds on every invoice submitted by Thunder or Lightning and that Exchange looked to AFS's creditworthiness in determining whether to advance funds to Thunder or Lightning. He testified that the total amount advanced was $74,679.15.

Jill Fagan explained that AFS received and reviewed these invoices before sending AmTran a weekly statement of the aggregate amount of the transportation charges of various companies. The statement consisted of a summary of the companies that had transported materials, a reference to the invoice number relating to the particular shipment, and the total amount due to each of the companies. The summary statement typically was accompanied by a stack of backup documentation consisting of invoices and supporting documents. Each week, AmTran made one payment to AFS based on the summary statement and AFS distributed payment to the transportation companies it had selected. Fagan testified as to several examples of invoices that she identified as having altered or duplicative supporting documents. She testified that she prepared a spreadsheet showing invoice numbers, dates of purported delivery, and the identification of the altered and original bills of lading attached to the invoices. In compiling the spreadsheet, she testified that she identified as fraudulent only those invoices with altered or duplicative bills of lading or backup documents attached. Fagan testified that the spreadsheet also identified each of the fraudulent invoices, which together totaled $272,494.56 and included some invoices for which Exchange had not been paid. Fagan also testified that she cross-referenced her spreadsheet with Exchange's list of open invoices and determined that $30,968.80 of the $90,407.11 in invoices sued upon were fraudulent. She calculated that AmTran had $145,717.95 worth of fraudulent invoices that it had either paid or were still open, which exceeds the amount sued upon. She stated that AmTran did not receive the goods that were listed on the fraudulent invoices and that there were possibly other duplicate invoices that AmTran did not discover. Fagan also testified that the duplicate invoices included those submitted by Lightning prior to termination of its relationship with Exchange.

The trial court found that it was obvious that Thunder and Lightning were using false and fraudulent invoices and bills of lading to obtain advances from appellee and that appellant, appellee, and AFS all were at fault to some degree. The trial court relied on the supreme court's decision in *Benton State Bank v. Warren,* 263 Ark. 1, 562 S.W.2d 74 (1978), and concluded that appellant and AFS were in the best position to detect the fraudulent scheme by Thunder and Lightning and awarded appellee judgment in the sum of $76,846.04 and attorney's fees of $7,500. The $76,846.04 represented 85% of the $90,407.11 in open-account invoices sued for by appellee. Judgment was entered, and AmTran appeals.

Appellant argues two points on appeal: (1) the trial court failed to properly apply Ark. Code Ann. § 4-9-318[2] and allowed appellee to recover in a situation where its assignor would not be able to recover; (2) the trial court erred in awarding appellee its attorney's fees. Appellant concedes that its argument on the second point is contingent upon its prevailing on its first point. Therefore, we address the two points as one.

The standard that we apply when reviewing a judgment entered by a circuit court after a bench trial is well established. We do not reverse unless we determine that the circuit court erred as a matter of law or we decide that its 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). However, a trial court's conclusion of law is not entitled to the same deference. *See Duchac v. City of Hot Springs,* 67 Ark. App. 98, 992 S.W.2d 174 (1999).

Benton State Bank was correctly considered by the trial court in resolving AmTran's counterclaim against Exchange (which is not appealed from) but is distinguishable from the present case (Exchange's action as assignee to recover under the contract). In *Benton State Bank,* the issue was which party, as between Warren (the owner/general contractor) and the bank, should bear the loss paid by Warren and caused by the subcontractor's failure to pay the

[2] The General Assembly adopted a new Article 9 to govern secured transactions in 2001, effective July 1, 2001. 2001 Ark. Acts 1439. The present case was commenced prior to July 1, 2001, and the prior version governs this case. *See* Act 1439, § 1(c). All references will be to the 1991 version of the statute unless otherwise noted. Former Ark. Code Ann. § 4-9-318 (1991) now corresponds, with modifications, to Ark. Code Ann. § 4-9-404 (2001).

suppliers. In the present case, the question is whether appellee, as assignee of Thunder, in bringing suit against appellant and AFS on the contract between Thunder and AFS, is subject to the defense of fraud to the same extent as Thunder would be had it brought suit.

In *Benton State Bank v. Warren, supra,* unpaid suppliers of building materials sued the subcontractor and the owners/general contractor for money due them. The owners had made progress payments, intended to pay for materials, jointly to the subcontractor and his assignee bank. The bank credited the money received against its outstanding loans to the subcontractor. The progress payments were made on the basis of false certifications by the subcontractor that all previous bills for labor and materials had been paid. The owners were ultimately required to pay for the labor and materials a second time when the subcontractor finally defaulted. The question presented to the court was whether the losses involved should be borne by the owners or by the bank or, in other words, whether the owners were entitled to recover their earlier payments to the bank. The supreme court found that the critical factor was the relative degree of fault of the parties. It held that, although the owners had been remiss in not verifying payment of the subcontractor's bills, the bank/assignee had ample reason to suspect that it was receiving payments that should have been used to pay for materials. The bank bore the greater fault and, consequently, the risk of loss. The bank was, therefore, required to reimburse the owners/general contractor for the amount paid to satisfy the subcontractor's suppliers.

■ Appellee's reliance on *Michelin Tires (Canada) Ltd. v. First National Bank,* 666 F.2d 673 (1st Cir. 1981), and *Irrigation Association v. First National Bank,* 773 S.W.2d 346 (Tex. App. 1989), is misplaced because those cases involved account debtors seeking affirmatively to recover the payments made to an assignee, which is more akin to appellant's counterclaim against appellee than appellee's claim against appellant and AFS. Appellant has specifically stated in its brief that it is not appealing the judgment against it on its counterclaim. *Michelin Tires* relied in part on Justice Byrd's dissenting opinion in *Benton State Bank* and held that the account debtor could not recover on an affirmative claim. In this regard, *Michelin Tires* is contrary to Arkansas law as expressed by *Benton State Bank.* Both *Michelin Tires* and *Benton State Bank* are restitution cases where the account debtor was seeking to recover payments made to the assignee, not cases where the assignee is

bringing suit on the contract as is the present case. *See* James J. White et al., *Uniform Commercial Code* § 34-6 at 370 (5th ed. 2001). As such, it was appropriate for the trial court to balance the equities in deciding whether to award restitution. *See Frigillana v. Frigillana*, 266 Ark. 296, 584 S.W.2d 30 (1979).

The trial court stopped its analysis with *Benton State Bank*, *Michelin Tires*, and *Irrigation Association*; this was error because a different body of law governed Exchange's claim as Thunder's assignee against AmTran and the trial court did not discuss this body of law.

An assignee ordinarily obtains only the rights possessed by the assignor at the time of the assignment, and no more. *First Nat'l Bank of Fayetteville v. Massachusetts Gen. Life Ins. Co.*, 296 Ark. 28, 752 S.W.2d 1 (1988); *Office of Child Support Enfcm't v. Watkins*, 83 Ark. App. 174, 119 S.W.3d 74 (2003). As stated by the *Restatement (Second) of Contracts*, § 336, Comment b (1981), an assignor can assign "only what he has," and the assignee's right "is subject to limitations imposed by the terms of that contract [creating the right] and to defenses which would have been available against the obligee had there been no assignment." These common-law principles were codified in the Uniform Commercial Code as section 4-9-318.[3] As such, Exchange stands in Thunder's position and is subject to any defenses AmTran could raise if Thunder had brought suit.

In the present case, the contract sued upon was the contract between Thunder and AFS and was an exchange of mutual promises: Thunder, to haul freight for AmTran; AFS, as agent for AmTran, to pay for the freight services. *See Restatement (Second) of Contracts*, § 238 (1981). The evidence that Thunder submitted fraudulent invoices is undisputed. Jill Fagan testified that $30,968.80 of the $90,407.11 in invoices sued upon were fraudulent and that AmTran did not receive the goods that were listed on the fraudulent invoices. As a general rule, the failure of one party to perform his contractual obligations releases the other party from his obligations. *TXO Prod. Corp. v. Page Farms, Inc.*, 287 Ark. 304, 698 S.W.2d 791 (1985); *Stocker v. Hall*, 269 Ark. 468,

[3] Section 4-9-318(1)(a) (1991) reads in part, "the rights of an assignee are subject to ... [a]ll the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom. . . ."

602 S.W.2d 662 (1980); 9 Arthur L. Corbin, *Corbin on Contracts*, § 895, pp. 524-26 (Interim ed. 2002). Exchange argues that AmTran, through Fagan, admitted liability for some $59,000 in unpaid invoices. However, this misses the point that AmTran alleges that it overpaid Exchange for fraudulent invoices in an amount greater than that sued upon. This could be a complete setoff against Exchange's claim, if proven. *See Walker v. First Commercial Bank*, 317 Ark. 617, 880 S.W.2d 316 (1994). We reverse and remand for a new trial.

On AmTran's second point concerning the award of attorney's fees to Exchange, we also reverse because Exchange is no longer a "prevailing party" entitled to attorney's fees under Ark. Code Ann. § 16-22-308 (1999).

Reversed and remanded.[4]

PITTMAN and ROAF, JJ., agree.

James Douglas DUNHAM *v.* Mike DOYLE and Stephanie Doyle

CA 02-515 129 S.W.3d 304

Court of Appeals of Arkansas
Division III
Opinion delivered November 19, 2003

[Petition for rehearing denied January 7, 2004.]

[4] The parties presented voluminous addenda containing hundreds of pages, all of the invoices at issue in this case, plus numerous additional documents. We find that this was unnecessary in light of the way the case was argued on appeal and remind counsel that an abstract and addendum can be deficient for containing *too much* material, as well as too little. *See Miller v. Hometown Propane Gas, Inc.*, 82 Ark. App. 82, 110 S.W.3d 304 (2003); *Frigon v. Frigon*, 81 Ark. App. 314, 101 S.W.3d 879 (2003).

Matthews, Campbell, Rhoads, McClure, Thompson, & Fryauf, P.A., by: *Edwin N. McClure*, for appellant.

Brenda Austin, Ltd., by: *Brenda Horn Austin*, for appellee.

JOHN B. ROBBINS, Judge. James Dunham appeals the order of the Washington County Circuit Court that changed custody of his two children, Jacob and Lexie, from a joint-custody arrangement between him and his ex-wife Kathleen to the children's maternal grandparents, appellees Michael and Stephanie Doyle. We reverse and remand.

Kathleen and James divorced pursuant to an order filed on September 7, 2000, which granted joint custody to the parents. James was ordered to have custody of the children during the week, and Kathleen during the weekend, Friday evening until Sunday evening, though required to be supervised by her parents. All parties resided in Fayetteville at the time; Kathleen resided with her parents, and James resided in the marital home, which was to be sold or auctioned under the terms of the divorce decree unless the parties could agree otherwise. At the time of the divorce, their son Jacob was attending kindergarten in Fayetteville, and their daughter Lexie, age two, was attending daycare at My Other Mother in Fayetteville. Jacob was transported to daycare after school was dismissed.

In October 2000, James remarried and moved to a two-bedroom apartment in Rogers with his new wife Desa, her two sons Remington and Magnum, and his two children Jacob and Lexie. In November 2000, Kathleen petitioned the court to change from joint custody to her full custody or, alternatively, to change the custody arrangement so that she could have the children during the week so as to move their son back to his original school. Kathleen worked as a medical assistant in various locations as assigned to her in northwest Arkansas. Kathleen lived with her parents in Fayetteville when the children were with her. Kathleen stayed with her boyfriend Jerry in Rogers when the children were not with her. Pursuant to the divorce decree, Kathleen was under an obligation to prevent any contact between her children and her boyfriend Jerry.

The maternal grandparents petitioned in December 2000 to intervene and to have the court appoint a guardian ad litem. The grandparents' petition requested that they be granted temporary custody, citing the multiple changes since the divorce and focusing on the actions or inactions of James as they affected the children. After hearings on the matter, the trial judge found that there had been a material change of circumstances, that neither parent was fit to have custody, and that vesting custody in the maternal grandparents was in the best interest of the two children, then age seven and three. Each parent was given visitation, and Kathleen was required to move out of her parents' home. The order was filed on August 22, 2001. Only James appeals, challenging the change-of-custody order on two bases: (1) that the circuit court clearly erred in finding that the children's best interest would be met by removing them from their parents and placing them with their

grandparents; and (2) that the trial court clearly erred because there is insufficient evidence to show that both parents were unfit. James does not challenge the finding that material changes in circumstances occurred.

The standard of review in child-custody appeals is well settled. 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 know of no cases in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great a weight as those involving children. *Watts v. Watts*, 17 Ark. App. 253, 707 S.W.2d 177 (1986). A finding is clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999).

The substantive law on this topic is equally well settled. The law prefers a parent over a grandparent or other third person, unless the parent is proved to be incompetent or unfit. *See, e.g., Schuh v. Roberson*, 302 Ark. 305, 788 S.W.2d 740 (1990); *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988); *Jones v. Strauser*, 266 Ark. 441, 585 S.W.2d 931 (1979); *Payne v. Jones*, 242 Ark. 686, 415 S.W.2d 57 (1967); *Riley v. Vest*, 235 Ark. 192, 357 S.W.2d 497 (1962). While there is a preference in custody cases to award a child to its biological parent, that preference is not absolute. *Freshour v. West*, 334 Ark. 100, 971 S.W.2d 263 (1998). Rather, of prime concern, and the controlling factor, is the best interest of the child. *Id.* The rights of parents are not proprietary and are subject to their related duty to care for and protect the child; the law secures their preferential rights only as long as they discharge their obligations. *Id.*; *Jones v. Jones*, 13 Ark. App. 102, 680 S.W.2d 118 (1984); *Watkins v. Dudgeon*, 270 Ark. 516, 606 S.W.2d 78 (Ark. App.1980).

We limit our examination of the evidence to that which is most relevant to James inasmuch as Kathleen did not appeal the finding that she is unfit to have custody. The testimony at the

hearings on this case revealed many undisputed facts. In line with the divorce decree, the children lived with their father James in the marital residence prior to and after the divorce, and they lived with their mother Kathleen and maternal grandparents on the weekends. However, while the parties all lived in Fayetteville, Kathleen had additional time with the children when mutually agreeable. Pursuant to the divorce decree, James was given the right to select the school that their children would attend. Also pursuant to the divorce decree, the marital residence was ordered to be sold, and it eventually went to public auction.

At the time of the divorce, and unbeknownst to the circuit judge, James was in a relationship with Desa, whom he met on the Internet in the spring of 2000 and married on October 19, 2000. Desa lived in an apartment in Rogers, and James moved himself and the children to Rogers on or about Sunday, October 29, 2000. This necessitated that the older child, Jacob, change schools. James notified Kathleen of this move in writing by hand-delivering a letter to her on that Sunday at the end of Kathleen's weekend visitation. Jacob started school in Rogers the following Monday. The move, along with other alleged changes including lack of communication between them and inadequate basic care of the children in James's custody, prompted Kathleen's petition to change custody. The Doyles moved to intervene in December 2000, asking for temporary custody.

At the hearing on the petitions conducted on August 1, 2001, James explained that he and Desa decided that they should move as a family to Rogers inasmuch as Kathleen would not agree that James retain the marital home. The move necessitated that Jacob change schools, where he would attend with his stepbrother Remington, who was two grades ahead of Jacob. Neither Magnum nor Lexie were school age at that time, so they attended My Other Mother daycare at the facility in Rogers.

Around Thanksgiving 2000, James, Desa, and the children moved to a three-bedroom house on Ash Street in Rogers, leasing the property for one year. The house had a fenced back yard, equipped with a sandbox, swing set, and clubhouse. By the summer of 2001, James and Desa had a son, Colt.[1] James testified that Jacob finished the school year 2000-2001 in Rogers where he

[1] James and Desa testified that the boys' names were not associated with guns, but were rather names of television characters.

had begun kindergarten in October, but that they planned to send Jacob and Remington to school in the district assigned to Ash Street beginning in the fall of 2001. James had not decided whether to move from Ash Street after the one-year lease expired, but he said that if they did, they would stay in the same school district as Ash Street.

Kathleen testified that her main concern was the frequency of injury and severity of illness of Jacob and Lexie while in James and Desa's custody. Jacob suffered a sunburn on a weekend camping trip with James and Desa in the late summer 2000. In the months after the divorce, Jacob had at least two black eyes, though one occurred at daycare. In James and Desa's backyard, Jacob had fallen from a tree and struck his head on a low limb, requiring four staples in his head. Lexie suffered a black eye when she and Jacob collided at play, and Lexie had also suffered a broken arm when she fell from a jungle gym in a city park while under James and Desa's care.

James explained the circumstances of those injuries and the timing of his notice to Kathleen about those injuries. James stated that DHS had been notified by someone of those injuries, DHS investigated the complaints, and nothing else ever came of that investigation. James inferred that Kathleen was the person who reported suspected abuse to DHS.

Kathleen also expressed concern about her children changing to another doctor and going to another school, but she agreed that she had not been denied any of her court-ordered visitation due to the move. Kathleen had other complaints. For example, she testified that James was responsible for Jacob being tardy for school on numerous occasions, that he did not ensure that Jacob's clothing or shoes fit, that he would send any uneaten food from one day's packed lunch on the following day for Jacob to eat, that James was slow to take the children to the doctor when they were ill, and that James refused her attempts to care for the children when James was unavailable at work. Basically, Kathleen questioned James's capability of caring for the children in a manner that she deemed best for them and thought she was the better suited parent with more time to attend to their needs.

James and Kathleen both testified that there had been occasional rearrangements with the joint-custody schedule to accommodate different family functions on each side. Both conceded that there was significant discord between them after the

divorce and that they often communicated about the children solely by letter. James and Kathleen disagreed on basic issues such as how to handle Jacob's lunch needs at school; basic discipline measures; types of extracurricular activities in which the children might participate; whether, when, and how to medicate the children; and whether each parent should get consent from the other regarding children's haircuts. James maintained that the anger between them had subsided in the months leading up to the hearings and that some healing had occurred between them. James explained that he was only in court to defend himself, not to seek a change.

The maternal grandparents, appellees Doyle, testified that they supervised the visits between their daughter and their grandchildren and that Kathleen was a wonderful mother, devoted to their care and comfort. The Doyles agreed that they provided financial support to their daughter and would continue to do so. Mrs. Doyle testified that the reason they intervened was because of the frequency of injury and illness when James had the children, citing to rashes, sunburns, cuts, black eyes, bumps and bruises. Mrs. Doyle expressed great concern that James and Desa were unable to supervise, whereas Mrs. Doyle had no reservations about her daughter's ability to care for her children. Mrs. Doyle said that if her daughter married her boyfriend Jerry, they possibly could move into the Doyle residence, but that was "a contingency plan" and just "talk" right now. Mrs. Doyle said that her main concern was to provide stability and safety for her grandchildren. She was concerned about changes in Jacob and Lexie after the birth of their half-brother Colt; Jacob expressed unusual aggression, and Lexie regressed to wanting to be more like a baby. Mrs. Doyle's position was that she stood ready to take the children as their permanent guardian if necessary, though she did not agree that her daughter was unstable.

Mr. Doyle testified that the joint-custody situation had never worked. Mr. Doyle said that he and his wife thought they were finished raising children, but if it were necessary to protect the grandchildren, then that is what they would do for as long as it took. Mr. Doyle testified that if his daughter was awarded custody, or if he and his wife were awarded custody, then he would ensure that his house would remain the children's home. He believed that the first school Jacob attended before he moved was one of the best in northwest Arkansas. Mr. Doyle was worried about Jacob's mental health since he began exhibiting aggressive behavior, he

was worried about Jacob's low weight, Jacob's extensive illnesses and injuries in James's care, and his education. Mr. Doyle expressed concern that Lexie exhibited sexually inappropriate knowledge for her age. He offered to pay for counseling for the children, and even for the parents if needed.

Mr. Doyle frankly admitted that his daughter Kathleen was dysfunctional right after the divorce, but he said she had improved dramatically. Mr. Doyle said that he and his wife wanted to give the court an alternative if it determined that neither of the parents could be reliable. He said he was certain that he could follow any orders of the court to preserve the children's relationship with their parents, but he said that his honest opinion was that James was a liar and a cheat who he would like to beat with a bull whip.

Jacob's first kindergarten teacher testified that she recalled Jacob being tardy several times in the first nine weeks of school, that he was thin but not unusually so, that he sometimes had difficulty with ill-fitting shoes but that Kathleen remedied that situation, and that he was a fairly clean child. The teacher remembered more interaction with Kathleen than James, but she recalled James informing her that Jacob was moving on the Friday before he left. She said that the school's policies did not prevent a parent from ensuring their kindergarten child made their way to the classroom in a timely fashion.

Tedra Spaw, the owner of My Other Mother daycare, testified that she had observed the children over time, primarily at the Rogers location. Ms. Spaw stated that the children appeared to be "well-adjusted, normal, every-day children" and were "clean and well-dressed." Nothing about their physical appearance concerned Ms. Spaw, even considering Jacob's weight. Ms. Spaw said she had no concerns about the well-being of the children since they had been at the Rogers facility, and she recognized her duty to report abuse to authorities. She recalled when Jacob blackened his eye at daycare and said that she gave an incident report to one of the parents. Ms. Spaw said that the children were happy to see their father and their step-mother when picked up, but she stated that their mother, who was initially very upset that the children had been moved to Rogers, was disruptive to the facility on more than one occasion.

Ms. Spaw remembered Mr. Doyle coming to the Rogers facility to pay the children's delinquent Fayetteville daycare account, and she said Mr. Doyle called both parents "slime and

unfit." Ms. Spaw said that Desa's sons Remington and Magnum were already attending care at My Other Mother in Rogers prior to Jacob and Lexie joining them there. Ms. Spaw said she would not call Desa's sons particularly rambunctious. Ms. Spaw testified that, to be fair, both James and Kathleen were frustrated and angry after the divorce like most parents, but that James was better able to contain his anger in front of the children, and that they both improved with time.

The children's current pediatrician in Rogers, Dr. Youngblood, testified that he was aware of the children's illnesses and injuries, which he described as typical. He reviewed their illnesses, including strep and ear infections, a rash associated with strep, and lacerations. The doctor said that Jacob was in the 25th percentile in both height and weight for his age, which was normal. He concluded that "they're both basically healthy children." The only concern Dr. Youngblood expressed was that Jacob was reported to have some attention problems in school. In particular, Dr. Youngblood was advised of his teacher's opinion that Jacob lacked focus in class and of reports that when Jacob was dropped off at school, he would wander the halls instead of go to class. However, Dr. Youngblood had not received all the reports to be filled out by various sources, so the evaluation on ADD was incomplete to date.

James and Desa's next door neighbor, Max Cardin, testified on their behalf. James and Desa introduced themselves to Mr. Cardin before they moved into the rent house, and Mr. Cardin said that they seemed to be nice people. Mr. Cardin said that he had been in the neighborhood for many years, that he helped James put up a sturdy swing set, and that he observed a clubhouse and sandbox in the back yard for the children. Mr. Cardin observed the children playing out in the yard and saw nothing that concerned him.

The children's attorney ad litem recommended that custody be placed with the maternal grandparents because they were the most stable force in the children's lives. The ad litem was concerned about the illnesses and injuries suffered by the children in their father's care. The ad litem was likewise concerned about the mother's lack of financial and housing stability and her association with Jerry, who was ordered to have no contact with the children. The ad litem recommended alternating weekend visitation with each of the parents and assessment of child support as to the parents.

Each attorney presented argument to the trial court as to why their respective positions should be the ruling of the court. James requested that the petitions be denied and that joint custody remain; Kathleen requested that her petition for sole custody be granted; the Doyles requested that if Kathleen was not granted custody, then they wanted custody.

The trial judge ruled that there were material changes in circumstances, attributable to James, and stated that joint custody was not working. The order listed as material changes: (1) that James was already in a relationship with Desa pending divorce, which was not divulged to the court; (2) that James quickly remarried and moved Jacob out of his kindergarten class in Fayetteville; (3) that James moved the children into a two-bedroom apartment holding six residents; (4) that James failed to promptly notify Kathleen about the move, the injuries, and illnesses; (5) that Jacob was experiencing difficulty focusing in school, after James changed his school twice since divorce; and (6) that the children together suffered at least seven illnesses or injuries in James's custody likely resulting from inadequate supervision.

The judge found that Kathleen was not fit, financially or in parental judgment. The judge found in the order that James was not fit as a parent because (1) James alienated the children from Kathleen and failed to give Kathleen her right of first refusal to care for the children when he was not available; (2) James wrongly blamed Jacob for being tardy to class instead of escorting him to the classroom; and (3) James exhibited a lack of adequate parental supervision. Having found that "neither parent in this case have discharged their obligations as parents," the judge found that the children's best interest was served by granting custody to the grandparents because the Doyles were candid with the court, lived in a stable home and school district familiar to the children, and were financially and emotionally stable. The judge ordered alternating weekend visitation and alternating holiday visitation for the parents, removing any requirement of supervision with regard to Kathleen and lifting the no-contact order regarding Jerry. Kathleen was ordered to move out of her parents' house, though her visitation was ordered to take place there for overnight visits, and Jerry could not stay overnight. The children were ordered to have therapy, and each parent was ordered to undergo an evaluation and to pay child support. James appeals.

James argues on appeal that the finding that he was unfit is clearly erroneous. After our de novo review of the evidence in this case, while deferring to the credibility determinations made at trial, we agree and hold that the trial judge clearly erred in finding that James was unfit as a parent. We do not address whether the trial court's finding that Kathleen was an unfit parent is clearly erroneous as that finding was not appealed by her.

The trial court was correct in its assessment that the joint-custody arrangement was not working and that material changes in circumstances occurred. The evidence could support a finding that James failed to be the ideal parent to the children and failed to communicate with Kathleen at the level required by joint custody. Nevertheless, as between the Doyles and James, we reverse the divesting of custody from James because the evidence simply does not support a finding that James was an unfit parent.

The supreme court in *Lloyd v. Butts*, 343 Ark. 620, 624, 37 S.W.3d 603, 606 (2001), quoted with approval the following text from *Holmes v. Coleman*, 195 Ark. 196, 111 S.W.2d 474 (1937):

> Courts are very reluctant to take from the natural parents the custody of their child, and will not do so unless the parents have manifested such indifference to its welfare as indicates a lack of intention to discharge the duties imposed by the laws of nature and of the state to their offspring suitable to their station in life. When, however, the natural parents so far fail to discharge these obligations as to manifest an abandonment of the child and the renunciation of their duties to it, it then becomes the policy of the law to induce some good man or woman to take the waif into the bosom of their home[.]

The language is strong, requiring the manifestation of indifference to the welfare of the child or abandonment. The law prefers a parent over a grandparent or other third person, unless the parent is proved to be incompetent or unfit. *See, e.g., Schuh v. Roberson*, 302 Ark. 305, 788 S.W.2d 740 (1990). The preference is based on the child's best interests. *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988). The right of natural parents to the custody of their children as against others is one of the highest of natural rights, and the state cannot interfere with this right simply to better the moral and temporal welfare of the child as against an unoffending parent. *Payne v. Jones*, 242 Ark. 686, 415

S.W.2d 57 (1967). The test as to custody between a natural parent and a third person has never been based solely upon who can do the most for the child. *Rayburn v. Rayburn*, 231 Ark. 745, 332 S.W.2d 230 (1960). James's actions and inactions, though perhaps fraught with missteps, do not rise to the level of manifest indifference to the welfare of Jacob and Lexie. Moreover, we cannot ignore that Jacob and Lexie have a half-brother with whom they share a significant family relationship. In short, the circuit judge clearly erred.

Having reversed the finding that appellant is an unfit parent, we cannot return the parties to the original decree of joint custody because Kathleen was adjudged to be an unfit mother, a determination that she did not appeal. We reverse, with the result to vest custody in appellant. A remand is necessary because the trial judge is in a better position to determine what visitation the mother is now entitled, *Lynch v. Brunner*, 294 Ark. 515, 745 S.W.2d 115 (1988), and to set an appropriate amount of support for her to pay.

Reversed and remanded.

PITTMAN and ROAF, JJ., agree.

Darold MAXFIELD *v.* DIRECTOR, Arkansas Employment Security Department

E 03-56 129 S.W.3d 298

Court of Appeals of Arkansas
Division I
Opinion delivered November 19, 2003

Sheila F. Campbell, for appellant.

Allan Pruitt, for appellee.

WENDELL L. GRIFFEN, Judge. This case arises from a decision of the Arkansas Board of Review of the Employment Security Department (ESD), denying unemployment benefits to appellant, Darold L. Maxfield. On appeal, appellant argues that the Board's decision denying unemployment benefits was not supported by substantial evidence and was contrary to the law. We agree; accordingly we reverse and remand so that the Board can enter an order that the unemployment benefits be paid.

Appellant filed a claim for unemployment benefits on September 4, 2002. His last employer was Cintas Corporation (Cintas). The ESD reviewed the case and disqualified appellant, finding that he had been discharged from his job for misconduct in connection with his work on account of dishonesty. Appellant then filed an appeal with the Appeal Tribunal on October 8, 2002. A telephone hearing took place on November 20, 2002. The Appeal Tribunal issued its decision on November 21, 2002, modifying the initial ESD determination inasmuch as appellant had not been discharged for dishonesty, but for misconduct in connection with his work. Benefits were denied for eight weeks. Appellant next filed an appeal with the Board of Review on December 3, 2002. The Board rendered its decision on January 30, 2003, affirming the Appeal Tribunal, holding that appellant had been discharged from his last work for misconduct connected with the work pursuant to Ark. Code Ann. § 11-10-514(a)(1).

The Appeal Tribunal's hearing officer received the following evidence on November 20, 2002. Randy Lewis, General Manager at Cintas, testified that appellant had been hired in 1999 as a telesales partner, and that Cintas fired appellant on August 30, 2002. Specifically, Lewis testified that appellant called him in the morning of August 19, 2002, to inform him that he had been ordered to military duty that same day as well as Tuesday (August 20) and Friday (August 23) of that week. Lewis stated that appellant said he had not known about the order to report for duty until the Saturday before August 19. Lewis told appellant to fax his orders and that they would complete his leave-of-absence paper-

work on Wednesday, August 21. Appellant faxed the orders as instructed. Lewis also testified that he and appellant completed two leave-of-absence forms on August 21, for the previous Monday and Tuesday as well as for the following Friday.

According to Lewis, appellant worked at Cintas that Wednesday and Thursday and was out again that Friday. The next Monday afternoon, on August 26, 2002, Lewis received the payroll sheets for the sales department in which appellant worked. The employee handing the payroll sheets to Lewis alerted him to the fact that appellant "was out sick two days last week on August 19th and 20th, and he had a vacation day on August 23rd." Lewis investigated the matter and found out that appellant had called the payroll clerk, another employee, on the afternoon of August 21—the same Wednesday Lewis and appellant had filled out the leave-of-absence forms—and that appellant told the payroll clerk that he had been out sick that Monday and Tuesday and that he was taking a vacation day that Friday. The payroll clerk also informed Lewis that appellant had signed the payroll as prepared by the payroll clerk, reflecting the sick days and the vacation day, and sent the payroll to Lewis's office manager.

At that point, Lewis suspended appellant and informed him of a pending investigation. Lewis testified that company policy requires that employees always request sick pay or vacation pay from their direct supervisors—in appellant's case, from Lewis. Lewis considered appellant's act one of dishonesty because he thought appellant had gone "around the system instead of going to your direct supervisor." Lewis also deemed the act to be one of "gross misconduct" and a "policy violation." Lewis stated that appellant knew the policies because he had been a supervisor at their company in the past. Soon after, Cintas terminated appellant's employment.

Lewis further testified that company policy as to military leave required them to prepare leave-of-absence forms. He admitted that employees can choose to use vacation days or sick pay for military leave, but that they had never used sick pay in appellant's case. Appellant had used vacation time for previous military leave. Lewis stressed that employees can request the use of vacation time for military leave, but that they have to do so in advance. He also stated that he would have had no problem if appellant had requested vacation time for the military leave on the Friday of the week in question, but that he had not done so.

Rick Johnson, the human resources manager for Cintas, also testified regarding the company's sick and vacation leave policies. He stated that emergency leave and sick leave were considered the same thing. Such leave could be obtained not just for actual sickness, but also for family emergencies requiring the employee to seek leave. Johnson also stated that they have never denied employees' use of accrued sick or vacation leave for military leave purposes, in compliance with federal laws. Johnson reiterated that all appellant had to do was actually request using sick or vacation leave and they would have granted it. Johnson stressed that appellant failed to do so, even though he knew the policy.

Appellant testified that he had been a telesale partner at Cintas from 1999 to the date of his employment termination. Appellant stated that he informed his supervisor, Lewis, of the emergency duty the Monday morning of the week in question and that he sent him the order by fax. He confirmed that he and Lewis met that Wednesday to complete military-leave-request forms. Concerning vacation requests, he testified that he had to make such requests to be forwarded to his supervisor for approval. However, he also testified that Lewis's office manager directed him to talk directly to the payroll clerk. Appellant testified that he informed the payroll clerk that he wanted to use sick time for the Monday and Tuesday military service of that week, but that he wanted to use vacation time for the Friday military leave.

According to appellant, later the payroll clerk requested that he sign the payroll sheet prepared by her, as part of a "new policy." Appellant stated that he had not been told that he had to take the payroll forms to his supervisor prior to giving them back to the payroll clerk. Appellant then stated that Lewis informed him that he was upset because appellant had used military leave as well as company leave. Appellant emphasized in his testimony that he had a right to use his accrued time for military leave purposes. He denies that he bypassed Lewis as his direct supervisor and that he incorrectly claimed sick and vacation time, because he had met with Lewis as early as he could to fill out leave-of-absence forms and because his "military leave" stated that he could use vacation or sick time to cover that time. Appellant also stated that Cintas did not pay him for military time.

Analysis

Our scope of appellate review in cases such as this is well-settled: On appeal, the findings of the Board of Review are conclusive if

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

E.g., *Fleming v. Director, Ark. Emp. Sec. Dep't*, 73 Ark. App. 86, 88, 40 S.W.3d 820, 822 (2001); *see also* Ark. Code Ann. § 11-10-529(c)(1) (Repl. 2002) (stating that the Board's findings are conclusive, absent of fraud, if supported by evidence). We further note that the credibility of witnesses and the weight to be accorded their testimony are matters to be resolved by the Board. *Niece v. Director, Ark. Emp. Sec. Dep't*, 67 Ark. App. 109, 992 S.W.2d 169 (1999).

Arkansas Code Annotated section 11-10-514(a)(1) (Repl. 2002) provides that an individual "shall be disqualified for benefits if he is discharged from his last work for misconduct in connection with the work." The employer has the burden of proving misconduct by a preponderance of the evidence. *Grigsby v. Everett*, 8 Ark. App. 188, 649 S.W.2d 404 (1983). Misconduct is defined as: (1) disregard of the employer's interests; (2) violation of the employer's rules; (3) disregard of the standards of behavior which the employer has a right to expect of his employees; (4) disregard of the employee's duties and obligations to the employer. *Nibco, Inc. v. Metcalf*, 1 Ark. App. 114, 613 S.W.2d 612 (1981). There is an element of intent associated with a determination of misconduct on the part of the employee. *Oliver v. Director, Ark. Emp. Sec. Dep't*, 80 Ark. App. 275, 94 S.W.3d 362 (2002). Therefore, mere unsatisfactory conduct, ordinary negligence, or good faith errors in judgment or discretion are not considered misconduct unless they are of such a degree or recurrence as to manifest wrongful intent, evil design, or an intentional disregard of the employer's interests. *Niece v. Director, Ark. Emp. Sec. Dep't, supra.*

Whether an employee's acts are willful or merely the result of unsatisfactory conduct or unintentional failure of performance is a fact question to be decided by the Board. *Id.*

In this case, we hold that the Board of Review's decision to deny unemployment benefits based on a finding of appellant's misconduct in connection with the work is unsupported by substantial evidence. The testimony of Lewis and Johnson established that Cintas allows its employees to use accrued vacation or sick time for military leave. They also testified that appellant had used vacation time for military leave in the past. Lewis admitted that employees can request the use of vacation time for military leave. He admitted further that he would not have had any problem with appellant using accrued leave time for his military leave, if he had but requested such use in advance.

The only evidence to the effect that appellant actually had to obtain advance approval from his immediate supervisor came from Lewis and Johnson. Neither of the witnesses were able to produce any written company policy to that effect. Appellant, in his turn, denied knowing of that specific advance approval requirement. While we are mindful of our rule upon appeal to defer to the Board's determination of witness credibility, we nonetheless note that the testimony of Lewis and Johnson demonstrates, at most, that appellant's conduct in signing the payroll record was a mere misjudgment. There is no evidence that appellant acted intentionally, willfully, or with disregard for his employer's interest. Our standard of review requires us to accept as substantial evidence such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Fleming v. Director, Ark. Emp. Sec. Dep't, supra.* We have found no relevant evidence in this case showing that appellant intentionally, willfully, or deceitfully acted with disregard for the employer's interest.

Lewis and Johnson testified that employees could use accrued sick leave for military leave absences. Lewis and Johnson admitted that Cintas employees are free to use accrued time for sick leave, vacation time, and non-specific emergency leave. They also admitted that their employees are free to use that accrued time for military leave. Without any showing that Cintas' interest was threatened, and despite the admission by Lewis that appellant made timely request for military leave and was entitled to use his sick leave while on military leave, the Board of Review found that

appellant's conduct constituted an infraction of such a degree as to manifest wrongful intent, evil design, or an intentional disregard of the employer's interests. *See Niece v. Director, Ark. Emp. Sec. Dep't, supra.* Because mere unsatisfactory conduct, ordinary negligence, or good faith errors in judgment or discretion are not considered misconduct, *Niece v. Director, Ark. Emp. Sec. Dep't, supra,* we would have to conclude that a one-time failure to seek advance approval for the use of accrued time—the use of which is the employee's manifest right under company policy—is indeed illustrative of manifest wrongful intent, evil design, or an intentional disregard of the employer's interests.

We certainly cannot now say that non-compliance with existing company rules could never constitute intentional disregard of the employer's interests. However, in the present case the employer failed to offer any, let alone substantial, evidence that would offer a valid basis for finding how appellant disregarded his employer's interests when the employee sought the use of accrued time for military leave, where the employee had the right to do so, and where the employer knew that the employee had military leave, merely because he failed to seek direct, personal advance approval for one such use of accrued time. We are at a loss how any of this constitutes a disregard of the employer's interests.

The employer also argues that because appellant at one point had been a supervisor, he knew that employees were required to request the use of accrued time in advance from their direct supervisors. There is no evidence to show us whether such a policy was in existence at the time appellant exercised supervisory functions.

Finally, we decide this case mindful that the Soldiers' and Sailors' Civil Relief Act of 1940, 50 App. U.S.C. Ann. §§ 501, *et seq.*, obligates employers to protect the jobs of military reservists called to active duty. The federal law does not give workers a license to defy the interests and workplace rules of their employers. Where a worker attempts to fulfill his military service obligation and notifies the employer of the need to do so, we deem it more than slightly unhelpful that an employer would dismiss the employee for allegedly violating a policy that the employer does not introduce into the documentary record in the worker's unemployment claim. Consequently, we reverse and remand with instructions to enter an order awarding benefits to appellant.

Reversed and remanded.

NEAL and CRABTREE, JJ., agree.

Wayne GAFFORD *v.* Philip COX

CA 03-382 129 S.W.3d 296

Court of Appeals of Arkansas
Division I
Opinion delivered November 19, 2003

R. Theodore Stricker, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *D. Keith Fortner*, for appellee.

The Brad Hendricks Law Firm, by: *George R. Wise, Jr.*, *amicus curiae*, for Arkansas Trial Lawyers Association.

OLLY NEAL, Judge. Appellant, Wayne Gafford, appeals the Pulaski County Circuit Court's grant of appellee Philip Cox's motion for summary judgment. On appeal, he argues that the grant of summary judgment was improper because the exclusive remedy provision of Ark. Code Ann. § 11-9-105 (Repl. 2002) does not apply to the facts of this case. We affirm.

Appellant and appellee worked for Sears, Roebuck and Company (Sears). On July 2, 1999, appellant was a passenger in a vehicle owned by Sears that was being driven by appellee to a service call. While en route, they were involved in an automobile accident when appellee failed to "yield" at a stop sign. As a result, appellant was injured. He filed suit against appellee seeking damages that he alleged were the result of appellee's negligent operation of the vehicle. Appellee moved for summary judgment, alleging that he was immune from suit because he was performing the employer's duty to provide a safe workplace and that Ark. Code Ann. § 11-9-105 provided that workers' compensation was appellant's exclusive remedy. Following a hearing on appellee's motion for summary judgment, the trial court found that it lacked subject-matter jurisdiction and thereby granted appellee's motion for summary judgment. Appellant now appeals.

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. *Elam v. Hartford Fire Ins. Co.*, 344 Ark. 555, 42 S.W.3d 443 (2001). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* On appellate review, we review the evidence in the light most favorable to the party resisting the motion for summary judgment, and resolve all doubts and inferences in the resisting party's favor. *Wilson v. Rebsamen Ins., Inc.*, 330 Ark. 687, 957 S.W.2d 678 (1997).

Appellant now argues that the grant of summary judgment was in error because the "exclusive remedy" provision of Ark. Code Ann. § 11-9-105 does not apply to the fact situation of this case and that the dismissal for lack of subject-matter jurisdiction was improper. Arkansas Code Annotated section 11-9-105 provides in pertinent part:

> (a) The rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee, his legal

> representative, dependents, next of kin, or anyone otherwise entitled to recover damages from the employer, or any principal, officer, director, stockholder, or partner acting in his capacity as an employer, or prime contractor of the employer, on account of the injury or death, and the negligent acts of a co-employee shall not be imputed to the employer.

However, Ark. Code Ann. § 11-9-410(a)(1)(A) provides:

> [t]he making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his dependents, to make a claim or maintain an action in court against *any third party* for the injury, but the employer or his carrier shall be entitled to reasonable notice and opportunity to join in the action.

(Emphasis added.) *See also Wilson v. Rebsamen Ins., Inc., supra.* Our supreme court has held that a negligent co-employee is a third party and that our workers' compensation law does not prevent an employee from maintaining an action for the negligence of a fellow employee. *King v. Cardin*, 229 Ark. 929, 319 S.W.2d 214 (1959).

In *Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969), it was held that an employer can not delegate its duty to provide a safe work place to an employee. *See also Allen v. Kizer*, 294 Ark. 1, 740 S.W.2d 137 (1987). Our supreme court later adopted the majority view that a supervisory employee was immune from suit for failure to provide a safe workplace. *Simmons First Nat'l Bank v. Thompson*, 285 Ark. 275, 686 S.W.2d 415 (1985). This immunity was later extended to non-supervisory employees who failed to provide a safe place to work when the injury occurred. *Allen v. Kizer, supra.* In *Brown v. Finney*, 326 Ark. 691, 932 S.W.2d 769 (1996), our supreme court held that co-employees who are performing the employer's duty to provide a safe workplace are immune from suit under Ark. Code Ann. § 11-9-105. Currently we recognize that in addition to the employer, Ark. Code Ann. § 11-9-105 extends immunity to the employer's workers' compensation carrier and to co-employees if at the time of the injury they were performing the employer's duty to provide a safe workplace. *Wilson v. Rebsamen Ins., Inc., supra.*

In support of his motion for summary judgment, appellee submitted an affidavit in which he stated that, on the day of the accident, he was training appellant. He said that his duties included transporting equipment and appellant to and from the service locations. In *Rea v. Fletcher*, 39 Ark. App. 9, 832 S.W.2d 513 (1992), we held that an employee responsible for transporting fellow employees to and from a work site involved the duty of providing a safe place to work. Here, appellant failed to contradict appellee's affidavit. Although appellant makes a strong argument, under the doctrine of stare decisis we are bound to follow prior case law. *Chamberlin v. State Farm Mut. Auto. Ins., Co.*, 343 Ark. 392, 36 S.W.3d 281 (2001). Thus, when we view the evidence in a light most favorable to appellant, there was no unresolved question of material fact, and the trial court did not err when it granted appellee's motion for summary judgment.

Affirmed.

GRIFFEN and BAKER, JJ., agree.

Michael J. HICKMAN and Lynda Hickman *v.*
KRALICEK REALTY and CONSTRUCTION COMPANY

CA 03-370 129 S.W.3d 317

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

Phillip J. Milligan, for appellants.

Bill Walters and *Troy Gaston*, for appellee.

TERRY CRABTREE, Judge. Appellants Michael and Lynda Hickman contracted with appellee Kralicek Realty and Construction Company to construct a residence on their property in Sebastian County, Arkansas. The price was to be $376,359.48, which included a "builder's fee" of $27,878.48, consisting of, among other things, the cost of supervision, overhead, and builder's fee. Appellants were permitted to choose their own subcontractors for certain items and pay for these expenses directly. When the balance owed was not paid, appellee filed suit seeking a materialman's lien for the sum of $97,634.08 and, if not satisfied, for foreclosure of the lien.[1] Appellants answered, admitting the existence of the contract but denying the remainder of the allegations of the complaint. Appellants later filed a counterclaim against appellee and pleaded that appellee breached the contract by not informing appellants that the cost of the residence would exceed $376,359.48 and that appellee breached the implied warranty of habitability in failing to provide a working septic system for which appellants would spend in excess of $30,000 to repair. In their counterclaim, appellants admitted that, by their calculations, they owed appellee approximately $21,000. Appellee denied the allegations contained in the counterclaim.

Following a bench trial, the trial court ruled from the bench, finding that the contract was a cost-plus contract; that there was a valid materialman's lien; that appellee was entitled to recover $94,520.92, representing the balance of appellee's total expenditures and the builder's fee; that appellants were entitled to an offset of $1,500 for minor construction problems such as paint, the walls, and brick coloration; that appellants were entitled to another $1,500 offset for unaccounted-for material; that appellee breached the implied warranty to supply the residence with a working septic system, granting appellants a credit of $19,675.34; and that appel-

[1] The complaint also named as a defendant Superior Federal Bank, the holder of the mortgage on the property. Superior Federal was dismissed by appellee's taking a non-suit.

lee was entitled to recover costs of $170 and interest from the date of filing its materialman's lien to the date of trial in the amount of $9,188.18. An amended judgment was entered on December 18, 2002, changing the date from which the interest was calculated to the date of the completion of the construction. This increased the amount of interest awarded to $10,488.07 and the total judgment, after setoffs and credits, in appellee's favor to $82,507.65. The judgment also ordered an immediate sale of the property. This appeal and cross-appeal followed. Appellants deposited $82,778.03 in an account with Superior Federal, and the trial court approved that deposit as a supersedeas bond.

Appellants argue three points on appeal: that the trial court erred in allowing appellee to amend its pleadings to conform to the proof to allege a breach of contract; that the trial court erred in allowing appellee a lien for sums that included appellee's profits; and that the trial court erred in holding that appellee's lien was valid when the lien was based on an ambiguous contract. Appellee argues on cross-appeal that the trial court erred in finding that it breached the implied warranty to provide a working septic system and that the trial court erred in failing to award appellee attorney's fees.

Equity cases such as lien foreclosure cases are reviewed *de novo* on appeal. *Cannon Remodeling & Painting, Inc. v. The Marketing Co.*, 79 Ark. App. 432, 90 S.W.3d 5 (2002). We do not reverse a trial court's findings of fact unless they are clearly erroneous. *Id.* 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. *Id.*

As their first point, appellants argue that the trial court erred in allowing the amendment to conform the pleadings to the proof during trial after an objection was made. At the close of its case, appellee made a motion to conform the pleadings to the proof to include a breach-of-contract claim. Appellants objected to the amendment, but the trial court overruled the objection.[2] On

[2] Appellants also moved for a directed verdict on the validity of the materialman's lien claim. The trial court denied the motion. Appellants do not challenge the denial of the motion for directed verdict on appeal.

appeal, appellants argue that this was error because they were denied a fair chance to defend on a breach-of-contract claim.

Arkansas Rule of Civil Procedure 15 governs the amendment of pleadings. Rule 15(b) states in part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended in its discretion. The court may grant a continuance to enable the objecting party to meet such evidence.

Rule 15 vests broad discretion in the trial court to permit amendment to the pleadings, and the exercise of that discretion by the trial court will be sustained unless it is manifestly abused; and one seeking reversal on that ground must show the manifest abuse of discretion. *Wingfield v. Page*, 278 Ark. 276, 644 S.W.2d 940 (1983). In the present case, the trial court overruled appellants' objection and stated that it would proceed on appellee's breach-of-contract claim and appellants' counterclaim and later determine whether the lien was valid. The trial court also indicated that it viewed the complaint as one requesting judgment for a debt and a lien, which it also asked to be foreclosed. We cannot say that the trial court abused its discretion in allowing the amendment to conform to the proof. First, it appears that the trial court decided the case as a lien claim, not a breach of contract case. Second, appellants did not move for a continuance to meet the new theory. Where neither a continuance was requested nor a demonstration of any prejudice resulting from an amendment was shown, the amendment should be allowed. *Turner v. Stewart*, 330 Ark. 134, 952 S.W.2d 156 (1997). We cannot say that the trial court abused its discretion in permitting the amendment.

For their second point, appellants argue that the trial court erred in allowing appellee a lien for sums that included appellee's profits. Appellee argues that the builder's fee covered the work of a person supervising the subcontractors. Diane Hamilton, appel-

lee's bookkeeper, testified that the actual builder's cost was $222,926.66 and that the builder's fee was $27,878.48, resulting in a total of $250,805.14. Appellants paid appellee a total of $156,284.22, leaving a balance owed of $94,520.92. She testified that the builder's fee covered the supervision of the project and other services of the office. Elmer Kralicek testified that the builder's fee covered workers' compensation insurance, general liability insurance, project supervision, overhead, and profit. He testified that appellant Lynda Hickman wanted a fixed bid on the builder's fee, instead of a fee based on a percentage of the cost, because she realized that she would exceed the contract allowance on some items and did not want to be penalized by paying appellee a larger fee.

The Arkansas Supreme Court has held that the mechanics' and materialmens' lien statute, Ark. Code Ann. §§ 18-44-101 through 135 (1987 & Supp. 2003), gives a lien to the person who performs the labor and not to the person who hires labor performed and pays for it. *Middleton v. Watkins Hardware Co.*, 196 Ark. 133, 116 S.W.2d 1043 (1938); *see also Simmons First Bank v. Bob Callahan Servs., Inc.*, 340 Ark. 692, 13 S.W.3d 570 (2000). The supreme court has construed the materialmens' lien statute as not extending to the contractor's profits or bonus. *Withrow v. Wright*, 215 Ark. 654, 222 S.W.2d 809 (1949); *Cook v. Moore*, 152 Ark. 590, 239 S.W. 750 (1922); *Royal Theater Co. v. Collins*, 102 Ark. 539, 144 S.W. 919 (1912). Section 18-44-101(a) was amended in 1995 and now provides in part:

> 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.)

As amended in 1995, the statute now specifically includes a contractor's services as an item covered by a materialmen's lien. Only one reported case has considered the scope of the amended statute. In *Simmons First Bank, supra*, the supreme court considered a request for a lien for both the services of a contractor's office personnel and the contractor himself under the amended statute.

There, the supreme court assumed without deciding that the amended statute provided for office support personnel and supervision services within its reach. The supreme court affirmed the trial court's denial of a lien for these items on the basis that the abstract was deficient on the time records of the office personnel and that the trial court was not clearly erroneous in finding that the time the contractor spent on the job was speculative.

The trial court found that the contract was a cost-plus contract and allowed appellee credit for its builder's fee, before offsetting the award with setoffs and the credit for appellants' counterclaim. This court has held that the lien provided by section 18-44-101 does not extend to profits on this type of contract, only to the costs of labor and material. *Wells v. Griffin*, 266 Ark. 763, 586 S.W.2d 239 (Ark. App. 1979).[3] Here, the trial court allowed appellee the full amount of its claim, which included the builder's fee without segregating the builder's fee or any profits. We reverse and remand for a determination of the cost of the services, labor, and materials that appellee actually furnished and used in the house and disallow appellee a lien for its profits.[4]

In their third point, appellants argue that the trial court erred in holding that appellee's lien was valid because the lien was based on an ambiguous contract. At trial, the parties stipulated that the contract was ambiguous and that parol evidence could be admitted to explain the ambiguity. Appellants argue that, because the contract is ambiguous and any ambiguity is construed against the drafter (in this case, appellee), the trial court erred in finding that appellee had a valid lien. The basis of appellants' argument is that, according to Lynda Hickman's testimony, appellants have paid $383,208.63 for the house and, therefore, if the contract was a fixed-price contract, then appellee is not entitled to a lien because appellee is not due any further payment.

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[3] In *Shaw v. Rackensack Apartment Corp.*, 174 Ark. 492, 295 S.W. 966 (1927), the court distinguished between cost-plus contracts and fixed-price contracts and allowed a lien to include profits in a fixed-price contract. *Wells* followed *Shaw* as to one of the lien claimants who had a fixed-price contract.

[4] Appellee, on its breach-of-contract claim, can recover judgment for the full amount of its builder's fee. However, the lien does not extend to appellee's profits. *See Withrow v. Wright*, 215 Ark. 654, 222 S.W.2d 809 (1949).

Where the meaning of a written contract is ambiguous, parol evidence is admissible to explain the writing. *Brown & Hackney v. Daubs*, 139 Ark. 53, 213 S.W. 4 (1919). The parties stipulated that the contract was ambiguous. Here, the trial court, after considering the parol evidence, including testimony that the contract had features of both a cost-plus contract as well as a fixed-price contract, found that the only conclusion possible was that the contract was a cost-plus contract. The rule that, where there is any doubt or ambiguity about the meaning of a contract, an ambiguity in the contract will be resolved against the party who prepared the contract is not to be applied until and unless doubt exists after the court has given consideration to the parol evidence admitted to explain and aid in the interpretation of ambiguities in the contract. *Jefferson Square, Inc. v. Hart Shoes, Inc.*, 239 Ark. 129, 388 S.W.2d 902 (1965). The trial court's findings do not indicate that the trial court entertained any doubt as to the meaning of the contract after considering the parol evidence. Therefore, there is no need to construe the contract against appellee. If the contract was ambiguous, as the parties stipulated, then its meaning would be a question of fact for the trial court to determine. *Coble v. Sexton*, 71 Ark. App. 122, 27 S.W.3d 759 (2000); *Vaccaro v. Smith*, 29 Ark. App. 175, 779 S.W.2d 193 (1989). An agreement, whether written or oral, is not rendered unenforceable because its terms are vague or uncertain. *See, e.g., Swafford v. Sealtest Foods*, 252 Ark. 1182, 483 S.W.2d 202 (1972). We cannot say that the trial court's finding that this was a cost-plus contract was clearly erroneous.

Appellee raises two points on cross-appeal: that the trial court erred in finding that appellee breached an implied warranty to provide a working septic system and that the trial court erred in not granting appellee its attorney's fees.

For its first point, appellee argues that the trial court erred in finding that appellee breached an implied warranty to provide a working septic system. Appellee argues that, in a cost-plus contract, a builder is not liable for unforeseeable costs associated with the contract. We agree and hold that the trial court erred in allowing an offset for the breach of the implied warranty in this case because such a finding is inconsistent with the trial court's finding that this was a cost-plus contract.

There was testimony that Lynda Hickman, not appellee, assumed responsibility for the septic system by hiring Al Prieur to conduct a percolation test[5] and hiring a subcontractor to install the system. A second subcontractor was hired to install a more elaborate system after it was determined that the first subcontractor was unable to properly install such a system. Because this is a cost-plus contract, appellants were the ones obligated to pay all unforeseen costs over appellee's bid incurred in installing the septic system. *See Vaccaro v. Smith, supra*; *Midwest Envtl. Consulting & Remediation Servs., Inc. v. Peoples Bank*, 251 Ill. App. 3d 256, 620 N.E.2d 469 (1993). Further, because appellants knew during construction that the system was defective, they could not recover for breach of implied warranty. *See Bankston v. McKenzie*, 287 Ark. 350, 698 S.W.2d 799 (1985). We reverse and remand with directions to disallow the offset for $19,675.34 for the septic system.

As its second point on cross-appeal, appellee argues that the trial court erred in failing to award it attorney's fees. The trial court denied fees to either party because both parties had prevailed in part on their claims. Appellee cites Ark. Code Ann. § 16-22-308 (1999), the general statute for fees in a breach-of-contract case, in support of its argument. Appellants respond that the trial court did not abuse its discretion and cite *Transportation Properties, Inc. v. Central Glass & Mirror*, 38 Ark. App. 60, 827 S.W.2d 667 (1992), for the proposition that attorney's fees are not recoverable in actions to foreclose a materialman's lien.[6] We find, however, that *Transportation Properties, Inc.*, is not controlling because in this case appellee presented a claim for breach of contract. The trial court here denied fees to either party because both parties had prevailed on their claims. Because we have reversed the claim on which appellants prevailed, on remand, the trial court may reconsider its decision with regard to fees.

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[5] The testimony was disputed as to whether Elmer Kralicek recommended that appellants use Prieur for the percolation test.

[6] We express no opinion on the applicability of Ark. Code Ann. § 18-44-128 (Supp. 2003), since appellee did not claim below and has not contended in this appeal that it is entitled to fees under this statute. However, on remand, the trial court is free to consider this statute in deciding whether or not a fee is warranted.

Affirmed in part; reversed and remanded in part on direct appeal.

Reversed and remanded on cross-appeal.

VAUGHT and BAKER, JJ., agree.

STATE of Arkansas *v.* Jonathan GRAYDON

CA 03-489 129 S.W.3d 342

Court of Appeals of Arkansas
Opinion delivered November 19, 2003

Appellee, pro se.

No response.

PER CURIAM. In this case, the State has appealed the trial court's decision to transfer the charge brought against appellee to juvenile court. The trial court has sealed the record of the proceedings. By this motion, appellee requests access to the sealed record in order to prepare his brief.

We grant the motion. In order to maintain confidentiality, we order that the materials contained within the sealed record not be released, and any reference to them not to be made, to anyone other than this court, the parties to the appeal, and the parties' attorneys. *See Johnson v. State,* 335 Ark. 333, 982 S.W.2d 669 (1998). Appellee is also directed to file his brief with the clerk of this court under seal. Appellee's brief is due December 3, 2003.

It is so ordered.

LAMAR OUTDOOR ADVERTISING, INC. *v.* ARKANSAS STATE HIGHWAY and TRANSPORTATION DEPARTMENT

CA 02-870 133 S.W.3d 412

Court of Appeals of Arkansas
Division II
Opinion delivered December 3, 2003

George Pike and *Clifton H. Hoofman*, for appellant.

Robert L. Wilson, Chief Counsel, and *Bruce P. Hurlbut*, for appellee.

JOHN F. STROUD, JR., Chief Judge. This appeal arises from the decision of the circuit court affirming an administrative decision by appellee Arkansas State Highway and Transportation Department that denied a request made by appellant Lamar Outdoor Advertising, Inc., to erect a billboard on Highway 67/167 across from McCain Mall in North Little Rock. Lamar raises two points on appeal. We affirm.[1]

Lamar applied to the Department for a permit to erect a billboard on Highway 67/167 across from McCain Mall. The Department denied the application, and Lamar requested an administrative hearing. The facts at the hearing were largely undisputed. The billboard would be located on property zoned "C3" by the City of North Little Rock as part of a zoning plan that the City

[1] Appellant filed a motion seeking to transfer this case and three companion cases to the supreme court under Supreme Court Rule 1-2(a), (b) on May 30, 2003, on the basis that the cases involve the construction and interpretation of the separation of powers provisions of Ark. Const. art. 4, §§ 1, 2 and Ark. Code Ann. §§ 27-74-203, 204 (1994 & Supp. 2003). The supreme court denied the motion on September 4, 2003.

considers comprehensive. The parties stipulated that the Department has not certified the City's plan as comprehensive under the Department's regulations. Under the City's zoning ordinance, billboards are not allowed in "C3" areas. On February 28, 2000, the City enacted Ordinance 7274 granting a special-use permit for Lamar to erect a billboard at the McCain location and on Interstate 40, in exchange for Lamar's removing another billboard on Highway 107/John F. Kennedy Boulevard in the City. The preamble to the ordinance states that "application was duly made by ... agent of the owner of the land ... seeking a special use of said land for the purpose of erecting a billboard." Ordinance 7274 did not change the zoning classification; the property remained zoned "C3." The special-use permit granted by Ordinance 7274 was conditioned upon Lamar's removing the other billboard from Highway 107.

At the hearing, the parties stipulated that the testimony of Mayor Patrick Hays and Robert Voyles, the City's Director of Planning, taken in another hearing for issuance of a permit for a billboard in another location, could be considered in determining whether the City's zoning action was taken primarily or solely for the purpose of erecting a billboard. Mayor Hays testified that the City's purpose in enacting the ordinance was to remove another billboard on John F. Kennedy Boulevard. Director Voyles testified that billboards are not allowed in "C3" zones, and that the City enacted the special-use permit for the purpose of erecting this billboard in an area that otherwise would not allow billboards. Voyles also testified that, if the area had been zoned "C4," Lamar would not have had to seek a special-use permit to erect a billboard.

Based on the stipulated facts set out above, the hearing officer found that the City's zoning action was solely for the purpose of allowing the erection of a billboard and therefore in violation of the federal and state regulations. The hearing officer upheld the Department's denial of the permit.

Lamar filed a petition and an amended petition for judicial review of the hearing officer's decision. The circuit court affirmed the hearing officer's decision based upon the record before the hearing officer. The circuit court also denied Lamar's request to conduct a *de novo* hearing, as provided by Ark. Code Ann. § 27-74-203(c) (Supp. 2003). This appeal followed.

Appellant raises two arguments on appeal: that the Department wrongfully applied Ark. Code Ann. § 27-74-204(a)(1) (1994) in denying its application for a permit and that the trial court erred in not conducting a *de novo* hearing under Ark. Code Ann. § 27-74-203(c).

Our review is directed not toward the circuit court but toward the decision of the agency. *Arkansas State Police Comm'n v. Smith*, 338 Ark. 354, 994 S.W.2d 456 (1999). That is so because administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts to determine and analyze legal issues affecting their agencies. *McQuay v. Arkansas State Bd. of Architects*, 337 Ark. 339, 989 S.W.2d 499 (1999); *Social Work Licensing Bd. v. Moncebaiz*, 332 Ark. 67, 962 S.W.2d 797 (1998). Our review of administrative decisions is limited in scope. Such decisions will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion. *McQuay*, *supra*; *Wright v. Arkansas State Plant Bd.*, 311 Ark. 125, 842 S.W.2d 42 (1992).

For its first point, Lamar argues that the Department misapplied Ark. Code Ann. § 27-74-204(a)(1) (1994) in denying its application for a permit. Section 27-74-204 states in part:

> (a) [N]othing contained in this chapter shall prohibit the erection and maintenance of outdoor advertising signs, displays, and devices consistent with customary use within six hundred sixty feet (660') of the nearest edge of the right-of-way of interstate, primary, and other state highways designated by the State Highway Commission:
>
> (1) Within those areas which are zoned industrial or commercial under authority of the laws of this state. . . .

Section 27-74-204 is a part of the Arkansas Highway Beautification Act, codified at Ark. Code Ann. §§ 27-74-101 through 27-74-502 (1994 & Supp. 2003), which is designed to accomplish the purposes set forth in the Federal Highway Beautification Act (FHBA) and to bring the state in compliance with federal law. *Arkansas State Highway Comm'n v. Roark*, 309 Ark. 265, 828 S.W.2d 843 (1992); *Yarbrough v. Arkansas State Highway Comm'n*, 260 Ark. 161, 539 S.W.2d 419 (1976). The FHBA provides for control of the installation and maintenance of outdoor advertising signs in areas adjacent to the

interstate and primary highway systems. 23 U.S.C. § 131(a) (2000). The purposes of the FHBA are to protect the public investment in highways, to promote the safety and recreational value of public travel, and to preserve natural beauty. *Id*; *Files v. Arkansas State Highway & Transp. Dep't*, 325 Ark. 291, 925 S.W.2d 404 (1996).

Lamar argues that, because the City has zoned the area "commercial," it is entitled to erect a billboard without further inquiry by the Department. However, the supreme court in *Files*, *supra*, rejected such an absolutist approach and instead looked to the regulations, both state and federal, which were adopted to implement the Acts, in order to resolve the appeal in that case. Lamar attempts to distinguish *Files* on the basis that *Files* involved a 58.51-acre tract that was annexed and zoned as "commercial" for the purpose of erecting a billboard although the rest of the tract remained undeveloped, while the present case involves the grant of a special-use permit in a commercial area in which billboards would not otherwise be permitted. This is a distinction without a difference because, in both cases, the issue before the Department was whether the zoning action was taken in order to erect a billboard.

Federal regulations found at 23 CFR § 750.708(b) (2003) provide:

> State and local zoning actions must be taken pursuant to the State's zoning enabling statute or constitutional authority and in accordance therewith. Action which is not a part of comprehensive zoning and is created *primarily* to permit outdoor advertising structures, is not recognized as zoning for outdoor advertising control purposes.

(Emphasis added.) Similarly, the Department has issued regulations implementing the federal and state laws on outdoor advertising. Under the Department's regulations, "comprehensive zoning" means

> a zoning plan established by State or local law, regulation or ordinance, which includes regulations consistent with customary use and the provisions of the agreement controlling the erection and maintenance of signs in the zoned areas. Except that, any area determined by the Department to be included in the area of such a zoning plan *solely* for the purpose of allowing outdoor advertising does not come within this definition.

Regulations for Issuance of Permits for Outdoor Advertising Devices and Signs, section 1, ¶ J. (Emphasis added.) As one can see, the two regulations use different standards for determining the purpose of the zoning action. The federal regulation uses the term "primarily," while the Department's regulation uses the term "solely." Lamar seizes upon this difference in terminology to argue that the purpose of the City's granting the special-use permit was not "solely" for the purpose of erecting the billboard because it was conditioned upon the removal of a billboard at another location. However, the supreme court in *Files* construed the Department's regulations in harmony with the corresponding federal regulations so as to allow the Department to deny a permit where a zoning action was taken *primarily* for the purpose of erecting a billboard. As noted earlier, the parties stipulated that the Department has not certified the City's zoning plan as "comprehensive." The language of the ordinance granting the special-use permit provides that the purpose of the ordinance was to allow the erection of a billboard, indicating that the special-use permit was *primarily* for the purpose of erecting a billboard and bringing the case within the rule in *Files*, giving the Department discretion to deny a permit.

■ ■ Because this is an appeal from an administrative agency under the Administrative Procedures Act, we affirm if there is substantial evidence to support the department's decision. *McQuay, supra*. Director Voyles's testimony that the special-use permit with conditions was for the purpose of erecting this billboard and the language of the ordinance itself constitute substantial evidence. We therefore affirm on this point.

In its second point, Lamar argues that the trial court erred in not conducting a *de novo* hearing under Ark. Code Ann. § 27-74-203(c), which provides in part:

> Any person whose business or property has been injured by a final adverse decision from the commission shall be entitled to a judicial hearing *de novo* . . . in the Pulaski County Circuit Court if the interests affected by the decision of the commission are constitutionally or statutorily preserved, or preserved by private agreement, so that their enforcement is a matter of right.

Lamar argues that its right to erect a billboard in commercial areas was statutorily preserved by Ark. Code Ann. § 27-74-204 and, therefore,

it was entitled to a *de novo* hearing in circuit court. However, Lamar's rights are not constitutionally or statutorily preserved. First, section 27-74-203(a) provides that the erection of billboards within 660 feet of a highway shall be regulated and that no billboard shall be erected except in accordance with the Department's regulations. Second, in *Files, supra,* the supreme court rejected an absolutist approach to section 27-74-204(a)(1) and held that the Department could appropriately examine the propriety of zoning ordinances when deciding whether to issue a permit for a billboard.

As the *Files* court stated:

> Some deference must be given to the Department's interpretation of state and federal regulations in this area. The Department's interpretation of its authority enables it to review limited commercial zoning decisions relating to outdoor advertising to determine validity. This fosters the purposes of the Highway Beautification Act and assures compliance with federal law. The General Assembly certainly contemplated that the Department would regulate outdoor advertising in accordance with state and federal law.

Id. at 298, 925 S.W.2d at 409. This deference means that Lamar's efforts to obtain a permit hinges on executive or legislative discretion. As such, *de novo* review under section 27-74-203(c) was not appropriate because of the separation-of-powers doctrine. *Tomerlin v. Nickolich*, 342 Ark. 325, 27 S.W.3d 746 (2000); *Goodall v. Williams*, 271 Ark. 354, 609 S.W.2d 25 (1980). Lamar makes much of the fact that section 27-74-203(c) was enacted in response to the *Tomerlin* decision. However, that section repeated the holding of *Tomerlin* but did not remove the Department's discretion to review zoning decisions when considering applications for permits for billboards.

Affirmed.

GLADWIN and CRABTREE, JJ., agree.

Gloria BILLINGS, *et al.* *v.* DIRECTOR, Employment Security Department; and Southwestern Bell

E 02-239 133 S.W.3d 399

Court of Appeals of Arkansas
Divisions II, III, and IV
Opinion delivered December 3, 2003

James Edward Nickels, for appellants.

Allan Pruitt and *Phyllis Edwards*, for appellee Director, Arkansas Employment Security Department.

Cynthia A. Barton and *H. Edward Skinner*; and *Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.*, by: *Hermann Ivester*, for appellee Southwestern Bell Telephone, L.P.

ROBERT J. GLADWIN, Judge. Following its determination that a force reduction was necessary, Southwestern Bell began its internal informal surplus proceedings in which employees with the most seniority were offered the opportunity to sign up for a voluntary severance package (hereinafter, "VSP"). Appellants accepted the VSP and took a sum of money approximately equal to one year's salary. They then filed claims for unemployment benefits. The Appeal Tribunal affirmed the Department's determination that appellants were eligible for benefits. The Board of Review, however, reversed that decision because it found that appellants had voluntarily left their work without good cause connected with the work. On appeal to this court, appellants argue that substantial evidence does not support the Board's decision. We disagree and affirm.

According to the area manager Rick Barteau, the VSP was offered based on seniority, with the employee with the highest seniority receiving the first right of refusal. The offer would then be extended to the employee with the next highest seniority and would continue down the list until the surplus was removed. Appellants' testimony collectively indicated that appellee had suggested that if there were not enough volunteers for the VSP, the employees with the least seniority would be laid off in order to eliminate the surplus. Both the area manager and appellants testified that appellants were not in any danger of losing their jobs, given their seniority.

In reversing the award of benefits, the Board noted that appellants had to first voluntarily apply for the VSP and then accept it once an offer was made by appellee. The Board found that appellants' jobs were clearly suitable for them because the work would have been a continuation of the jobs they were already performing. The Board also found that appellants were not in imminent danger of losing their jobs. Because appellants had control over whether their employment continued, the Board concluded that they were not entitled to unemployment benefits.

The findings of the Board of Review are conclusive if they are supported by substantial evidence. *Walls v. Director*, 74 Ark. App. 424, 49 S.W.3d 670 (2001). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Lovelace v. Director*, 78 Ark. App. 127, 79 S.W.3d 400 (2002). Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

An individual shall be disqualified for benefits if he, voluntarily and without good cause connected with the work, left his last work. *See* Ark. Code Ann. § 11-10-513(a)(1) (Repl. 2002). 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. *Weaver v. Director*, 82 Ark. App. 616, 120 S.W.3d 158 (2003). "Voluntarily leaving work" has been said to be the opposite of discharge, dismissal, or lay-off by the employer severing relations with the employee. *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978). The basic design of the Employment Security Act is to protect an employee from his becoming unemployed through no fault of his own. *Id.* Unemployment benefits are not for those individuals who are voluntarily unemployed. *Wacaster v. Daniels*, 270 Ark. 190, 603 S.W.2d 907 (Ark. App. 1980).

Appellants seemingly concede that there is a split of authority in other jurisdictions on whether acceptance of an incentive program constitutes good cause attributable to employment such

that benefits should be awarded. Although appellants assert that the Board failed to consider a line of cases that support their position, there is no evidence to support such assertion. The Board was simply not persuaded.

Appellants rely on one Arkansas case in particular, *Jackson v. Daniels*, 267 Ark. 685, 590 S.W.2d 63 (Ark. App. 1979), and contend that it is similar to the case at bar. In that case, claimant was a manager of a restaurant that was sold to a new owner. Thinking that lay offs were imminent, claimant expressed a preference that she be laid off before the two employees she had recently hired. In awarding benefits to claimant, this court found a distinction between simply expressing a preference to be laid off in the event of a lay off and a direct request to be laid off work. Appellants argue that, similarly, they requested to participate in a reduction in force that was both negotiated and accepted by appellee.

In *Terry v. Director of Labor*, 3 Ark. App. 197, 623 S.W.2d 857 (1981), the employer initiated a reduction in the work force and claimant was given the option of being laid off or taking one of two available jobs. Claimant chose to be laid off work and was disqualified from receiving benefits. In reversing the Board's decision, this court believed the *Jackson* case to be controlling and concluded that the fact that the claimant preferred to be laid off did not alter the fact that his employment ended by reason of a work reduction instituted by the employer and not for personal reasons. The decision in *Terry* was later overruled by this court in *Reynolds Metals Co. v. Couch*, 8 Ark. App. 37, 648 S.W.2d 497 (1983), but as appellants point out, it did not expressly overrule *Jackson*.

In *Reynolds*, management announced a force reduction and offered senior employees the choice of "bumping" into a lower job classification or taking a lay off. Rather than exercising their "bumping rights," claimants chose the lay off and were subsequently awarded benefits. Realizing that there was no evidence as to the suitability of the work offered, this court reversed its position in *Terry* and held that good cause to refuse work that is otherwise suitable does not exist merely because the employee's acceptance of the offered position will result in the discharge of a fellow employee with less seniority. The case was remanded for the Board to consider the suitability of the offered work.

"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 and is ordinarily a question of fact for

the Board of Review to determine. *Thornton v. Director*, 80 Ark. App. 99, 91 S.W.3d 523 (2002). 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. *Gunter v. Director*, 82 Ark. App. 346, 107 S.W.3d 902 (May 28, 2003). Although appellants contend that volunteering for the VSP in order to save the job of a fellow employee with less seniority constitutes good cause for leaving their work, this contention flies in the face of this court's holding in *Reynolds, supra*. As pointed out by the Board, appellants availed themselves of the VSP even though they had the option of continuing in positions that were clearly suitable for them regardless of the fact that appellee initiated the process to reduce its workforce.

The dissenting judges contend that we should consider the 2003 amendment to Ark. Code Ann. § 11-10-513, enacted after the Board's decision, as indicative of the legislature's intent. Pursuant to the amendment, "[n]o individual shall be disqualified under this section if he or she left his or her last work because he or she voluntarily participated in a permanent reduction in the employer's work force after the employer announced a pending reduction in its work force and asked for volunteers." Ark. Code Ann. § 11-10-513(c)(1) (Supp. 2003). The dissenting judges essentially would have this amendment apply retroactively.

■■ It is presumed that all legislation is intended to act prospectively, and statutes are to be construed as having only a prospective operation unless the purpose and intention of the legislature to give them a retroactive effect is expressly declared or necessarily implied from the language used. *See City of Dover v. Barton*, 337 Ark. 186, 987 S.W.2d 705 (1999); *James v. James*, 52 Ark. App. 29, 914 S.W.2d 773 (1996). Any doubt on the matter is resolved against retroactive application. *Arkansas Rural Med. Prac. Student Loan & Scholarship Bd. v. Luter*, 292 Ark. 259, 729 S.W.2d 402 (1987). This rule, however, does not ordinarily apply to procedural or remedial legislation. *Bean v. Office of Child Support Enfcm't*, 340 Ark. 286, 9 S.W.3d 520 (2000). Although the Employment Security Act is remedial in nature and must be liberally construed in order to accomplish its beneficent purpose, *Graham v. Daniels*, 269 Ark. 774, 601 S.W.2d 229 (Ark. App. 1980), retroactive application is appropriate for remedial statutes

that "do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation." *Aka v. Jefferson Hosp. Ass'n, Inc.*, 344 Ark. 627, 42 S.W.3d 508 (2001). Statutes which are remedial or procedural generally supply new, different, or more appropriate remedies which relate to existing rights, and do not create new rights or extinguish old ones. *Harrison v. Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962).

The 2003 amendment was not enacted to clarify the existing law. Indeed, the amendment changes the existing law by creating a new right. In *Gannett River States Publishing Co. v. Arkansas Indus. Dev. Comm'n*, 303 Ark. 684, 799 S.W.2d 543 (1990), where the language of an amendment to the Arkansas Freedom of Information Act was not curative or for clarification but, rather, made seven additional types of records exempt from disclosure, the amendment operated prospectively only. *Cf. Pledger v. Baldor Int'l, Inc.*, 309 Ark. 30, 827 S.W.2d 646 (1992), (where an act's preamble stated that its purpose was to clarify prior law, the subsequent act could be considered). While it is true that we can look to changes to statutes made by subsequent amendments to determine legislative intent, *Pledger v. Mid-State Constr. & Materials, Inc.*, 325 Ark. 388, 925 S.W.2d 412 (1996), we cannot discern any intent on the part of the General Assembly to have the 2003 amendment applied retroactively. Considering the law as it existed at the time of the Board's decision, we hold that substantial evidence supports the Board's determination that appellants are not eligible for unemployment benefits.

Affirmed.

STROUD, C.J., PITTMAN, BIRD, VAUGHT, and CRABTREE, JJ., agree.

HART, BAKER, and ROAF, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. The Southwestern Bell employees who participated in a force reduction selection process pursuant to their union contract are being denied unemployment benefits based upon the majority's reasoning that participating in the selection process rendered their termination by Southwestern Bell "voluntary" under our statutes. The majority, in reaching this con-

clusion, ignores the public-policy considerations of the Arkansas General Assembly, the body that represents the collective will of the Arkansas people.

The Arkansas legislature in the 2003 session specifically stated that employees who participate in a force-reduction process shall not be disqualified from benefits:

> (c)(1) No individual shall be disqualified under this section if he or she left his or her last work because he or she voluntarily participated in a permanent reduction in the employer's work force after the employer announced a pending reduction in its work force and asked for volunteers.
>
> (2) Such actions initiated by the employer shall be considered layoffs regardless of any incentives offered by the employer to induce its employees to volunteer.

Ark. Code Ann. § 11-10-513 (Supp. 2003).

The majority characterizes this amendment as a change in public policy and asserts that the dissent would apply this change retroactively. That is not the case. Our public policy for over twenty years, as expressed by this court's decision in *Jackson v. Daniels*, 267 Ark. 685, 590 S.W.2d 63 (Ark. App. 1979), even without the legislature's specific directive, requires that we reach the conclusion that these employees were not disqualified from receiving unemployment benefits. In *Jackson*, following the employer's announcement that it would be terminating an employee, appellant Jackson volunteered saying that if the employer had to terminate someone, she hoped she would be the one to lose her job. By *per curiam* opinion, we found that the employee's "volunteering" to be the one to be terminated did not render her leaving employment voluntary under our statutes and awarded benefits. In reaching our decision, we said:

> [I]t is admitted that a reduction in staff of at least three employees was necessitated at the decision of the employer. The fact that the claimant preferred to be one of them rather than those she had hired does not alter the underlying fact that her employment ended by reason of work reduction . . . .

Jackson, 267 Ark. at 687, 590 S.W.2d at 64.

If the majority is suggesting that the decision in *Reynolds Metals Co. v. Couch*, 8 Ark. App. 37, 648 S.W.2d 797 (1983), invalidated the reasoning in *Jackson* without expressly overruling the case, then we would be faced with two precedents in conflict with one another. However, the court in *Reynolds* specifically stated that the situation in *Jackson* was different from the situation in *Terry v. Director of Labor*, 3 Ark. App. 197, 623 S.W.2d 857 (1981), and the one before them in *Reynolds*. Unfortunately for appellants in this case, the court in *Reynolds* did not specifically identify the distinction. Despite that omission, the readily apparent difference is that the employers in *Terry* and *Reynolds* terminated the employees' current positions, then offered the employees other employment with the company pursuant to union contracts. The employers had already decided that the positions in which particular employees were employed would be terminated.

Reynolds did not overrule *Jackson*. Until today, the precedent of *Jackson* controlled and stood for the proposition that an employee who volunteers to be considered for termination when the employer initiates a work-force reduction is not disqualified from receiving unemployment benefits.

Appellants argued at oral argument that the Director was following the holding in *Jackson* prior to the decisions in these cases, and that the 2003 amendment of Ark. Code Ann. § 11-10-513 was enacted in response to these decisions. Appellees did not dispute that assertion, but merely insisted that the statute cannot be applied retroactively.

Although clearly the amendment itself was not applicable at the time these employees were denied benefits, the amendment is an indication of the legislature's intent that we are required to determine when construing our unemployment security laws. Statutes are to be construed with reference to the public policy which they are designed to accomplish. *Commercial Printing Co. v. Rush*, 261 Ark. 468, 549 S.W.2d 790 (1977); *Ark. Tax Comm'n v. Crittenden County*, 183 Ark. 738, 38 S.W.2d 318 (1931). As the supreme court stated in *Little Rock Furniture Mfg. Co. v. Commr. of Labor*, 227 Ark. 288, 298 S.W.2d 56 (1957), our Employment Security Act must be given an interpretation in keeping with the declaration of state policy. The intent of the Arkansas Legislature controls the construction of our unemployment security laws. *Feagin v. Everett*, 9 Ark. App. 59, 66, 652 S.W.2d 839, 843 (1983).

Unemployment benefits are intended to benefit employees who lose their jobs through no fault or voluntary decision of their own. There are not intended to penalize employers or reward employees, but to promote the general welfare of the State. *Wacaster v. Daniels*, 270 Ark. 190, 194, 603 S.W.2d 907, 910 (Ark. App. 1980). The policy of the Arkansas Employment Security Act is "to encourage employers to provide more stable employment" and to accumulate "funds during periods of employment from which benefits may be paid for periods of unemployment." Ark. Code Ann. § 11-10-102(2)(Repl. 2002).

In a 1910 case, our supreme court recognized that collective-bargaining agreements help advance the interests of society:

> The conservation of the chief asset of the laboring man namely, his labor, through combination with his fellows and by their organized efforts is to be commended rather than condemned. For in that way his well-being may be best promoted and the interest of society thereby advanced. As observed by Judge Taft in *Thomas v. Cincinnati, N. O. & T. Ry. Co. (C. C.)*, 62 Fed. 803, 817: "It is of benefit to them and the public that laborers should unite. They have labor to sell. If they stand together they are often able, all of them, to command better prices for their labor, than when dealing singly with rich employers, because the necessities of the single employee may compel him to accept any terms offered."

Meier v. Speer, 96 Ark. 618, 626-27, 132 S.W. 988, 991-92 (1910).

We have recognized for almost a century that collective bargaining agreements promote employment stability and the general welfare of the State. We should follow the majority of jurisdictions that hold that employer-initiated work-force reductions and terminations do not disqualify terminated employees from benefits:

> Authority is split over whether an employee volunteering to be included in an employer-planned reduction in force . . . should be considered as having effectively resigned from employment. The majority of these cases provide that although an employee may opt for inclusion in an employer-mandated layoff, the layoff itself is still instituted at the employer's prerogogative. The fact that the employees may decide among themselves who will bear the burden of termination does not make the employee's departure voluntary.

> These courts reason that when the first and last steps for the termination process are taken by the employer, i.e., planning the reduction and then selecting certain employees for inclusion, even one who has agreed to participate in the process has not voluntarily terminated employment.

B.E. & K Construction v. Abbott, 59 P.2d 38, 42-43 (2002) (citations omitted). We have already applied this reasoning in *Jackson*.

Further, the case cited by the Board of Review does not support the majority's position. The Board cited *Oklahoma Empl. Sec. Comm. v. Board of Review for Empl. Sec.*, 914 P.2d 1083 (Okla. Ct. App. 1996), saying that "[i]n cases such as the current one, the offered separation package is best characterized "as an 'opportunity'; that is, it was a bona fide choice that could prove as beneficial as continuing in employment." The Board inserted the parenthetical after the cite stating "(denying benefits to claimant who chose to accept a voluntary separation package when her seniority insulated her from any real danger of being laid off)." The Oklahoma case, however, distinguishes cases where the employees were found eligible for unemployment compensation even though they voluntarily accepted separation benefits under a reduction-in-force plan. The opinion specifically states that each case it was distinguishing involved a mandatory reduction in workforce rather than a truly voluntary separation incentive. This distinction was again applied last year by the Oklahoma Supreme Court in *B.E. & K Construction v. Abbott, supra*, in the context of a worker compensation claim. The court reasoned:

> We consider the analysis proffered by the majority of jurisdictions addressing whether an employee's offer to be included in an employer-announced lay off should be considered a voluntary termination persuasive and logical. The majority's conclusions are based in the realities of the workplace—an employee electing to volunteer for an employer-planned reduction in force does not exercise the ultimate power or final decision as to which employees will be targeted for termination. It is the employer who decides to eliminate a job and to lay off a given individual, based on the employer's needs. It is irrelevant that the employee may have made the employer's determination easier by first volunteering to be laid off.

Id. at 43-44.

Our legislature codified that reality with the 2003 amendment of Section 11-10-513. We recognized and applied that reality in *Jackson* more than twenty years ago. Therefore, I would reverse and order an award of benefits.

HART and ROAF, JJ., join.

Archie M. DONALD *v.* CITY OF WEST MEMPHIS

CA CR 02-1179 133 S.W.3d 410

Court of Appeals of Arkansas
Division III
Opinion delivered December 3, 2003

Archie M. Donald, for appellant.

Mike Beebe, Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant Archie M. Donald was convicted of third-degree battery in West Memphis Municipal Court on May 4, 1988. He was sentenced to one year in jail, fined

$1000.00, and ordered to pay court costs, and he appealed the conviction to Crittenden County Circuit Court. On June 17, 2002, Mr. Donald filed a motion to dismiss the third-degree battery conviction, arguing that he had yet to be brought to trial and that such delay constituted a violation of his right to a speedy trial. On July 15, 2002, the Crittenden County Circuit Court entered an order "setting aside affirmance of lower court judgment and dismissal." In its order, the trial court ruled that further prosecution of the case was barred by speedy trial rules and vacated the jail sentence imposed against Mr. Donald. The trial court also made the following ruling:

> The Court declines to order refund of fine and costs in this case given that defendant, Archie Donald, at no time appealed from or took any other action as relates to this pending municipal appeal until the year 2002, after defendant, Archie Donald, had paid the fine and costs levied by both courts in connection with his incarceration on another charge several months ago, thereby rendering the issues as relates to fine and costs moot by virtue of payment and waiver[.]

On August 2, 2002, Mr. Donald filed a timely notice of appeal from the trial court's July 15, 2002, order. On the same day, Mr. Donald filed a "motion for new hearing, or in the alternative, motion for reconsideration." In this motion, Mr. Donald alleged that he was arrested on March 30, 2000, for a speeding violation, and was required to pay a fine of $1099.35 relating to his 1988 conviction before being released from custody. Mr. Donald asserted that due to the speedy trial violation the fine was improperly imposed, and requested that the trial court enter an order directing the county clerk to refund his payment. On August 8, 2002, the trial court denied this motion.

Mr. Donald now appeals to this court, arguing that the circuit court erred by refusing to refund his payment of the fine and costs. He again asserts that he was required to pay the fine in March 2000 before being released from jail for a speeding violation, and contends that since the prosecutor and judge knew at the time that the time for speedy trial had elapsed, their actions were malicious and illegal. Mr. Donald asserts that he has been deprived of property without due process of law in violation of his Fifth Amendment rights. He further argues that he is entitled to a refund pursuant to Ark. Code Ann. § 16-96-509 (1987), which provides, "If judgment is rendered for the defendant, any money paid into

the circuit court which has been collected from the defendant on the original judgment shall be forthwith returned to the defendant."

We agree that the trial court erred to the extent it held that Mr. Donald was not entitled to a refund of any money previously paid into the circuit court on the judgment. The trial court acknowledged in its order that Mr. Donald paid the fine and costs related to his 1988 conviction in municipal court, and yet found that he was not entitled to repayment. This finding was contrary to the plain language of the applicable statute. The trial court's order of dismissal set aside the 1988 conviction, and constituted a "judgment rendered for the defendant" under Ark. Code Ann. § 16-96-509 (1987). As such, pursuant to the statute, any money paid by Mr. Donald into the circuit court that was collected on the original judgment should have been forthwith returned to him.

We affirm the trial court's order to the extent that it vacates appellant's 1988 third-degree battery conviction. However, we reverse the trial court's finding that Mr. Donald is not entitled to a refund for money paid to the circuit court that was collected from Mr. Donald on the original judgment.

Affirmed in part; reversed in part.

PITTMAN and ROAF, JJ., agree.

Shelly TURNER, Administratrix of the Estate of Ricky Turner, *Deceased v.* NORTHWEST ARKANSAS NEUROSURGERY CLINIC, P.A.

CA 03-208 133 S.W.3d 417

Court of Appeals of Arkansas
Division IV
Opinion delivered December 3, 2003

[Petition for rehearing denied January 7, 2004.]

Benson, Robinson & Wood, P.L.C., by: *Jon Robinson*; *Milligan Law Office*, by: *Phillip J. Milligan*, for appellant.

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

SAM BIRD, Judge. Shelly Turner, administratrix of the Estate of Ricky Turner, deceased, brings this appeal from the entry of summary judgment against her. Turner had filed suit against appellee Northwest Arkansas Neurosurgery Clinic, P.A. (Clinic), for negligent hiring, supervision, and retention. She argues three points on appeal: the trial court erred in denying her motion to reconsider an order in limine, in granting summary judgment to the Clinic, and in denying her request to take certain depositions. We hold that the trial court abused its discretion in its evidentiary and discovery rulings, and that genuine issues of material fact remain for trial.

This lawsuit is a medical-malpractice action that began after the death of Mr. Turner, who underwent a laminectomy on September 26, 1996. The surgery was performed by Dr. Kelly Danks and Dr. Luke Knox, who were employed by the Clinic. Complications developed after the surgery, and Mr. Turner died from what was later revealed to be an Escherichia coli (more commonly known as E. coli) infection. According to Mrs. Turner, Dr. Danks pierced the psoas muscle and the bowel of Mr. Turner while performing surgery, causing his death. Mrs. Turner filed her malpractice suit against Drs. Danks and Knox individually, the Clinic, Washington Regional Medical Center, and two other physicians; the medical center and the two other physicians were later dismissed from the case. Mrs. Turner sought to hold the Clinic vicariously liable for the actions of Drs. Danks and Knox. She contended that, at the time of Mr. Turner's surgery, Dr. Danks was suffering from undiagnosed bipolar disorder and was being improperly treated by Dr. Knox, who was not his physician, with the contraindicated antidepressant Prozac. She also alleged that Dr. Danks was inhaling nitrous oxide gas because the Prozac exacerbated his mental disorder.

The Clinic successfully moved for an order in limine prohibiting the admission of any evidence relating to Dr. Danks's mental illness, use of Prozac, abuse of nitrous oxide gas, and subsequent suspension from the practice of medicine by the Arkansas Medical Board. Although Mrs. Turner dismissed her complaint against Dr. Knox without prejudice, she again included him as a defendant when she filed her second amended complaint on November 13, 2000. In her second amended complaint, Mrs. Turner added causes of action against the Clinic and Dr. Knox for the negligent hiring, supervision, and retention of Dr. Danks. She sought to depose Dr. Danks's treating physicians. The trial court, however, denied her discovery request and entered a protective order prohibiting the taking of those depositions.

On July 31, 2002, Mrs. Turner filed a motion to reconsider the order in limine and attached affidavits, excerpts from depositions, copies of Dr. Danks's personal medical records,[1] and Dr. Danks's testimony before the medical board in an effort to demonstrate that Dr. Danks was suffering from bipolar disorder, was using Prozac, and was abusing nitrous oxide gas before the

[1] These records are under seal.

surgery. The trial court denied the motion to reconsider and held that Mrs. Turner had failed to state a cause of action against Dr. Knox for negligence. Mrs. Turner settled her individual claims against Dr. Danks, leaving only the negligent hiring, supervision, and retention claims against Dr. Knox and the Clinic.

The Clinic then moved for summary judgment. The trial court granted this motion, stating:

> That the Court further finds the defendants, Northwest Arkansas Neurosurgery Clinic, P.A., and Luke Knox, M.D., are entitled to summary judgment on plaintiff's allegations of negligent hiring, supervision, and retention. The Court finds the plaintiff has no admissible evidence to support these claims beyond pure speculation and conjecture and that there are no genuine issues of material fact and the defendants are entitled to summary judgment as a matter of law. Plaintiff's allegations of negligent hiring, negligent supervision, and negligent retention are therefore dismissed with prejudice.

In this order, the trial court denied Mrs. Turner's motion for reconsideration of the dismissal of her cause of action against Dr. Knox for negligent post-operative care. Mrs. Turner settled her claims against Dr. Knox, leaving only her claims against the Clinic.

On appeal to this court, Mrs. Turner argues that the trial court erred: (1) in denying her motion to reconsider the order in limine, (2) in granting summary judgment to the Clinic on her claims of negligent hiring, supervision, and retention, and (3) in denying her the opportunity to depose Dr. Danks's treating physicians.

The Motion to Reconsider

Mrs. Turner argues that the trial court abused its discretion in denying her motion to reconsider its order holding as inadmissible all evidence of Dr. Danks's bipolar disorder, nitrous oxide abuse, suspension by the medical board, and inappropriate treatment with Prozac. She contends that this evidence was essential to her negligent hiring, supervision, and retention claims; was relevant under Ark. R. Evid. 401; and was not inadmissible under Ark. R. Evid. 403. In denying her motion to reconsider, the trial court accepted the Clinic's argument that this evidence was so prejudicial that its probative value was outweighed. The trial court

also adopted the Clinic's assertion that no evidence existed in regard to Dr. Danks's mental impairment or abuse of nitrous oxide gas or Prozac prior to or on the date of Mr. Turner's surgery.

To challenge the trial court's ruling, Mrs. Turner points out that, in support of her motion to reconsider, she offered evidence of the following: Dr. Danks testified under oath before the medical board that he was suffering from depression, for which he received Prozac from his partner, Dr. Knox, in the fall of 1996; Dr. Danks testified before the medical board that his mental illness was exacerbated by the use of Prozac and that this led to his use of nitrous oxide gas; in its emergency November 7, 1997, order and its February 27, 1998, order, the medical board noted that Dr. Danks had used nitrous oxide during 1996; Dr. Phillip Villanueva gave an opinion that, on the date of Mr. Turner's surgery, Dr. Danks was suffering from untreated bipolar disorder and was using Prozac; and Dr. Alan Cohen gave an opinion that, on the date of Mr. Turner's surgery, Dr. Danks was suffering from undiagnosed bipolar syndrome, which was exacerbated by his contraindicated use of Prozac. Mrs. Turner argues that the evidence she attached to her motion to reconsider demonstrates that Dr. Danks was impaired during late summer 1996 until March 1997. She contends that, although Dr. Danks was not diagnosed with bipolar disorder until after Mr. Turner's surgery, it is clear from her evidence that he was exhibiting symptoms of the illness before the surgery. Mrs. Turner also points out that she attached to her motion copies of Dr. Danks's medical records, which revealed that he began experiencing mental illness in March 1996, began using Prozac in September 1996, and began abusing nitrous oxide gas as early as August 1996, one month before Mr. Turner's surgery. She argues that the excluded evidence is absolutely essential to prove that Dr. Danks breached the standard of care and to establish what the Clinic knew or should have known about his mental impairment.

Citing *Schichtl v. Slack*, 293 Ark. 281, 737 S.W.2d 628 (1987), Mrs. Turner contends that motions in limine are not to be used as a sweeping means of testing issues of law. She asserts that simple intoxication is not the basis for her contention that Dr. Danks breached the neurosurgeon's standard of care in performing surgery on Mr. Turner. Instead, she argues, Dr. Danks's continuing medical condition, along with unsupervised use of Prozac and abuse of nitrous oxide gas, caused his breach of the

standard of care. She also argues that the Clinic knew or should have known that his conduct would subject patients to an unreasonable risk of harm.

We will not reverse the trial court's decision to admit or refuse evidence in the absence of an abuse of that discretion and a showing of prejudice. *Madden v. Aldrich*, 346 Ark. 405, 58 S.W.3d 342 (2001).

In order to determine what evidence was relevant to Mrs. Turner's cause of action, we must first discuss its elements. In *Sparks Regional Medical Center v. Smith*, 63 Ark. App. 131, 976 S.W.2d 396 (1998), we stated that employers are subject to direct liability for the negligent hiring, retention, or supervision of their employees when third parties are injured by the tortious acts of unfit, incompetent, or unsuitable employees. This must be established by proving that the employer knew, or in the exercise of ordinary care should have known, that its employee's conduct would subject third parties to an unreasonable risk of harm. *Id. Accord Saine v. Comcast Cablevision of Ark., Inc.*, 354 Ark. 492, 126 S.W.3d 339 (2003); *Jackson v. Ivory*, 353 Ark. 847, 120 S.W.3d 587 (2003); *Madden v. Aldrich, supra*; *Regions Bank & Trust v. Stone County Skilled Nursing Facility, Inc.*, 345 Ark. 555, 49 S.W.3d 107 (2001).

Arkansas Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevance is a concept of admissibility and not one of weight. Wilson Howe, *Arkansas Rules of Evidence* 41-42 (2d ed. 1995). In that treatise, the author states:

> Thus, to be relevant, evidence need not conclusively establish the fact of consequence. All it must do, when considered in the entire context of the trial, is make the proposition for which it is offered more or less probable than it would be without it.
>
> A very important aspect of the definition of relevant evidence is contained in the phrase "*any* tendency." . . . [U]nless the rationale of this Rule's definition is followed carefully and with the realization that evidence need only have a "tendency," the error of arguing its weight rather than admissibility will be easily made.

> The same analysis is applicable whether the evidence be direct, circumstantial, real or demonstrative. The test remains whether it has "any tendency" to prove or disprove a proposition consequential to determining the case. . . .
>
> . . . .
>
> . . . . [E]vidence is not rendered irrelevant simply because, standing alone, its probative force is weak or its circumstantial nature requires many connecting links.

Id. at 42-43 (emphasis in original).

Even though evidence is relevant according to Rule 401, it may be excludable under Rule 403, which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A trial court must first consider whether the relevant evidence creates a danger of unfair prejudice and, second, whether the danger of unfair prejudice outweighs its probative value. *Aka v. Jefferson Hosp. Ass'n, Inc.*, 344 Ark. 627, 42 S.W.3d 508 (2001). The probative value of evidence correlates inversely to the availability of other means of proving the issue for which the allegedly prejudicial evidence is offered. *Easterling v. Weedman*, 54 Ark. App. 22, 922 S.W.2d 735 (1996). The trial court has discretion in determining the relevance of evidence and in gauging its probative value against unfair prejudice, and its decision will not be reversed absent a manifest abuse of that discretion. *Jackson v. Buchman*, 338 Ark. 467, 996 S.W.2d 30 (1999).

In *Arkansas Rules of Evidence, supra*, 55-56, the author states:

> The key phrase in the rule is "substantially outweighed." This phrase and the general spirit of the Arkansas Rules strongly favor admissibility of relevant evidence. Thus the probative value of questioned evidence is pitted against the dangers it poses calling for exclusion only if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. . . .

. . . .

> . . . . The kind of prejudice the Rule addresses, of course, is *unfair* prejudice, not the kind of "prejudice" that inheres in all evidence that advances one side to the detriment of the other. Unfair prejudice will naturally confuse the issues, mislead the jury and cause undue delay. But it is to be distinguished from the normal tendency of proper evidence to advance one's cause. This unfair prejudice in the Rule 403 sense means an undue influence on the jury that substantially outweighs its persuasive force. . . .

(Emphasis in original.)

Thus, the mere fact that evidence is prejudicial to a party does not make it inadmissible; it is only excludable if the danger of *unfair* prejudice substantially outweighs its probative value. *See Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003); *Marvel v. Parker*, 317 Ark. 232, 878 S.W.2d 364 (1994). The prejudice referred to in Rule 403 denotes the effect of the evidence upon the jury, not the party opposed to it. *Easterling v. Weedman, supra.*

A motion in limine is a threshold motion, and a trial court is at liberty to reconsider its prior rulings during the course of a single trial. *ConAgra, Inc. v. Strother*, 340 Ark. 672, 13 S.W.3d 150 (2000). In *Schichtl v. Slack*, 293 Ark. at 285-86, 737 S.W.2d at 630-31, the supreme court stated:

> [M]otions in limine are not to be used as a sweeping means of testing issues of law. Such motions are to be used to prevent some specific matter, perhaps inflammatory, from being interjected prior to the trial court's having decided on its admissibility outside the hearing of the jury. *Kozy Kitchen v. State*, 271 Ark. 1, 607 S.W.2d 345 (1980); *Arkansas State Highway Comm. v. Pulaski Inv. Co.*, 272 Ark. 389, 614 S.W.2d 675 (1981).
>
> In *Kozy Kitchen v. State* we refused to reverse the denial of a vague motion in limine which, like this one, was filed without legal authority on the morning of trial. We cited *Bridges v. City of Richardson*, 349 S.W.2d 644 (Tex.Civ.App. 1961) where it was said that motions in limine are to enlighten the court and advise counsel of the specific nature of the anticipated testimony so that the court may intelligently act on such motions. Here, the trial judge knew

nothing of the case except as may have been revealed by the pleadings or the brief argument in chambers. Yet he was asked to rule that Schichtl was under no duty to warn Slack of the possibility of fire no matter what the circumstances of the case. Without some legal authority supporting that proposal, we do not regard it as error for the trial court to refuse to grant a motion in limine. In *Lewis v. Buena Vista Mutual Ins. Assn*, 183 N.W.2d 198 (Iowa, 1971), also cited approvingly in *Kozy Kitchen*, the Iowa Supreme Court described the purpose of motions in limine:

> The motion in limine is a useful tool, but care must be exercised to avoid indiscriminate application of it lest parties be prevented from even trying to prove their contentions. That a plaintiff may have a thin case or a defendant a tenuous defense is ordinarily insufficient justification for prohibiting such party from trying to establish the contention. Nor should a party ordinarily be required to try a case or defense twice — once outside the jury's presence to satisfy the trial court of its sufficiency and then again before the jury. Moreover, the motion in limine is not ordinarily employed to choke off an entire claim or defense, as it was here regarding arson. Rather, it is usually used to prohibit mention of some specific matter, such as an inflammatory piece of evidence, until the admissibility of that matter has been shown out of the hearing of the jury.

To her second amended complaint, Mrs. Turner attached copies of a number of documents that contain evidence of Dr. Danks's mental impairment, abuse of nitrous oxide gas, and use of Prozac at or before the time of Mr. Turner's surgery. Mrs. Turner included copies of Dr. Danks's medical records from his treatment at three separate psychiatric hospitals. These records contain evidence that Dr. Danks had used nitrous oxide as early as September 1996; that his bipolar symptoms had begun in March 1996; that he had taken Prozac from September through November 1996; and that he had used nitrous oxide over a period of time dating back to August 1996. Mrs. Turner also supplied copies of the medical board's emergency suspension on November 7, 1997, wherein it stated that on various occasions in 1996 and 1997 Dr. Danks had inhaled nitrous oxide. She attached transcripts of the hearings before the medical board. In the first hearing, Dr. Danks admitted to the board that he had used Prozac in the fall of 1996, as prescribed by Dr. Knox. Mrs. Turner also attached a copy of the deposition of Brenda Cook-Willis, who while work-

ing as a nurse at a Houston, Texas, hospital in 1990 or 1991, caught Dr. Danks abusing nitrous oxide gas.[2]

In support of her motion to reconsider, Mrs. Turner filed copies of excerpts from Dr. Danks's testimony before the medical board, his sealed medical records, and the affidavits of Dr. Alan Cohen and Dr. Phillip Villanueva. Both doctors opined that, on the day of Mr. Turner's surgery, Dr. Danks was impaired and that he breached the applicable standard of care. She also attached a copy of Dr. Hugo Smith's deposition in which he stated that one of Dr. Danks's instruments had perforated Mr. Turner's colon and that Dr. Knox had negligently hired and supervised Dr. Danks.

[redacted] We believe that the evidence that Mrs. Turner was prohibited from introducing was completely relevant and essential to her cause of action, and that its "prejudice" was not unfair. We therefore reverse the trial court's refusal to reconsider its order in limine.

Summary Judgment

[redacted] Mrs. Turner argues that the trial court erred in granting summary judgment to the Clinic on the issues of negligent hiring, supervision, and retention. In reviewing summary-judgment cases, we determine whether the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Alberson v. Automobile Club Interins. Exchange*, 71 Ark. App. 162, 27 S.W.3d 447 (2000). The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* All proof submitted with a motion for summary judgment must be viewed in the light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *McWilliams v. Schmidt*, 76 Ark. App. 173, 61 S.W.3d 898 (2001). Summary judgment is not appropriate where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses

[2] This deposition was taken in a malpractice case filed against Dr. Danks in Texas.

might reasonably be drawn and reasonable minds might differ. *Lee v. Hot Springs Village Golf Sch.*, 58 Ark. App. 293, 951 S.W.2d 315 (1997).

It is apparent that, in deciding whether to grant summary judgment, the trial court weighed the evidence and determined that Mrs. Turner's experts were not credible. However, it is not the role of the trial court, in deciding whether to grant summary judgment, to weigh and resolve conflicting testimony, but to simply decide whether such questions exist to be resolved at trial. *See Adams v. Wolfe*, 73 Ark. App. 347, 43 S.W.3d 757 (2001). The evidence discussed above, which should have been ruled admissible, clearly establishes the existence of genuine issues of material fact as to whether Dr. Danks breached his standard of care when operating on Mr. Turner and whether the Clinic knew or should have known that Dr. Danks would pose an unreasonable risk of harm to patients. Accordingly, we reverse the award of summary judgment to the Clinic and remand this case for trial.

Depositions

In her third point, Mrs. Turner argues that, if we reverse and remand for trial, she should be given the opportunity to depose Dr. Danks's treating physicians,because depositions play an important and critical role in litigation. She asserts that she should be given the chance to explore any other leads to evidence that the treating physicians could offer her in the preparation of her case. We agree.

At the hearing on the Clinic's motion for a protective order, the trial court stated that it would not permit Mrs. Turner to depose people whom it seriously doubted she could call as witnesses at trial. However, that is not the standard by which such decisions should be made. Arkansas Rule of Civil Procedure 26(b)(1) provides that parties may obtain discovery regarding any matter, not privileged, that is relevant to the issues in the pending action, and that it is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. One of the purposes of discovery procedures is to provide a device for ascertaining not only the facts, but information as to the existence or whereabouts of facts relative to the basic

issues between the parties; this permits a litigant to secure the type of information that may lead to the production of other relevant evidence or that will facilitate his preparation for trial. *Rickett v. Hayes*, 251 Ark. 395, 473 S.W.2d 446 (1971).

The trial court has wide discretion in matters pertaining to discovery, and its decision will not be reversed absent an abuse of discretion. *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001). However, an abuse of discretion may be found when there was an undue limitation of the appellant's substantial rights under the prevailing circumstances. *Id.* The goal of discovery is to permit a litigant to obtain whatever information he may need to prepare adequately for issues that may develop without imposing an onerous burden on his adversary. *Id.* Permissible discovery necessarily revolves around the cause of action alleged by the plaintiff, and from this cause of action, the trial court must fashion its rulings on discovery. *Id.*

We believe that, on remand, Mrs. Turner should be permitted to depose the doctors who treated Dr. Danks for his bipolar disorder.

Reversed and remanded.

HART and VAUGHT, JJ., agree.

John CLARK *v.* Tara HENDRIX

CA 03-326 134 S.W.3d 551

Court of Appeals of Arkansas
Division I
Opinion delivered December 3, 2003

Therese M. Free, for appellant.

No response.

WENDELL L. GRIFFEN, Judge. This case arises from a no-contact order issued by the White County Circuit Court, preventing appellant, John Clark, from exercising filial visitation rights granted by the Pulaski County Circuit Court. Appellant now argues that the White County Circuit Court (1) did not possess subject-matter jurisdiction to issue the order of protection; (2) erred in examining appellant concerning testimony that that trial court had previously ruled inadmissible; and (3) erred by making a finding that was clearly erroneous and unsupported by substantial evidence. Ap-

pellee, Tara Hendrix, did not file a response. We reverse and dismiss for lack of subject-matter jurisdiction.

Appellant and appellee were married and divorced in the early 1990s. They have one daughter from that marriage who was ten years of age at the time of the incident involved in this case. Appellant is a resident of the State of Texas; appellee is a resident of Pulaski County, Arkansas. On October 22, 2002, appellee filed a petition for an order of protection against appellant in the White County Circuit Court. In that petition, she alleged that on May 27, 2002, appellant had been seen at a restaurant in Searcy, White County, Arkansas, while on visitation with their ten-year-old daughter, severely berating her, beating her on the buttocks and legs while holding her in the air, and getting involved in verbal fights with intervening restaurant patrons. The local police intervened but did not pursue an investigation. The Arkansas Department of Human Services (ADHS) also investigated, but concluded that evidence of child abuse was insubstantial. Several witnesses submitted notarized affidavits of what they had seen at that restaurant.

Upon appellee's petition, the White County Circuit Court issued an *ex parte* temporary order of protection on October 22, 2002. That order restrained appellant from committing any acts of domestic abuse and excluded him from the dwelling of appellee and her child in Little Rock as well as from the places of appellee's employment and the child's school, both in Little Rock. Specifically, the order restrained appellant "from harassing, assaulting, threatening, physically abusing, mentally abusing, molesting," or otherwise bothering either petitioner or the child. The order commanded appellant to appear at the White County Circuit Court on November 20, 2002, for a show-cause hearing.

On November 20, 2002, the parties convened at the White County Circuit Court. Appellee, acting *pro se*, tried to testify about the alleged child abuse incident of May 27, 2002. When she repeatedly tried to refer to letters and affidavits from potential witnesses, counsel for appellant objected and the trial court sustained the objection on the basis of hearsay. The trial court also instructed appellee that she must have those witnesses present in court to get their statements into evidence.

Appellee then continued to testify that they have been "in and out of court in Pulaski County maybe three times now." She stated that she was trying to obtain supervised visitation at the

Pulaski County Circuit Court because she was afraid that appellant might harm the child during visitation.

In subsequent testimony, appellee referred to e-mails from appellant, in which he acknowledged that he had spanked the child. She stated further that she had waited until October 22, 2002, to file a petition for a protective order because she did not know that such a step was available to her. She admitted that she had not told the White County Circuit Court that she had been scheduled for a contempt hearing in the Pulaski County Circuit Court on October 24, 2002, two days after filing the petition in White County.

Appellee testified about the contempt hearing in Pulaski County. The trial judge in Pulaski County granted a continuance, but also ordered that visitation resume on October 24, 2002, or thereabout. Appellee also stated that "all of the witnesses" concerning the Searcy restaurant incident had come to Pulaski County Circuit Court to testify. The Pulaski County Circuit Court subsequently referred appellant and appellee into mediation, during which time visitation had to continue as originally ordered — which involved dropping off the child at appellant's mother's residence in Searcy.

Appellee next testified that the ADHS investigated the Searcy incident and that she received a notification that the evidence did not support an allegation of child mistreatment. Appellee admitted that she did not notify the White County Circuit Court of the ADHS notification because she was "fighting them and I think what the [ADHS] did was wrong." She stated that she was "looking for some kind of supervised visitation."

Counsel for appellant moved to dismiss the case in White County Circuit Court. He stated:

> I move to dismiss for two reasons. Jurisdiction is one. I believe the proof has shown, this matter and these facts are before the Court in Pulaski County. Not only is the Court dealing with the contempt and the ongoing battle between these parties, but the Court is dealing specifically with the incident specified in this Order of Protection, and after hearing that entire evidence, the Court continued visitation, so that is the jurisdiction objection for, or jurisdictional basis for this.

The trial court denied the motion with the following statement:

> I believe any Court can hear a domestic abuse case at the same time another Court is hearing all the same issues in a divorce case or in the aftermath of the divorce case, so as a jurisdictional thing I think this court has a right to hear the case if it wants to. Now, I could easily defer to that Court if I chose to do so, but I don't believe that I'm required to defer. That is my understanding of this new law.

Counsel for appellant then argued, as an alternate reason to dismiss the case, that the timing of the petition for a protective order was suspicious in that it occurred two days before a contempt hearing in another court, five months after the alleged incident. Again, the trial court denied the motion to dismiss.

Appellant then presented his case to the White County Circuit Court. During his testimony appellant repeatedly accused appellee of failing to cooperate with him in visitation and child-rearing matters and generally cast a negative light on appellee. He mentioned that appellee had not informed him of a new medication for their daughter until shortly before the alleged incident and that he may have erred in his judgment by withholding that medication because he did not then believe that their daughter truly needed it. Appellant, too, referred to testimony in Pulaski County Circuit Court, where he admitted that he probably should have continued the medication.

Specifically, appellant testified about the Searcy restaurant incident. According to him, the child became very unruly during the restaurant visit. Appellant testified that he took the child outside because of her conduct. When a little "scuffle" ensued, he spanked her "three times." He expressed understanding for other restaurant guests becoming upset, even to the point of intervening, but he also admitted that at the time he felt very agitated by the circumstances. He denied throwing objects inside the restaurant, as some of the witness affidavits had stated. He also denied lifting the child into the air.

The White County Circuit Court then continued the case until November 27, 2002, to afford appellee time to present witnesses instead of affidavits. The first witness was Greg Harnden, the Director of Athletics at Harding University, Searcy. He stated that appellant was yelling at the child inside the restaurant. He testified that he saw appellant's shoes "come flying over the table

on the floor," followed by a bill-holder. According to Harnden, appellant picked up the child and carried her out. Harnden followed appellant outside and saw appellant "holding her kind of like you'd hold a log and he was whaling on her." Harnden agreed with appellant, however, that his fist was not closed and that he was hitting her from her waist down. Harnden stated that he and two other men then intervened. He testified that appellant was particularly upset with one younger man who tried to stop the beating. According to him, appellant used profanity.

Rodney Rains had also been eating lunch at the Searcy restaurant. He testified that he observed appellant "fussing at his daughter first," then yelling at the two women who also sat at appellant's table—his mother and his fiancee. Rains explained that he and his party left early to get away from the noise, but that they saw appellant "dragging" the girl as they were getting ready to drive off, "pulling her by the arm," and having her in a "headlock" at one point. During that time, appellant was trying "to swat at her and hit her several times," using "some awful bad language." Rains called the police and intervened along with the others.

After that, Robert Edison testified. He was a police officer with the North Little Rock Police Department. He testified that he was ordered to serve an order of protection on appellant, on October 23, 2002. Edison further testified that he saw that appellant was agitated about it, but that appellant by and large kept his temper. Edison stated that, at that point in time, he had not been aware of the fact that appellant and appellee were at the location where he served the order of protection in order to undergo court-ordered mediation.

Another witness, Denise Cobb, a friend of appellee, testified that the child at one point told her that appellant sometimes does not allow her to wear eyeglasses because he does not think she needs them.

Evelyn Clark, the mother of appellant, also testified. Her testimony concurred with appellant's in that they had not known about the child's new medication until shortly before the Searcy restaurant incident. Evelyn Clark also confirmed that the child acted very abnormally in the restaurant and was extremely agitated. She stated that she never saw any spanking because she had stayed inside.

During his final remarks, the trial judge specifically stated that appellant had done "nothing but vilify [appellee] by the other evidence." The trial court continued to state that it does not "know whether those things are true or not, but she hasn't responded in kind, and it really doesn't matter because I believe that you are a threat to this child and I don't think you ought to be around this child." The trial court entered an order of protection valid for one year. Appellant then brought this appeal.

Subject-Matter Jurisdiction

Appellant first and foremost argues that the White County Circuit Court was without subject matter jurisdiction to decide the order for protection because the order pertained to an ongoing matter in Pulaski County Circuit Court. We agree.

It is well settled in Arkansas that a trial court presiding over visitation issues maintains continuing jurisdiction over visitation, modification, or vacation of such orders. *Stellpflug v. Stellpflug*, 70 Ark. App. 88, 14 S.W.3d 536 (2000). Specifically, our supreme court has held that when a case is brought in a court of competent jurisdiction, the authority and control of that court over the case continues until the matter is disposed of in the appellate court. *Tortorich v. Tortorich*, 324 Ark. 128, 919 S.W.2d 213 (1996) (citing in support, *inter alia*, *Vaughan v. Hill*, 154 Ark. 528, 242 S.W. 826 (1922); *Doss v. Taylor*, 244 Ark. 252, 424 S.W.2d 541 (1968)). In the *Tortorich* case, a wife obtained a limited divorce in Pulaski County, for which an appeal was still pending. *Id.* The Pulaski County Circuit Court, at that time still the Chancery Court, specifically had retained jurisdiction for further orders. *See id.* Her husband then moved to Saline County and filed for an absolute divorce there, before the appellate revision had become available. *Id.* The wife moved to dismiss the action in Saline County because of pendency of the Pulaski County action between the same parties arising out of the same occurrence. *Id.* The trial court in Saline County denied dismissal and granted the husband an absolute divorce, with terms differing from the order from the Pulaski County trial court. *Id.*

The *Tortorich* court based its decision in part on Ark. R. Civ. P. 12(b)(8), which provides that a cause may be dismissed because of "pendency of another action between the same parties arising out of the same transaction or occurrence." *Id.* In addition,

the *Tortorich* court referred to another case in which one party had brought a suit to foreclose on property in chancery court, while at the same time bringing an action in replevin in circuit court, as two separate causes of action on the same subject matter. *Id.* (citing *Moore v. Price*, 189 Ark. 117, 70 S.W.2d 563 (1934)). The *Moore* court held that the chancery court, being the first to acquire jurisdiction, had jurisdiction to bring adequate and complete relief, and that the party could not bring an action for replevin in circuit court as well. *Id.* Relevant for the analysis of the instant case, the 1934 reasoning employed by our supreme court was:

> This rule rests upon comity and *the necessity of avoiding conflict in the execution of judgments by independent courts*, and is a necessary one because any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results.

Id. at 131, 919 S.W.2d at 214 (citing *Moore v. Price*, 189 Ark. at 121-22, 70 S.W.2d at 565) (emphasis ours).

Here, the Pulaski County Circuit Court had ongoing jurisdiction over the visitation dispute between the parties. Even though appellant did not include any documentation of the Pulaski County Circuit Court proceedings in the addendum of his brief and even though none of the Pulaski County proceedings became part of the record of the White County proceedings, the record makes it abundantly clear, by testimony of both appellant and appellee, that the Pulaski County Circuit Court had a proceeding ongoing concerning their visitation dispute. It also becomes clear that the Pulaski County court had available the same testimony concerning the Searcy restaurant incident. Notably, the record reflects that the trial judge in White County was on notice that the Pulaski County court either had dealt with the matter or was in the process of dealing with it.

Consequently, we hold that the trial judge erred when he assumed jurisdiction over the matter. It is true that, strictly speaking, the Pulaski County Circuit Court did not have before it a protective order. However, it had before it appellee's continuous desire to have visitation modified. The protective order from November 2002, while certainly going to the heart of an incident that occurred within the jurisdiction of the White County Circuit Court, primarily dealt with the issue of whether appellant could exercise his right to visitation for another year. In light of the fact

that the Pulaski County court dealt with anything that might affect the valid and ongoing Pulaski County Circuit Court visitation order in the parties' case, the White County Circuit Court should have refrained from exercising its jurisdiction. Therefore, we reverse and dismiss. As such, it becomes unnecessary to discuss appellant's remaining points on appeal.

Reversed and dismissed.

PITTMAN and HART, JJ., agree.

David and Margaret STATLER *v.* Bobby and Rose PAINTER

CA 03-531 133 S.W.3d 425

Court of Appeals of Arkansas
Division I
Opinion delivered December 3, 2003

Don R. Brown, for appellant.

Tom Garner, for appellee.

WENDELL L. GRIFFEN, Judge. Appellants David and Margaret Statler petitioned the Randolph County Circuit Court to reform their deed and the deed of their neighbors, appellees Bobby and Rose Painter, to correct the deeds' description of the parties' common border. The trial court refused to reform the deeds, and appellants appeal. We affirm in part and remand in part.

Appellants acquired their property in 1997 from the Hufstedler family, who owned nearly seventy acres of land in Randolph County. That year, Darren Hufstedler informed appellant David Statler that he would like to sell some of the family's land. Statler told Hufstedler that he wanted approximately ten acres. Hufstedler testified that whichever ten acres Statler chose was fine with him. Statler staked out the particular area he wanted, showed the area to Hufstedler, and contacted Terry Throesch to survey the area and provide a description for the deed. The chosen tract was irregularly-shaped but resembled a triangle with a wide base on the south, two fairly even sides on the west and east, and a jagged top on the north.

Throesch observed the area Statler had staked out, set the corners, and proceeded to conduct the survey. From that survey, he prepared a legal description that would appear in the deed from the Hufstedlers to appellants. However, as Throesch would later admit, he made a mistake in surveying appellants' eastern border; his line was not far enough east and, as a result, the description did

not include a .29-acre strip that appellants had staked out. Throesch's description follows, with the mistaken portion emphasized:

> A part of the Northwest Quarter of the Northwest Quarter (NW1/4 NW1/4) of Section Five (5), Township Eighteen (18) North, Range One (1) West, Randolph County, Arkansas, more particularly described as follows: Commencing at the Northwest corner of the said Northwest Quarter of the Northwest Quarter (NW1/4 NW1/4); thence South 00° 13' 06" West along the West line of said...NW1/4 NW1/4, 224.76 feet to the point of beginning; thence S. 89° 13' 35" East parallel with the North line of said...NW1/4 NW1/4, 255.00 feet; thence North 00° 13' 05" East parallel with the West line of said...NW1/4 NW1/4 170 feet; thence South 89° 13' 35" East 297.00 feet; *thence South 40° 50' 22" East 150.00 feet; thence South 49° 46' 17" East 326.35 feet* to the Northwesterly right of way line of U.S. Highway #62; thence in a Southwesterly direction along said right of way line the following meanders: a nontangent curve to the left, 276.83 feet, said curve having a central angle of 02° 49' 36" and a radius of 5611.06 feet; North 26° 27' 51" West 10.00 feet; a nontangent curve to the left, 404.32 feet, said curve having a central angle of 04° 07' 16" and a radius of 5621.06 feet; South 30° 35' 07" East 10.00 feet; a nontangent curve to the left, 351.83 feet, said curve having a central angle of 03° 35' 33" and a radius of 5611.06 feet; thence leaving said right of way line, North 00° 13' 06" East along the West line of said...NW1/4 NW1/4, 660.00 feet to the. point of beginning, containing 9.054 acres, and subject to an easement for road purpose along the West side thereof.

The error would not be discovered for several years; it was not apparent to appellants merely by looking at the survey.

Meanwhile, the Hufstedlers sold their remaining land to the Walton family in 1998. Some of the land conveyed to the Waltons abutted appellants' eastern border. The Walton deed described that common border in a manner that corresponded precisely to the erroneous description in appellants' deed:

> thence leaving said right-of-way line, *North 49° 46' 17" West 326.35 feet; thence North 40° 50' 22" West 150 feet. . .*

The record does not reveal who prepared this description, but in any event, the error in appellants' survey carried over into the Walton deed.

In 1999, Throesch was hired to divide the Walton land into three equal tracts of 19.08 acres each. He did so and prepared legal descriptions of each tract. He did not go into the field to create these descriptions. In describing the border line that Tract II shared with appellants, Throesch used the same erroneous description that appeared in appellants' deed. On April 3, 2000, the Waltons deeded Tract II to appellees. Appellees' deed contained the following description of the border line that they shared with appellants:

> thence leaving said right-of-way, *N. 49° 46' 16"W. 326.35 feet; thence N. 40° 50' 22"W. 139.60 feet.*

Except for a slight variation, this description of the boundary line in appellees' deed corresponds to the erroneous description of it in appellants' deed. Thus, Throesch's original mistake carried over into appellees' deed.

The end result of Throesch's mistake is that appellees' deed contains the .29-acre disputed strip that should have been included in appellants' deed.

In 2001, in the course of setting appellees' corners on an unrelated matter, Throesch realized his mistake. He informed appellants and appellees and tried to help them resolve the situation, but his efforts were not successful; both parties wanted the strip. Thereafter, appellees began clearing the strip to erect a fence. On August 23, 2002, appellants filed suit, seeking a declaration that they owned the strip and seeking monetary damages from appellees for the destruction of trees. At trial, without objection from appellees, appellants changed their claim to seek reformation of their deed and appellees' deed on the ground of mutual mistake. The trial court declined to grant reformation, and this appeal followed.

[redacted] Reformation is an equitable remedy that is available when the parties have reached a complete agreement but, through mutual mistake, the terms of their agreement are not correctly reflected in the written instrument purporting to evidence the agreement. *Lambert v. Quinn*, 32 Ark. App. 184, 798 S.W.2d 448

(1990). A mutual mistake is one that is reciprocal and common to both parties, each alike laboring under the same misconception in respect to the terms of the written instrument. *Yeargan v. Bank of Montgomery County*, 268 Ark. 752, 595 S.W.2d 704 (Ark. App. 1980). A mutual mistake must be shown by clear and decisive evidence that, at the time the agreement was reduced to writing, both parties intended their written agreement to say one thing and, by mistake, it expressed something different. *See Lambert v. Quinn, supra.* Whether a mutual mistake warranting reformation occurred is a question of fact. *Id.*

Even in reformation cases, where the burden of proof is by clear and convincing evidence, we defer to the superior position of the trial judge to evaluate the evidence, *Akin v. First National Bank*, 25 Ark. App. 341, 758 S.W.2d 14 (1988), and the proof need not be undisputed. *Lambert v. Quinn, supra.* Although we review traditional equity cases *de novo*, the test on review is not whether we are convinced that there is clear and convincing evidence to support the trial judge's findings but whether we can say that the trial judge's findings are clearly erroneous. *Id.*

The mistake of a draftsman, whether he is one of the parties or merely a scrivener, is an adequate ground for reformation if the writing fails to reflect the parties' true understanding. *See Jones v. Jones*, 27 Ark. App. 297, 770 S.W.2d 174 (1989). A court may, through reformation, correct the description in a deed where the deed incorrectly reflects the property that the parties intended to be conveyed. *See, e.g., Kohn v. Pearson*, 282 Ark. 418, 670 S.W.2d 795 (1984); *Galyen v. Gillenwater*, 247 Ark. 701, 447 S.W.2d 137 (1969); *Lambert v. Quinn, supra.*

In the case at bar, it is undisputed that the Hufstedlers intended to sell and appellants intended to buy the disputed strip of land. Darren Hufstedler allowed appellant David Statler to choose the property he wanted. Statler staked out the area that contained the strip. Throesch testified that Statler showed Hufstedler what he wanted to buy. Throesch then completed the survey that resulted in the incorrect description of the eastern border. Thus, through the mistake of the person who wrote the land description, the strip was not contained in appellants' deed, even though both buyer and seller intended that it would be.

Ordinarily, appellants would be entitled to reformation of their deed for such a mistake. However, a party cannot obtain reformation if reformation would prejudice a subsequent bona fide purchaser. *Maurice v. Schmidt*, 214 Ark. 725, 218 S.W.2d 356 (1949); 76 C.J.S. *Reformation of Instruments* § 58 (1994); 66 AM. JUR. 2D *Reformation of Instruments* § 62 (2d ed. 2001); 14 Richard Powell, *Powell on Real Property* § 81A.07[3][d] (2000); 2 *Dobbs Law of Remedies* § 11.6(1) at 743, 754 (2d ed. 1993); Annot., *Right to Reformation of Contract or Instrument as Affected by Intervening Rights of Third Persons*, 79 A.L.R. 2d 1180 (1961 & Supp. 2000). The reason behind such a rule is that, when a bona fide purchaser acquires an interest in land and makes an investment in the land, that party is entitled to have his expectations protected. *Powell on Real Property, supra.*

We hold that appellees were bona fide purchasers, such that they should not be divested of the disputed strip through reformation of the deeds. If reformation were allowed in this case, appellees would lose ownership of the strip, even though the strip is contained in their deed description, they purchased the strip, and they bought their land with no notice of the mistake in the deed descriptions. Although there was some evidence that, after appellees purchased their property, they were unsure about where the common boundary line was located and they later recognized appellants' ownership of the strip, there is nothing to show that, at the time of purchase or before, they had notice of any claim on the land they were purchasing. *See Grasby v. Findley*, 198 Ark. 1015, 132 S.W.2d 379 (1939). Therefore, appellees should be regarded as bona fide purchasers whose interests cannot be prejudiced by reformation. The trial court's denial of reformation is therefore affirmed.[1]

Despite our affirmance of this case, we remand to the trial court to consider what appears to be an error in the order appealed from. The order sets out each parties' ownership by reciting the legal descriptions of each party's land. Because the deeds were not reformed, those descriptions should read the same

[1] While we cannot be sure of the trial judge's reason for denying reformation, because he announced no reason, we may affirm the court's decision if it was correct for any reason. *Fritzinger v. Beene*, 80 Ark. App. 416, 97 S.W.3d 440 (2003).

as the descriptions in the parties' deeds. However, the trial court's recitation of appellants' description appears to us to read as though it were reformed. Lines 13 and 14 contain the call lines "South 61° 31' 40" East 142.15 feet, thence South 40° 26' 39" East 332.16 feet." We believe that this may be the description of the border as it would have read if the deed had been reformed, not as it was actually deeded. We therefore remand to the trial court for the sole purpose of considering whether a mistake occurred in drafting the order and, if so, to rectify it.

Affirmed in part; remanded in part.

NEAL and CRABTREE, JJ., agree.

William A. COX *v.* Jane Merle KEAHEY

CA 02-1118 133 S.W.3d 430

Court of Appeals of Arkansas
Division IV
Opinion delivered December 3, 2003

S. Christopher Thomason, for appellant.

Wilson, Walker & Short, by: *Charles M. Walker*, for appellee.

LARRY D. VAUGHT, Judge. William Cox, administrator of the estates of Virginia Lantrip and John Lantrip, has appealed from an order of the Miller County Circuit Court dismissing his third-party complaint against appellee Jane Merle Keahey. This case was previously before us in *Lantrip v. Keahey*, No. CA01-150 (September 26, 2001), when we dismissed the appeal for lack of a final order. The facts and proceedings leading up to our earlier decision were as follows:

> This is an appeal from an order granting the appellee/third-party defendant's motion to dismiss on the basis of *res judicata*, claim preclusion, and issue preclusion. Appellant/third-party plaintiff contends that the trial court erred in granting the motion to dismiss. We dismiss the appeal because the order from which it is taken does not adjudicate all of the claims or the rights and liabilities of the parties and is, therefore, not a final appealable order.
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> On October 4, 1999, John Allen Cross and Glenda Jo Cross (the Crosses) filed a complaint against Virginia Maxine Lantrip, individually and as the administratrix of the estate of John Lantrip, deceased. The complaint alleged that the Lantrips conveyed, by warranty deed, a one-fourth interest in certain property located in Miller County, Arkansas, to the Crosses on December 14, 1999 [1993]. The Lantrips reserved one-fourth of the mineral rights. John Lantrip claimed to have title to the property as the only child and sole heir of his father, Earl Lantrip, who died intestate.
>
> The Crosses' complaint further alleged that on June 26, 1998, James and Brenda Cross and David and Agnes Cross filed a complaint (No. E-99-323-3) against the Crosses, alleging that they purchased a one-eighth interest in the same property the Crosses purchased from the Lantrips. James and Brenda Cross and David and Agnes Cross claimed to have purchased their one-eighth interest from Jane Merle Keahey, who executed a warranty deed conveying the property on January 7, 1998. Keahey also claimed to be the child and heir at law of Earl Lantrip.

For relief in the present case, the Crosses sought to compel Virginia Lantrip to intervene in case No. E-99-323-3 and to be required to defend their one-fourth interest in the property at issue. Virginia Lantrip filed an answer, and later she filed a third-party complaint against Jane Merle Keahey on November 15, 1999. She alleged that Keahey was the natural born child of Mabel Lantrip, who was born prior to Mabel's marriage to Earl Lantrip and had no blood relationship to Earl. Thus, Keahey was the half-sister of John Lantrip and sister-in law of Virginia Lantrip. Lantrip alleged that any interest claimed by Keahey in the property at issue is based on the improper claim that she is the natural born child of Earl Lantrip. Based on Keahey's wrongful conveyance, Lantrip claimed to have been damaged in that she was forced to defend the lawsuit filed by the Crosses and that her reserved interest in the mineral rights had been depleted. Additionally, Lantrip claimed that Keahey tortiously interfered with her contract with the Crosses.

On April 4, 2000, Keahey filed a motion to dismiss Lantrip's third-party complaint on the grounds that it failed to state facts upon which relief could be granted, that the claim was barred by *res judicata,* and that she was incompetent and without a guardian and thus could not be sued. In support of the motion, Keahey attached as exhibits, a motion for judgment on the pleadings and brief in support from case No. P-98-243-3, styled "*Virginia Lantrip, administratrix of the estate of John Lantrip, deceased, v. Jane Merle Keahey,*" a reply brief, and an order of dismissal. The motion for judgment on the pleadings in case No. P-98-243-3 had been granted by way of an order of dismissal entered September 7, 1999. The order of dismissal stated that the pleadings did not set forth a justiciable controversy between the parties and that Lantrip had no standing to raise the issue of heirship between herself as the administratrix of the estate of John Lantrip, deceased, and Keahey. Lantrip filed a response to the motion to dismiss, denying the allegations of the motion.

The trial judge granted Keahey's motion, dismissing the third-party complaint with prejudice, on the grounds that the claim was barred by *res judicata,* claim preclusion, and issue preclusion. The order of dismissal was filed October 4, 2000, and Lantrip's notice of appeal was timely filed November 3, 2000.

Lantrip v. Keahey, No. CA 01-150 (September 26, 2001), *slip op.* at 1-3.

On September 26, 2001, we dismissed the appeal as not final because it adjudicated fewer than all of the claims of fewer than all of the parties and the trial court had not followed the requirements of Ark. R. Civ. P. 54(b). We now address the facts and proceedings leading to the present appeal.

Virginia Lantrip died on April 1, 2001. On November 7, 2001, "Mrs. Lantrip" filed a motion for entry of final judgment in keeping with Rule 54(b). In response, Ms. Keahey noted that Mrs. Lantrip had recently died, that an alternate administrator of Mr. Lantrip's estate had not been appointed, and that this action had not been revived. Appellant William Cox, the Lantrips' son-in-law, was appointed administrator of Mrs. Lantrip's estate on February 8, 2002. Plaintiffs John and Glenda Cross filed a motion to revive this action on February 13, 2002. Mr. Cox filed a motion on February 21, 2002, to revive this action on behalf of the estates of Mr. and Mrs. Lantrip. In that motion, he also requested that he be appointed special administrator of the estate of Mr. Lantrip for the purpose of litigating this case.

On June 26, 2002, the circuit court entered an order of revivor substituting Mr. Cox, as administrator of the estates of Mr. and Mrs. Lantrip, as the defendant in this action. On the same day, the court entered an "Order of Final Judgment and Dismissal," amending the original order of dismissal and stating:

> That this Court did on September 29, 2000, enter its Order of Dismissal granting the Third Party Defendant's Motion for Dismissal of the Third Party Plaintiff's Complaint with prejudice; that said Order of Dismissal was filed of record with the Circuit Court of Miller County, Arkansas, on October 3, 2000; and that to date, there has been no entry of Final Judgment in this matter adjudicating all claims, rights and liabilities of all the parties under which said Third Party Complaint was filed;
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> That the Court did not state in its original Order of Dismissal entered on September 29, 2000, that said Order was a Final Judgment as to the claim of the Third Party Plaintiff against the Third Party Defendant and that there was no just reason for delay of any appeal from said Order because the likelihood of hardship or injustice that would occur if the Third Party Plaintiff was unable to effect an immediate appeal; and

> That said Order of Dismissal should be amended and entry of a Final Judgment made herein, as to one or more, but fewer than all the claims or parties herein; that the Court makes said determination based upon the following find[ing]s:
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> (A) That there is an extreme likelihood of unnecessary hardship or injustice to the Defendant/Third Party Plaintiff which would be alleviated by an immediate appeal of said Order:
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> (B) The absence of an immediate appeal would defeat the policy of judicial economy in that the Defendant/Third Party Plaintiff, could only resolve the issues presented therein by separate litigation; and
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> (C) That the Defendant/Third Party Plaintiff shall endure the injustice of having her rights, status of ownership interest in the mineral state reserved to her and the property which is at issue in the subject suit being uncertain; and that said uncertainty will have the full force and effect of having her property interest depleted without new production or due process of law.

Although the circuit court made specific findings to support an immediate appeal, it neglected to include a certification as required by Rule 54(b). Mr. Cox filed a notice of appeal on July 22, 2002, and the record was lodged with the supreme court clerk on October 18, 2002. On November 27, 2002, Mr. Cox filed a motion to stay brief time and to remand to the trial court for an order complying with Rule 54(b). We granted that motion, and the trial court entered an amended order of final judgment and dismissal that included the necessary findings and certification. The amended order was filed with this court as a supplement to the record on February 3, 2003.

Mr. Cox argues on appeal that the trial court erred in finding his claims to be barred by *res judicata*, claim preclusion, and issue preclusion.

Standard of Review

After being served with the third-party complaint, Ms. Keahey moved to dismiss for failure to state a claim and also raised the defenses of incompetency and *res judicata*. She based her *res judicata* argument on the trial court's dismissal in Case No. P98-243-3. In finding that Mr. Cox's claims were barred by *res judicata*, claim preclusion, and issue preclusion "as a result of the Order of Dismissal filed by this Court in cause No. P98-243-3," the trial court obviously based its decision on a document that was outside the pleadings. Therefore, according to Ark. R. Civ. P. 12(b), the trial court implicitly treated the motion as one for summary judgment, and our review of that decision is governed by the standard of review appropriate for appeals from summary judgments.

In reviewing summary-judgment cases, we determine whether the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Alberson v. Automobile Club Interins. Exch.*, 71 Ark. App. 162, 27 S.W.3d 447 (2000). The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* All proof submitted with a motion for summary judgment must be viewed in the light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *McWilliams v. Schmidt*, 76 Ark. App. 173, 61 S.W.3d 898 (2001). Summary judgment is not appropriate where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. *Lee v. Hot Springs Village Golf Schs.*, 58 Ark. App. 293, 951 S.W.2d 315 (1997).

Collateral Estoppel

The doctrine of *res judicata* has two aspects: claim preclusion and issue preclusion. *See Coleman's Serv. Ctr., Inc. v. Federal Deposit Ins. Corp.*, 55 Ark. App. 275, 935 S.W.2d 289 (1996). Issue preclusion is also known as collateral estoppel. *Id.* The doctrine of collateral estoppel bars the relitigation of issues of

law or fact actually litigated in the first suit. *Van Curen v. Arkansas Prof'l Bail Bondsman Licensing Bd.*, 79 Ark. App. 43, 84 S.W.3d 47 (2002). When an issue of law or fact is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. *Id.* Collateral estoppel is based upon the policy of limiting litigation to one fair trial on an issue. *Id.* Unlike *res judicata*, or claim preclusion, collateral estoppel does not require mutuality of parties before the doctrine can be applied. *Johnson v. Union Pac. R.R.*, 352 Ark. 534, 104 S.W.3d 745 (2003).[1] For collateral estoppel to apply, the following elements must be met: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; (4) the determination must have been essential to the judgment. *Id.* Whether an issue was previously litigated has been interpreted very narrowly for purposes of collateral estoppel. *Guidry v. Harp's Food Stores, Inc.*, 66 Ark. App. 93, 987 S.W.2d 755 (1999).

In the dismissal entered in Case No. P-98-243-3, the trial court made no findings of fact or law other than to state:

> The complaint of the plaintiff and the answer of the defendant do not set forth a genuine, justiciable controversy between these parties. The plaintiff has no standing to raise the issue of heirship as between herself as administratrix for the estate of John Lantrip, deceased, and Jane Merle Keahey.
>
> Therefore it is CONSIDERED, ORDERED and ADJUDGED that the defendant's Motion for Judgment on the Pleadings is hereby granted and the Petition for Declaratory Judgment filed hereby by the plaintiff is dismissed with prejudice.

[1] The offensive use of collateral estoppel, however, should be available only in limited cases, and the trial court should be given broad discretion to determine if it should be applied. *Johnson v. Union Pac. R.R., supra.* In cases where a plaintiff could easily have joined in the earlier action or where the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel. *Id.*

Because the issues relevant to Mrs. Lantrip's claims were not actually litigated or determined in that decision, we hold that the court erred in applying issue preclusion in this case.

Res Judicata

Our next question is whether the court was correct in applying claim preclusion to Mr. Cox's claims. The purpose of the *res judicata* doctrine is to put an end to litigation by preventing a party who had one fair trial on a matter from relitigating the matter a second time. *Brandon v. Arkansas W. Gas Co.*, 76 Ark. App. 201, 61 S.W.3d 193 (2001). The test in determining whether *res judicata* applies is whether matters presented in a subsequent suit were necessarily within the issues of the former suit and might have been litigated therein. *Van Curen v. Arkansas Prof'l Bail Bondsmen Licensing Bd., supra.* Under the claim-preclusion aspect of the doctrine of *res judicata*, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim or cause of action. *Brandon v. Arkansas W. Gas Co., supra.* When a case is based on the same events as the subject matter of a previous lawsuit, *res judicata* will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *Id.* The key question regarding the application of *res judicata* is whether the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. *Id. Res judicata* is based upon the assumption that a litigant has already had his day in court. *Dickerson v. Union Nat'l Bank of Little Rock*, 268 Ark. 292, 595 S.W.2d 677 (1980).

Mr. Cox argues that the order of dismissal "with prejudice" in Case No. P98-243-3 was not on the merits. We agree insofar as this case is involved. Usually, dismissal with prejudice is as conclusive of the rights of the parties as if there had been an adverse judgment as to the plaintiff after a trial. *See Francis v. Francis*, 343 Ark. 104, 31 S.W.3d 841 (2000). However, there are limitations to the doctrine of *res judicata*, and we believe that the court erred in failing to apply an exception to that doctrine under the circumstances presented here. It is true that both this action and Case No. P98-243-3 were based on the same event — Ms. Keahey's conveyance of a deed to property in which she, like Mr.

Lantrip, claimed an interest as a child and heir of Earl Lantrip. Both lawsuits involve Ms. Keahey's and Mr. Lantrip's respective rights to this property, and in order to make that determination, the court would be required to determine whether Earl Lantrip was Ms. Keahey's biological father. However, Mr. and Mrs. Lantrip's alleged breach of warranty of title, on which this lawsuit is based, could not have been litigated in Case No. P98-243-3, which was dismissed as having been brought prematurely. When that case was dismissed, neither the Lantrips nor their estates had been sued on their warranties of title. John and Glenda Cross filed this action on October 4, 1999, which was a few days after Case No. P98-243-3 was dismissed by the same judge. Mrs. Lantrip filed her third-party complaint over a month later.

The *Restatement (Second) of Judgments* § 20(2) (1982) provides:

> A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied unless a second action is precluded by operation of the substantive law.

Comment *k* expresses the rationale for this section as follows:

> A determination by the court that the plaintiff has no enforceable claim because the action is premature, or because he has failed to satisfy a precondition to suit, is not a determination that he may not have an enforceable claim thereafter, and does not normally preclude him from maintaining an action when the claim has become enforceable. The rule of this Subsection and the rationale behind it shade over into the rule that subsequent events may give rise to a new claim that is not barred by a prior judgment (see § 24, Comment *f*).
>
> The rule stated in this Subsection is applicable whether the fact that the action is premature, or that a precondition has not been satisfied, appears on the face of the pleadings, as a result of pretrial discovery, or from the evidence at trial.

Comment *f* to section 24 explains the importance of a change of circumstances in determining whether claim preclusion applies:

> Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first.

It is clear to us that Mr. Cox has not yet had a full and fair opportunity to litigate the issues in question, and that the filing of this lawsuit by the Crosses was a subsequent event giving rise to a new claim that is not barred by the prior judgment. We therefore conclude that claim preclusion cannot apply here. Accordingly, the circuit court's decision must be reversed and Mr. Cox's claims must be remanded for trial.

Reversed and remanded.

HART and BIRD, JJ., agree.

Lisa A. HILL (*Now Dechaine*) *v.* Samuel Paul HILL

CA 03-518 134 S.W.3d 6

Court of Appeals of Arkansas
Division III
Opinion delivered December 3, 2003

Steven R. Jackson, for appellant.

Penix & Taylor, by: *Stephen L. Taylor*, for appellee.

ANDREE LAYTON ROAF, Judge. This appeal arises from post-divorce efforts by appellant Lisa Hill DeChaine to collect an unpaid child-support arrearages judgment from appellee Samuel Hill after their minor child reached the age of majority. The sole issue on appeal is one of statutory interpretation — whether subsections (a) and (c) of Ark. Code Ann. § 9-14-235 (2002) are mutually exclusive so that the prior use of subsection (a) precludes the use of other collection methods authorized by subsection (c). The trial court ruled that the two sections were mutually exclusive and prohibited appellant from collecting the child-support arrearages by any means other than collection of a $100 monthly payment previously ordered pursuant to subsection (a). Because we hold that subsections (a) and (c) are not mutually exclusive, we reverse and remand.

The parties were divorced in September 1986, with appellant being awarded custody of the parties' minor child and appellee was ordered to pay child support of $28 per week. In September 1992, appellee was found to be in arrears for child support, and appellant was granted judgment in the sum of $11,563.21, representing child support, interest, and attorney's fees and costs. In October 1993, the parties jointly petitioned the trial court to modify the divorce decree to provide for appellee to have custody of the minor child during the school year and for appellant to have custody of the child during the summer months. An order was entered on October 25, 1993, modifying the decree as sought and providing that neither party would pay the other party child support and that appellee would pay $100 per month on any accrued child-support arrearages. The order did not determine the amount of any arrearages. The parties' child reached the age of majority on February 16, 2002.

On May 3, 2002, appellant filed a petition seeking to hold appellee in contempt for nonpayment of child support and a judgment for the unpaid sums. A show-cause hearing was held on June 11, 2002, and both appellee and his attorney failed to appear. The trial court found that appellee was in willful contempt and that, after credit for payments made, appellee owed appellant $21,184.86 in unpaid child support and interest from the 1992 order.

On July 3, 2002, appellee filed an Arkansas Rule of Civil Procedure 60(a) motion to set aside the June 18, 2002, judgment, alleging that appellee's counsel failed to properly docket the hearing date. After a hearing, the trial court entered an order on September 3, 2002, modifying the June 18 order by finding that appellee was not in willful contempt. The trial court left unchanged the finding that appellee owed arrearages of $21,184.86, and appellee was ordered to pay $100 per month to satisfy the arrearages.

On September 11, 2002, appellant served appellee with post-judgment interrogatories and requests for production of documents seeking information about appellee's financial holdings as well as his three most recent income-tax returns. Appellee responded by objecting to each interrogatory or request for production by stating that "[appellee] objects to this interrogatory. The Court has previously ruled that the arrearages are to be paid by [appellee] at $100 per month and [appellant] did not appeal the Court's order. Furthermore, [appellant] has already filed a petition for contempt to enforce such order." Appellant filed a motion to compel discovery on October 23, 2002.

At the hearing on the motion to compel, the parties argued the applicability of section 9-14-235(c). Appellant argued that the statute was applicable, and appellant could pursue other remedies, while appellee argued that it did not apply because appellant chose to collect the arrearages through contempt proceedings. The trial court stated that it was his intention that the $100-per-month payment would be the only method of satisfying the arrearages. The trial court granted the motion to compel discovery, requiring appellee to answer the post-judgment interrogatories and requests for production by December 13, 2002. The trial court also ordered appellant not to take other steps to collect on the judgment until after receipt of the discovery answers. The trial court provided that, if appellant was not satisfied with the discovery, she could file a petition seeking to collect the arrearages through other means.

Appellant filed such a petition, alleging that she should be allowed to use sections 9-14-230, 9-14-231, 9-14-233 and 9-14-235 to collect the judgment and that, if she were not allowed to do so, her ability to collect the arrearages would be prejudiced. At the hearing, appellee testified that he was a self-employed painter and the sole support for his wife and son. He stated that his adjusted gross income from 1999 was $12,807; from 2000, it was $9,193; and from 2001, it was $8,621. He stated that his affidavit of

financial means listed expenses of $4,796.25 per month and annual income of $8,621 in 2001. He testified that, in 2001, he took out a loan from Arkansas National Bank in the amount of $180,000 to build a house and that his house payment is approximately $1,100 per month. Appellee testified that his wife receives $20,000 per year from a $1,000,000 trust fund from her grandmother but that the grandmother was not obligated to give the funds every year and that this money is used to make the house payments and to pay other expenses. Appellee stated that he could afford to pay only $100 per month on the child-support arrearages. He admitted that he had other assets that could be sold to pay off the arrearages. Appellee stated that he could not make his current monthly payments. Appellee testified that the land on which his house is situated is worth $45,000 and that nothing is owed on the land.

The trial court denied appellant's motion from the bench, repeating its statement from the December 3 hearing that the $100 per month was intended to be the only means of satisfying the judgment. The trial court stated that it appeared that subsections (a) and (c) of Ark. Code Ann. § 9-14-235 are contradictory. The trial court relied on *Office of Child Support Enforcement v. Tyra*, 71 Ark. App. 330, 29 S.W.3d 780 (2000), as the only interpretation of section 9-14-235 and stated that *Tyra* held that it was the trial court's discretion to determine how the arrearages are paid. The trial court also noted that appellant was in a financially embarrassed position and was a candidate for bankruptcy. In addition, the trial court stated its belief that, when appellant filed her contempt action on September 23, 2002, she chose her remedy and was prevented from seeking satisfaction in any other manner. This appeal followed.

Appellant argues one point on appeal — that the trial court erred in prohibiting her from collecting a judgment for child-support arrearages in the same manner as provided for the collection of other judgments.

The standards governing our review of a traditional equity case are well established and did not change as a result of the enactment of Amendment 80. *Lewellyn v. Lewellyn*, 351 Ark. 346, 93 S.W.3d 681 (2002). Although we review equity cases *de novo* on the record, we do not reverse unless we determine that the trial court's findings were clearly erroneous. *Anderson v. Holliday*, 65 Ark. App. 165, 986 S.W.2d 116 (1999). A trial court's finding of fact is clearly erroneous when, although there is evidence to

support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Lammey v. Eckel*, 62 Ark. App. 208, 970 S.W.2d 307 (1998). In reviewing a trial court's findings, we defer to the trial court's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). However, we do not defer to a trial court's conclusion on a question of law. *City of Lowell v. M & N Mobile Home Park, Inc.*, 323 Ark. 332, 916 S.W.2d 95 (1996). If the trial court erroneously applied the law and the appellant suffered prejudice as a result, we will reverse the trial court's erroneous ruling on the legal issue. *Id.*

This case involves the interplay between two subsections of the same statute, section 9-14-235, which provides in part:

> (a) If a child support arrearage or judgment exists at the time when all children entitled to support reach majority, . . . the obligor shall continue to pay an amount equal to the court-ordered child support, or an amount to be determined by a court based on the application of guidelines for child support under the family support chart, until such time as the child support arrearage or judgment has been satisfied.
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> . . . .
>
> (c) Enforcement through income withholding, intercept of unemployment benefits or workers' compensation benefits, income tax intercept, additional payments ordered to be paid on the child support arrearage or judgment, contempt proceedings, or any other means of collection shall be available for the collection of a child support arrearage or judgment until such is satisfied.

The trial court relied on this court's decision in *Office of Child Support Enforcement v. Tyra, supra*, for its conclusion that, once the trial court ordered appellee to satisfy the arrearages by paying $100 per month, Ark. Code Ann. § 9-14-235(a) precluded appellant from utilizing other methods of collection. This reliance is misplaced because *Tyra* was not a case in which other methods of collecting unpaid support were at issue. Rather, the issue was whether section 9-14-235(a) authorized the trial court to allow the obligor to satisfy the arrearages by paying an amount less than the previously ordered support. This court held that the trial court "is

not entirely precluded from adjusting the amount as deemed warranted under the facts of a particular case, and this court will not disturb the [trial court's] decision to do so absent an abuse of discretion." *Tyra*, 71 Ark. App. at 335, 29 S.W.3d at 783 (quoting *Lovelace v. Office of Child Support Enfcm't*, 59 Ark. App. 235, 955 S.W.2d 915 (1997)). Neither *Tyra* nor *Lovelace* discussed section 9-14-235(c).

Instead, we believe that this case is controlled by *Sharum v. Dodson*, 264 Ark. 57, 568 S.W.2d 503 (1978). In that case, the mother obtained a judgment for child-support arrearages in the amount of $3,096. The trial court ordered that the current support and arrearages should be paid at a rate of $5 a month "and that execution was to be held in abeyance unless [the father] failed to make prompt payments each month." *Id.* at 59, 568 S.W.2d at 504. The *Sharum* court concluded that the trial court erroneously held execution on the judgment in abeyance. The supreme court characterized a judgment for past-due child-support payments as being like any other judgment, whether at law or equity. *Id.* Likening garnishment after a judgment to a form of execution, the court applied the general garnishment statutes to a final judgment for arrearage, concluding that:

> A court may not restrict the right of one parent to collect a judgment against the other for arrearages in child support payments by legal process; it may, however, if changed circumstances have rendered the payments inequitable, in its discretion, decline to enforce, by contempt proceedings, the payment of a greater sum than the circumstances warrant.

Id. at 62, 568 S.W.2d at 506 (citations omitted).

We realize that *Sharum* was decided before the enactment of Act 383 of 1989, which contained what are now sections 9-14-234 and 9-14-235. However, the supreme court followed *Sharum* in *Stewart v. Norment*, 328 Ark. 133, 941 S.W.2d 419 (1997), decided after Act 383. The *Stewart* court mentioned the fact that *Sharum* did not involve the remedies provided during the 1980s, such as income withholding, but did not find that fact distinguishing. Similarly to what the trial court did in the present case, the trial court in *Stewart* stated that "it was the Court's intention that the additional award of $20.00 every two weeks to be applied to the child support arrearage would be the sole and

exclusive method for the payment of the arrearage." *Id.* at 135, 941 S.W.2d at 420. The supreme court rejected an argument similar to appellee's argument in the present case as follows:

> The General Assembly has provided that an order for child-support arrearages is a final judgment subject to garnishment or execution until the order is modified or otherwise set aside. The fact that an order also provides for income withholding to satisfy accrued support arrearages is irrelevant in determining whether garnishment provides a viable alternative method for collecting the arrearage. This conclusion is supported by Ark. Code Ann. § 9-14-202 (Repl. 1993), which states that the remedies provided in the child-support enforcement subchapter "shall not be exclusive of other remedies presently existing," and by Ark. Code Ann. § 9-14-218(a)(1)(B) (Supp. 1995), which expressly provides that the use of income withholding in orders providing for child support "does not constitute an election of remedies and does not preclude the use of other enforcement remedies."

Id. at 136, 941 S.W.2d at 420.

Sharum and Ark. Code Ann. §§ 9-14-234 and 9-14-235(a) and (c) are consistent with each other. Section 9-14-234(b) codifies the rule in *Sharum* that child support becomes a judgment when due and is subject to execution or garnishment. *Sharum* also provides that the trial court does have some discretion in setting the payments on the arrearage, as does section 9-14-235(a). Section 9-14-235(c) and *Sharum* both provide that a parent who is owed child-support arrearages may utilize other enforcement methods to collect the arrearages. This conclusion is supported by Ark. Code Ann. § 9-14-202 (Repl. 2002), which states that the remedies provided in the child-support enforcement subchapter "shall not be exclusive of other remedies presently existing."

Reversed and remanded.[1]

PITTMAN and ROBBINS, JJ., agree.

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[1] Appellant recognizes the trial court's discretion in setting the amount of monthly payments and does not challenge the trial court's setting the monthly payment at $100-per-month. However, the supreme court in *Sharum* noted that the $5-per-month payment in that case would not even satisfy the interest on the $3,096 judgment. In the present case, the $100-per-month payment will likewise not cover the interest on the arrearages.

Kevin Jeremy LINN *v.* STATE of Arkansas

CA CR 03-476 133 S.W.3d 407

Court of Appeals of Arkansas
Division III
Opinion delivered December 3, 2003

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

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

ANDREE LAYTON ROAF, Judge. Appellant Kevin Linn was convicted of second-degree battery and sentenced to fifteen years' imprisonment. On appeal, Linn argues (1) that the trial court erred in declining to direct a verdict because the State did not prove physical injury associated with physical trauma, and (2) that he

should be granted a new trial because he was denied adequate assistance of counsel in his first trial. We affirm.

The victim, Deputy Sheriff McKinley Scott, testified at trial that on February 15, 2001, he worked in the U-Unit of the Pulaski County Jail and was responsible for Linn's supervision. During Scott's shift, Linn was handcuffed during his scheduled cell break in a sub-day area until he freed one hand and began to bang his cuffs against the cell's glass window. After hearing the noise, Scott refastened the handcuff through the open space in the door. He then moved Linn to the front of the room, told him that his break was over, and prepared to return Linn to his cell. Suddenly, Linn grabbed Scott's keys, which were in his left hand. While they struggled for the keys, Linn pulled the key ring and Scott's left hand to his mouth and bit the deputy's thumb. According to Deputy Sheriff Kala Cherry who was assisting Scott, Scott screamed and immediately dropped the keys. A distress call was made, and the responding officers were eventually able to restrain Linn after putting him in the restraint chair. One of the responding officers testified that he saw blood on Scott's hand where Linn had bitten him.

Scott testified that the bite wound produced teeth marks around his left thumb knuckle and that his thumb was swollen and sore. He was taken to the emergency room, where Dr. Darren Flamik treated him and gave him a tetanus shot. Dr. Flamik testified that the skin was broken around Scott's thumb by the bite, in an abrasive-type wound, and that it looked like a tooth had caught the skin and had torn it. He advised Scott to watch for infection, due to the fact that a human bite is one of the worst types of bites in terms of the high incidence of infection. Also, due to the nature of the wound, Scott was told that he needed to be routinely tested for HIV and other diseases for up to one year. Scott testified that, more than one year after the incident, his thumb still had a visible mark from the bite.

After the State rested its case, Linn made a motion for a directed verdict, arguing that there was not enough evidence of a physical injury. The court denied the motion, and the defense rested without presenting any evidence. The jury then convicted Linn of second-degree battery and sentenced him to fifteen years' imprisonment.

Linn first argues that the trial court erred in declining to direct a verdict because the State did not prove that the victim suffered a physical injury. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Farrelly v. State*, 70 Ark. App. 158, 15 S.W.3d 699 (2000). When reviewing a challenge to the sufficiency of the evidence, the appellate court will affirm the conviction if there is substantial evidence to support it, when viewed in the light most favorable to the State. *Id.* Substantial evidence, whether direct or circumstantial, is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another without resort to speculation or conjecture. *Id.*

Arkansas Code Annotated section 5-13-202(a)(4)(A) (Supp. 2001) provides that a person commits battery in the second degree if he "intentionally or knowingly, without legal justification, causes physical injury to one he knows to be . . . an employee of a correctional facility while such [employee] is acting in the line of duty[.]" "Physical injury" is "the impairment of physical condition, infliction of substantial pain, or infliction of bruising, swelling or visible marks associated with physical trauma[.]" Ark. Code Ann. § 5-1-102(14) (Supp. 2001). In determining whether a physical injury exists, a jury may consider the severity of the attack and the sensitivity of the area of the body to which the injury was inflicted. *Farrelly, supra.* A jury may also rely on its common knowledge, experiences, and observations in life in making such a determination. *Id.*

Linn asserts that the requirement of physical injury under the statute is not satisfied by just *any* bruising, swelling, or visible marks, but rather only those bruising, swelling, or visible marks that are *associated with physical trauma.* He argues that the word "trauma" carries a connotation of severity and thus that the minor scrape on Scott's hand in this case does not meet the definition of physical injury. However, we find that the bite wound in this case satisfies the requirement of physical injury.

"Trauma" has been defined as "an injury (as a wound) to living tissue caused by an extrinsic agent," *Webster's Ninth New Collegiate Dictionary* 1256 (1991), and as "a bodily injury, wound, or shock." *Webster's New World Dictionary* 1423 (3d ed. 1994). These definitions do not require the severity suggested by Linn. Also, the definition of physical injury was amended in 1999

to make it easier for the State to prove physical injury by including the additional language of "infliction of bruising, swelling, or visible marks associated with physical trauma." *Conner v. State*, 75 Ark. App. 418, 58 S.W.3d 865 (2001). The court in *Conner* held that scratches and abrasions, as well as bruises that did not show up in the photographs, caused when the victim was dragged through and outside her house, were encompassed by the amended statutory definition of physical injury. *Id.*

In this case, the evidence showed that Deputy Scott was involved in a struggle with Linn for the keys to the jail when Linn grabbed his hand and bit it, causing Scott to immediately scream and drop the keys. The bite left teeth marks on Scott's thumb and caused it to bleed. Scott testified that he was in pain, that his thumb was swollen, and that he went to the emergency room. Dr. Flamik testified that the bite tore the skin and that he had to give Scott a tetanus shot. Dr. Flamik further testified that there was a high risk of infection and that Scott would have to be periodically tested for HIV and other diseases for one year after the incident. Scott also stated that he still has a visible mark on his hand from the bite by Linn. This evidence is sufficient to show that Scott suffered swelling or other visible marks associated with physical trauma under section 5-1-102(14).

In addition, the State contends that Linn's conviction may be affirmed on an alternative basis because the evidence was also sufficient to show that Scott sustained a physical injury caused by the infliction of substantial pain, which is another part of the definition of physical injury. However, we need not address this contention in light of our finding that there was substantial evidence to prove that the victim suffered a physical injury due to swelling or other visible marks associated with physical trauma, and the definition of physical injury is in the disjunctive. Thus, substantial evidence supports Linn's conviction for second-degree battery.

Linn next argues that he should be granted a new trial because he was denied "meaningful" and "adequate assistance" of counsel due to "a near-total lack of communication between him and his trial counsel" prior to the trial. He asserts that he did not receive adequate assistance sufficient to rise to the level of "counsel" as guaranteed by the United States and Arkansas Constitutions.

The State contends that Linn's argument is not preserved for appellate review because it was not raised or developed in the trial court. Appellate courts do not consider claims of ineffectiveness of counsel on direct appeal unless the trial court has previously considered the issue during the trial or in a motion for a new trial, and the facts surrounding the claim were fully developed in the trial court. *Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998).

Linn did not object on the basis of ineffective assistance of counsel during the trial, nor did he raise the issue in a motion for a new trial. He did make a motion for a continuance to the trial court prior to the start of the trial, on the basis that he had not had enough time to consult with his counsel and to discuss his defense, which was denied by the court. He did not, however, raise the issue he now raises on appeal, which is that he was denied his constitutional right to counsel based on the lack of communication prior to trial. A party cannot change the grounds for an objection or argument on appeal, but is bound by the scope and nature of the arguments made at trial. *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000). Because Linn did not raise the argument he now makes on appeal to the trial court, it is not preserved for our review, and therefore, we do not address Linn's claim that he was denied adequate assistance of counsel.

Affirmed.

PITTMAN and ROBBINS, JJ., agree.

EPOXYN PRODUCTS, INC., and Lumberman's Mutual Casualty Company v. Tim PADGETT

CA 03-228 138 S.W.3d 118

Court of Appeals of Arkansas
Division II
Opinion delivered December 10, 2003

Rieves, Rubens & Mayton, by: *Eric Newkirk*, for appellants.

No response.

JOHN F. STROUD, JR., Chief Judge. In this one-brief appeal, appellants, Epoxyn Products, Inc., and its workers' compensation insurance carrier, Lumbermen's Mutual Casualty Company, appeal the Workers' Compensation Commission's grant of workers' compensation benefits to appellee, Tim Padgett. On appeal, they contend, "The decision by the Full Commission that the appellee's urine test results reflecting the presence of marijuana were insufficient to trigger the rebuttable presumption of an injury substantially occasioned by drug use is erroneous as a matter of law, and their finding of a compensable injury is not supported by substantial evidence." We affirm the decision of the Commission.

On February 27, 2000, Padgett was severely burned on his arm while at work when he unclogged a pipe and some hot resin fell onto his arm. He admitted that when the injury occurred, he was not wearing a canvas sleeve, which would have kept the skin on his arm from being burned, and he said that he just was not using common sense. He also stated that prior to going to work that day, he had been with friends who were smoking marijuana.

He said that he did not smoke any marijuana, but that he was in an enclosed garage with the friends while they were smoking. He said that he knew that he could get high from being in the closed room with his friends, and even though he opened the door, he still stayed in the garage and talked to his friends while they smoked the marijuana. Neither friend testified on Padgett's behalf at the hearing.

After the accident, Padgett's supervisor, Carl Head, took him to the hospital. Head testified that he noticed nothing unusual about Padgett's behavior on the night of the accident that would indicate that he was intoxicated in any way. At the hospital, Padgett was given a urine drug test, and the results, which were confirmed using gas chromatography/mass spectrometry, tested positive for cannabinoids and the metabolites found in marijuana. However, prior to that test, Padgett had been given the medications Demerol and Compazine because of his severe pain. Furthermore, Padgett also testified that he took Depakote, an antiseizure medication, twice a day.

Deborah Williams, the Director of Laboratory Services at Baxter Regional Medical Center, testified by deposition that she had no reason to doubt the accuracy of Padgett's drug test. She said that the testing lab should have been provided a list of medications that Padgett had taken, but she did not know what information they had received. She stated that Padgett's chart indicated that he had been given medication prior to collection of the sample for the drug test. Williams stated that in her twenty-two years of lab work, she had not seen Compazine, Demerol, or Depakote cause a positive cannabinoids test, but that she could not say this with a reasonable degree of medical certainty because she was not a toxicologist. However, she did say that she was surprised that the test did not indicate a positive for one of the three other drugs.

Dr. Richard Burnett is the medical-review officer for appellant Epoxyn. He testified by deposition that he had seen Padgett's drug test that indicated positive for cannabinoids and the metabolites found in marijuana. He said that although he was not a toxicologist, he did not believe that a person would have a positive drug test from inhaling second-hand smoke. He said that he did not know without researching the issue whether Depakote, Demerol, or Compazine would affect the drug test, but he did say that the hospital should not have administered the medications prior to collecting the urine sample for Padgett's drug test.

In awarding Padgett workers' compensation benefits, the Commission found

> that claimant provided credible testimony of the circumstances surrounding his accident — the Commission finds that claimant sustained a compensable injury. Specifically, we find that claimant's test was invalid and that the preponderance of the evidence simply fails to establish the presence of illegal drugs in claimant's body at the time of his accident. Subsequently, because the test used by the hospital was invalid, the presumption that claimant's injury was substantially occasioned by the illegal use of drugs never arose.

Appellants appeal, arguing that the Commission erred as a matter of law in finding that the rebuttable presumption had not been triggered by the positive drug test.

In workers' compensation cases, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, affirming 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). On appeal, the issue for this court 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 *Brown v. Alabama Electric Company*, 60 Ark. App. 138, 141-42, 959 S.W.2d 753, 754 (1998); this court held:

> A prima facie presumption existed under our prior workers' compensation law that an injury did not result from intoxication of the injured employee while on duty. Ark. Code Ann. § 11-9-707(4) (1987). Act 796 of 1993 changed that presumption: Arkansas Code Annotated § 11-9-102(5)(B)(iv) (Repl. 1996) now reads in pertinent part:
>
> "Compensable injury" does not include:
>
> . . . .

(iv)(a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(c) Every employee is deemed by his performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body.

(d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

See also Graham v. Turnage Employment Group, 60 Ark. App. 150, 960 S.W.2d 453 (1998). The employee has the burden of proving a compensable injury. *Wentz v. Service Master*, 75 Ark. App. 296, 57 S.W.3d 753 (2001). In *Express Human Resources III v. Terry*, 61 Ark. App. 258, 260-61, 968 S.W.2d 630, 632 (1998), this court noted:

> Prior to the passage of Act 796 of 1993, it was the employer's burden to prove that an employee's accident was caused by intoxication or drug use.
>
> . . . However, Act 796 shifted this burden of proof by requiring the employee to prove by a preponderance of the evidence that alcohol or drug use did not substantially occasion the injury, if alcohol or drugs were found in his body after an accident.

■ ■ It is the Commission's responsibility to use its experience and expertise to translate medical testimony into findings of fact, and it is within the Commission's province to accept or reject medical opinion and to determine its medical soundness and probative value. *Williams v. Brown's Sheet Metal*, 81 Ark. App. 459, 105 S.W.3d 382 (2003). Furthermore, it is the duty of the Commission to weigh the medical evidence and, if the evidence is

in conflict, the resolution of such evidence is a question of fact for the Commission. *Searcy Indus. Laundry, Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003).

In the present case, the Commission had before it a drug test that indicated that Padgett had tested positive for cannabinoids and marijuana metabolites. However, there was also testimony that Padgett was given pain medication prior to submitting a urine sample for testing, although there was no testimony that the improper procedure conclusively created a false positive on Padgett's drug test. Nevertheless, we are bound by the Commission's determination that the drug test was not credible evidence, and therefore the statutory presumption did not arise.

Not only do appellants argue that the statutory presumption was raised, they also contend that Padgett failed to rebut the presumption. However, due to our disposition on the first issue, it is not necessary to address this point of appeal because the statutory presumption never arose. We find that there is sufficient evidence to support the Commission's award of benefits to Padgett.

Affirmed.

GLADWIN and BAKER, JJ., agree.

Omar ALMOBARAK *v.* Darryl and Cindy McCOY

CA 03-427 137 S.W.3d 440

Court of Appeals of Arkansas
Division IV
Opinion delivered December 10, 2003

Wright, Lindsey & Jennings LLP, by: *H. Keith Morrison*, for appellant.

Stephen Lee Wood, P.A., by: *Stephen Lee Wood*, for appellees.

JOSEPHINE LINKER HART, Judge. Appellant Omar Almobarak brings this appeal, arguing that the trial court erred by refusing to set aside the confirmation of a public sale. Specifically, appellant contends that the terms of the notice of the public sale did not strictly comply with the requirements set forth in Ark. Code Ann. § 18-49-104 (1987), and that the property was sold for an inadequate price. We affirm.

Title to sixteen lots of land in Horseshoe Bend Estate in Benton County was quieted in appellant by an order filed on August 2, 2002. The order quieting title also imposed a lien to secure payment of approximately $40,000 for improvements made on the property by appellees, Darryl and Cindy McCoy. When the judgment for the improvements was not paid, appellees sought enforcement of the lien by obtaining an order that appointed a commissioner and directed that the property be sold at a public sale to the highest bidder. On October 24, 2002, the property was sold to the highest bidders, appellees, for $30,000.

Less than one hour after the order confirming the sale was entered on November 12, 2002, appellant filed an objection to the confirmation. When the trial court did not rule on appellant's objection, it was deemed denied on December 12, 2002.[1] From that denial, appellant brings this appeal, arguing that the notice of sale did not comply with Ark. Code Ann. § 18-49-104 and that the accepted bid for the property was inadequate.

■■ An appellate court reviews questions of statutory interpretation *de novo* because it is the court's responsibility to determine what a statute means. *Simmons First Bank v. Bob Callahan Serv.*, 340 Ark. 692, 13 S.W.3d 570 (2000). A trial court's conclusions on a question of law will be given no weight on appeal. *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000). We will affirm the ruling of a trial court if it reached the right result, even though it may be for a different reason. *Nettleton Sch. Dist. v. Owens*, 329 Ark. 367, 948 S.W.2d 94 (1997).

[1] After appellant attempted to file the record on appeal on April 8, 2003, he was directed by the Supreme Court Clerk to file a motion for rule on the clerk because the notice of appeal appeared untimely on its face. Appellant's motion for rule on the clerk was granted on May 8, 2003.

The order foreclosing the lien appointed the circuit clerk, Sue Hodges, as commissioner of the sale. It also ordered the property to be sold to the highest bidder at a public sale after twenty days' notice of the sale had been published in a newspaper of general circulation. The order provided that the sale should be made on three months' credit with the purchaser giving security to the court for the purchase price and with a lien to continue on the property until payment of such purchase price. Notice of the sale was published in accordance with the order on October 3 and 10, 2002, and provided in pertinent part:

> Terms of Sale: Purchaser will be required to pay full amount of bid the day of sale or ten percent down with remaining balance due in 90 days bearing interest from the date of sale. Purchaser will also be required to provide a bond or proof of security for remaining balance.

Both parties attended the sale on October 24, 2002, and bid on the property. The property was sold to appellees for $30,000. On October 30, 2002, appellant's counsel wrote to the circuit clerk, who was also the commissioner of the sale, that appellant intended to object to the sale. The confirmation of sale was filed on November 12, 2002, at 8:11 a.m. Appellant's objection, however, was not filed until 8:55 a.m. on the same day.

For his first point on appeal, appellant argues that the notice of public sale did not comply with Ark. Code Ann. § 18-49-104 or the trial court's decree setting forth the court's requirements for the sale. Arkansas Code Annotated section 18-49-104 states in part:

> Sales of real property made by court order shall be on a credit of not less than three (3) months nor more than six (6) months, or on installments equivalent to not more than four (4) months credit on the whole, to be determined by the court.

Citing *Nineteen Corporation v. Guaranty Financial Corporation*, 246 Ark. 400, 438 S.W.2d 685 (1969) (superseded by statute on other grounds), appellant asserts that the sale did not comply with the statute because the law requires that the sale be made on credit of not less than three months, and here, the published notice required a potential buyer to make a full payment on the day of the sale, or at a minimum

pay ten percent of his winning bid. Further, he argues, citing *Welch v. Hicks*, 27 Ark. 292 (1871), that the notice provisions of the statute must be strictly construed. Thus, he contends that the court should not have confirmed the sale.

For his second argument, appellant asserts that because the bid on the property was inadequate, the trial court erred in confirming the sale of the property. Citing *Looper v. Madison Guaranty Savings & Loan Association*, 292 Ark. 225, 729 S.W.2d 156 (1987), appellant argues that the courts have historically refused to confirm judicial sales when the bid allows a purchaser to procure the property for a grossly inadequate price. Also, citing *Mulkey v. White*, 219 Ark. 441, 242 S.W.2d 836 (1951) and *Moore v. McJudkins*, 136 Ark. 292, 206 S.W.2d 445 (1918), appellant asserts that when the inadequate price is combined with other irregularities in the sale process, appellate courts have declared that a new sale must take place. In *Moore*, the court, citing *Graffam v. Burgess*, 117 U.S. 180 (1886), stated:

> If the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold.

Here, Jerry Danehower, witness for appellees, testified that he was a real-estate appraiser, that the value of the unimproved property in June of 1996 was $15,000, and that the value of the property, as improved, on August 21, 2000, was $60,000. Appellees purchased the property at the public sale for $30,000.

We decline to address whether appellant is correct in his assessment of the law on either issue because we affirm based on a different point. In *Clarke v. Federal Land Bank of St. Louis*, 197 Ark. 1094, 126 S.W.2d 601 (1939), our supreme court held that a decree confirming the commissioner's report of a foreclosure sale imports a finding that the terms of the decree and provisions of the applicable statutes were complied with, and objections made thereafter which offer no reason why they were not made before the confirmation came too late.

We also note that *Clarke* is in accordance with other general authority. "The confirmation of a mortgage foreclosure sale is an act of consent, sanction, and approval which the court gives to the sale; and it is a judicial, rather than a ministerial, act, even where no contest is made." 59A C.J.S. *Mortgages* § 872 (1998). "It is generally considered that a foreclosure sale ordered by a court of equity is subject to confirmation by the court and that the sale is not final or complete or binding or conclusive, or is not fully a sale or a true sale in the legal sense or a legal sale or valid as such, unless, and until, it is confirmed, it being nothing more, prior to confirmation, than an unexecuted sale or an unaccepted offer to purchase." *Id.* Objections to confirmation should be seasonable and specific. They should not include objections which might and should have been made before the decree, or objections to the decree itself unless they involve the jurisdiction of the court to render the decree. 59A C.J.S. *Mortgages* § 874 (1998).

Appellant was under no obligation to present his objections to the sale either before or at the time of the sale. However, appellant must present all of his grounds for objection prior to the order of confirmation. Here, appellant appeared at the sale and participated in the bidding process on October 24, 2002. Thereafter, he failed to file an objection until after the order of confirmation was filed on November 12, 2002, at 8:11 a.m.

In order to be considered, an objection to the sale must be filed before the confirmation of sale is filed. *See Clarke.* Although appellant's objection was filed a mere forty-four minutes after the sale was confirmed, we must affirm the trial court's confirmation of the public sale.

Affirmed.

BIRD and VAUGHT, JJ., agree.

Sonya J. CALHOUN *v.* John Mark CALHOUN

CA 03-356 138 S.W.3d 689

Court of Appeals of Arkansas
Divisions I, II and III
Opinion delivered December 10, 2003

Sharon M. Fortenberry, for appellant.

Greg Robinson, for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Sonya J. Calhoun, appeals from the circuit court's denial of her petition for change of custody in which she urged that the custody of her minor child, who was born March 1, 1995, be transferred from the custodial parent, John Mark Calhoun, to her. Appellant, noting that the court found that she established a material change in circumstances, argues that the court erred when it "failed to find that all those changes had an [e]ffect on the best interest of the child." Because we conclude that the court failed to determine whether the material

change in circumstances affected the best interest of the child, we reverse and remand for further proceedings.

In a decree entered October 3, 1995, the parties were divorced and granted joint custody of their only child. However, in a decree entered May 22, 1997, custody was transferred to appellee. On December 19, 2001, appellant filed a petition for a change of custody, alleging that since the previous change of custody, there had been a significant change in circumstances and that best interest of the child necessitated that custody be transferred to her. Particularly, appellant noted that appellee had divorced his second wife and married his third and that he had been placed on administrative leave by the Pine Bluff Police Department because of inappropriate conduct, news of which was published in the newspapers. She concluded that these "circumstances are not conducive to a stable and happy home life for the minor child."

Hearings on the petition were held on August 27 and November 14, 2002. At the first hearing, appellant presented the testimony of appellee, who at that time was employed as a police officer. He testified that since the 1997 custody hearing, he had divorced his second wife, having separated in October of 1998, and on May 18, 2001, married his third wife. Appellee admitted that in December of 2001 he had been demoted in rank and suspended for thirty days without pay for conduct unbecoming an officer, abuse of position, and dishonesty, because, in November of 2001, while on duty, he had sexual relations with the wife of a deputy he was supervising. Also, at that hearing, the director of children's studies at the Southeast Arkansas Behavioral Health Care System testified that he performed a social evaluation of the parties and that the child wanted to live with appellant.

At the November 14 hearing, appellant further established through appellee's testimony that he had resigned from the police force and that he and his wife were opening a sports grill. According to appellee, he currently did not have any income, having received his last weekly check of $613 on November 1. Appellee testified that when he left his job, he took a lump-sum payout of his retirement in the amount of $25,000, part of which he would use to start the restaurant. Appellee stated that his restaurant would be open for lunch and dinner, would close about 9:00 p.m. during the week, but would remain open until 10:00 to 11:00 p.m. on Friday and Saturday and would close on Sundays.

He further stated that his wife would also run the restaurant and would quit her current job. He estimated that his income would be $400 a week with his wife earning the same amount.[1]

In an order filed December 9, 2002, the court concluded that appellant "showed a material change of circumstances in that [appellee] is currently in his third marriage. She also showed a material change of circumstances with [appellee's] placement on administrative leave and the resulting publicity in the press." The court also noted that appellant established that appellee was currently unemployed, and the court noted that appellee and his "present wife" would open a business in December, using part of his retirement funds to capitalize the business. The court, however, further stated that "although [appellant] met her threshold burden [of showing a material change in circumstances], she did not show that a modification of the custody order of May 22, 1997[,] would be in the best interest of the child. There was no showing that the third marriage, administrative leave[,] or publicity had an adverse impact on the welfare of the child." Also, the court found that appellant "failed to show that the employment status of [appellee] is presently having a direct adverse impact on the parties' child." The court further concluded that the minor

[1] The dissent makes three assertions of fact to which we must respond. First, the dissent states that appellant is working in the "adult industry." Any such conduct predated the May 22, 1997, change of custody to appellee, and there was no allegation that appellant engaged in any such conduct after appellee was awarded custody on that date. In fact, the evidence established that appellant had positive changes in her life, with both a stable environment and a stable job. Second, the dissent asserts that "the minor child was also aware of appellant's promiscuous conduct at her home." There is nothing in the record suggesting that appellant was engaged in "promiscuous conduct." The witness quoted by the dissent did not testify that appellant was engaged in "promiscuous conduct," only that based on what he was told by the minor child, he "wonder[ed]" about appellant's private life, and that while appellee had a history of relationships with different women, it sounded "like [the] mother might." However, he further testified that based on what he was told by the minor child, it was "unclear" whether appellant was having a relationship with other men. For her part, appellant testified that both she and one of the three married men mentioned by the minor child had together taken their respective children out to I-30 Speedway, Wild River Country, and twice to dinner; that the second man was in his sixties and was performing maintenance work on her home; and that the third man was a neighbor in his seventies who walks the neighborhood. Third, the dissent suggests that we are disregarding appellee's testimony regarding his work hours. Certainly, the circuit court may consider appellee's testimony on remand and accord it the weight the court deems appropriate. In sum, the dissent appears to labor under the misapprehension that we have remanded for a change of custody. We do not decide that issue here.

child was "functioning as a normal child" in appellee's custody. Appellant appealed from that decision, arguing that while the court found that she established a material change in circumstances, the court erred when it "failed to find that all those changes had an [e]ffect on the best interest of the child."

The Arkansas Supreme Court has stated that "the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary." *Hamilton v. Barrett*, 337 Ark. 460, 466, 989 S.W.2d 520, 523 (1999). Further, the court has stated that "[a] judicial award of custody should not be modified unless it is shown that there are changed conditions that demonstrate that a modification of the decree is in the best interest of the child, or when there is a showing of facts affecting the best interest of the child that were either not presented to the chancellor or were not known by the chancellor at the time the original custody order was entered." *Jones v. Jones*, 326 Ark. 481, 491, 931 S.W.2d 767, 772 (1996). "[C]hild custody is determined by what is in the best interests of the child, and it is not altered absent a material change in circumstances." *Id.* at 487, 931 S.W.2d at 770. "The party seeking modification of the child-custody order has the burden of showing a material change in circumstances." *Id.* at 491, 931 S.W.2d at 772. Further, "[f]or a trial court to change the custody of children, it must first determine that a material change in circumstances has transpired from the time of the divorce decree and, then, determine that a change in custody is in the best interest of the child." *Lewellyn v. Lewellyn*, 351 Ark. 346, 355, 93 S.W.3d 681, 686 (2002).

We conclude appellant is correct in her assertion that the circuit court failed to consider the best interest of the minor child. After the court found that appellant had met her threshold burden of showing a material change in circumstances, the court then stated that appellant did not "show" that a modification would be in the best interest of the child, as she did not "show" that the child had suffered an "adverse impact" by reason of the changed circumstances. In doing so, the court failed to apply the two-step analysis described above and as set forth in *Lewellyn*. After the noncustodial parent has shown a material change in circumstances, rather than requiring the noncustodial parent to then show an adverse impact on the child, the court should weigh these

material changes and consider the best interest of the child. Here, the court found there was a material change in circumstances but then placed an additional burden on appellant, that is, a showing of an "adverse impact" on the child, without simply weighing the child's best interest.

We do not hold, however, that the circuit court should never consider whether there was adverse impact on the child when determining whether a material change in circumstances has occurred. In *Taylor v. Taylor*, 353 Ark. 69, 110 S.W.3d 731 (2003), the Arkansas Supreme Court addressed the issue of whether the noncustodial parent showed a material change in circumstances. In holding that the noncustodial parent's evidence was insufficient to constitute a material change in circumstances, the court noted that the noncustodial parent "failed to demonstrate any actual harm or adverse effect." Accordingly, in some instances it may be the adverse impact on a child that makes a change in circumstances "material." This is also in keeping with *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003). There, the Arkansas Supreme Court held that the custodial parent's relocation no longer constituted a material change in circumstances, and there was a presumption in favor of relocation, with the noncustodial parent having to rebut the presumption. In that case, the court concluded that there was no material change in circumstances, noting that there was no evidence that the relocation would be detrimental to the children.

Moreover, we do not hold that in making a determination of the best interest of a child, the court cannot consider whether the material change in circumstances had an adverse impact on the child. *See Lewellyn, supra* (determining the best interest of a child by considering whether a material change in circumstances had a "negative emotional impact" on the child). We hold that once the noncustodial parent has established a material change in circumstances, the court is to weigh the best interest of the child to determine which parent shall serve as the custodian of the child.

Here, the circuit court found that appellant met the first step of the two-step analysis by concluding that there had been a material change in circumstances. However, rather than weighing the best interest of the child, the court required appellant to

show that the material change in circumstances had an adverse impact on the child. Thus, in view of the circuit court's requirement that the noncustodial parent show an adverse impact on the child, or stated differently, that the child must first suffer harm before the court considered the best interest of the child, we must remand the case to the circuit court for further proceedings. Consequently, we reverse and remand for the court to determine, without requiring appellant to establish an adverse impact on the child, whether a change in custody is in the best interest of the child. *See Walker v. Torres*, 83 Ark. App. 135, 118 S.W.3d 148 (2003)(reversing and remanding where this court found that the circuit court made a misstatement of law in its findings).

Reversed and remanded.

ROBBINS, BIRD, NEAL, and ROAF, JJ., agree.

STROUD, C.J., and PITTMAN, GLADWIN, and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. Although the majority professes continued allegiance to the long-settled principle that a change of custody requires proof that a material change of circumstances has occurred since the last custody order, *and* that a change of custody is indeed in the best interest of the child, today it has reversed a trial court decision which found a material change in circumstances, but also found that appellant, a noncustodial parent, failed to prove that a change of custody to her was in the best interest of the child. I do not understand how this result is consistent with the clearly erroneous standard of review. It is not consistent with our practice of deferring to trial court assessments of witness credibility in this sensitive area of Arkansas law. Instead, the majority opinion abandons our established standard of review while paying lip service to it, and amounts to a transparent exercise in redeciding credibility issues in a child-custody case. Moreover, the majority opinion asserts the logically implausible proposition that a party who initiates a change of custody proceeding does not have to prove that a change of custody is in the best interest of the child. Aside from being logically implausible, that proposition violates years of Arkansas case law as well as an Arkansas statute.

The law in this case is well established:

> For a trial court to change the custody of children, it must first determine that a material change in circumstances has transpired

> from the time of the divorce decree and, then, determine that a change in custody is in the best interest of the child.

Lewellyn v. Lewellyn, 351 Ark. 346, 355, 93 S.W.3d 681, 686 (2002) (citing *Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001)). One of our very recent decisions, authored by Judge Neal, addressed the legal requirements for a change of custody:

> Custody should not be changed unless conditions have altered since the decree was rendered or material facts existed at the time of the decree but were unknown to the court, and then only for the welfare of the child. *The court must first determine that a material change in circumstances has occurred since the last order of custody; if that threshold requirement is met, it must then determine who should have custody with the sole consideration being the best interest of the child.*

Middleton v. Middleton, 83 Ark. App. 7, 113 S.W.3d 625, 629 (2003) (citations omitted) (emphasis provided). The *Middleton* court also emphasized that "the party seeking modification has the burden of showing a material change of circumstances sufficient to warrant a change in custody." *Id.* The court found that a "change of circumstances of the noncustodial parent, including a claim of an improved life because of recent marriage, is not alone sufficient to justify modifying custody." *Id.*

In another case, this court stated:

> The principles governing the modification of custodial orders are well-settled and require no citation. The primary consideration is the best interest and welfare of the child. All other considerations are secondary. Custody awards are not made or changed to punish or reward or gratify the desires of either parent. Although the chancery court retains continuing power over the matter of child custody after the initial award, the original decree is a final adjudication of the proper person to have care and custody of the child. *Before that order can be changed, there must be proof of material facts which were unknown to the court at that time, or proof that the conditions have so materially changed as to warrant modification and that the best interest of the child requires it. The burden of proving such a change is on the party seeking the modification.*

Word v. Remick, 75 Ark. App. 390, 393, 58 S.W.3d 422, 424 (2001) (citations omitted) (emphasis provided). Before today's decision, our

court clearly recognized that the party seeking modification of custody bears the burden of proof to show a material change of circumstances *and that a custody change is in the best interest of the child.*

The *Word* court also stated that upon appellate review we do not disturb the trial court's findings unless clearly against the preponderance of the evidence. *Id.* at 394, 58 S.W.3d at 424. The question of the preponderance of the evidence turns largely upon the credibility of the witnesses and we therefore defer to the trial court's superior position to evaluate witness credibility. *Id.* In fact, in cases involving child custody, we particularly rely on the trial court's "powers of perception" to evaluate the witnesses. *Id.*, 58 S.W.3d at 424-25. From this, we should recognize that a trial court's findings concerning material changes as well as what is in the best interest of the child are questions of fact; accordingly, we must apply the clearly-erroneous standard of review.

Again, in *Eaton v. Dixon*, 69 Ark. App. 9, 9 S.W.3d 535 (2000), we acknowledged that

> [a] judicial award of child custody should not be modified *unless it is shown that there are changed conditions that demonstrate that a modification of the decree is in the best interest of the child, or when there is a showing of facts affecting the best interest of the child* that were either not presented to the chancellor or were not known by the chancellor at the time the original custody order was entered.

69 Ark. App. at 11-12, 9 S.W.3d at 537 (citations omitted) (emphasis provided). In other words, the party seeking change of custody must show proof that there are changed conditions and that those changed conditions warrant a custody modification in the best interest of the child. The principle that the proponent of a change of custody carries the burden of proof on both the question of whether material changes exist and whether a change of custody is in the best interest of the child was also reflected in *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). In that case, our supreme court stated:

> A judicial award of custody should not be modified *unless it is shown that there are changed conditions that demonstrate that a modification of the decree is in the best interest of the child, or when there is a showing of facts affecting the best interest of the child* that were either not presented to the chancellor at the time of the original custody order or were not

> known by the chancellor at the time the original custody order was entered.

326 Ark. at 491, 931 S.W.2d at 772 (citations omitted) (emphasis provided).

One simply cannot read this body of law and correctly conclude that the party seeking custody modification does not have the burden to prove that a change of custody is in the best interest of the child. *See also Mason v. Mason*, 82 Ark. App. 133, 111 S.W.3d 855 (2003) (employing similar language concerning the burden of proof).

This long-settled body of case law is being distorted and disturbed by the decision in this case. The trial court found a change in circumstances, but refused to change custody because appellant failed to prove that a change of custody would be in the best interest of the child. Here, both parties presented obvious faults. Appellant's private life involved factors, such as working in the adult industry, that put into question her suitability to obtain physical custody over her minor son. In fact, one of the witnesses, William P. Wilcox, director of children's studies at Southeast Arkansas Behavioral Health Care System, conducted a psychological evaluation of the parties. Notably, the majority opinion omits the pertinent statements that were available to the trial court before it made the determinations now subject to this appeal. Wilcox testified that his studies "didn't find what we usually look for, which is a compelling reason to recommend one parent over the other." According to Wilcox, the minor child was also aware of appellant's promiscuous conduct at her home. Wilcox clearly stated that the minor "did mention these men in the interview. But he said nothing derogatory about them." Specifically, Wilcox testified as follows:

> . . . But there again, you see, there's that other side when [the minor] mentioned like several, several men that come to visit mother and you know, their wives don't come. He said this very innocently, you know, kids are not aware of what it means to[,] you know, be unfaithful or questions of adultery and that sort of thing. . . .

Based on this testimony, we should find that the trial court was not clearly erroneous when it decided not to change custody. Arkansas law has long been adamantly clear that a parent's illicit

sexual conduct in the presence of children is against the best interest of the children. We have never condoned a parent's promiscuous conduct or lifestyle when such conduct has been in the presence of the children. *Ketron v. Ketron (Aguirre)*, 15 Ark. App. 325, 692 S.W.2d 261 (1985) (allowing mother custody over the child, but ordering her to discontinue living arrangements with a man who was married but separated from his wife); *see also Scherm v. Scherm*, 12 Ark. App. 207, 671 S.W.2d 224 (1984) (terminating custody because of promiscuous conduct). In fact, the supreme court has held that we outright presume that illicit sexual conduct on the part of a custodial parent is detrimental to the children. *Digby v. Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978).

All of this merely goes to say that the trial court could properly consider appellant's current lifestyle and conclude that it was not in the best interest of the child to change custody to her, or, similarly, conclude that appellant had failed to show how a change of custody would be in the best interest of the child. This is particularly notable in light of the fact that Wilcox also quite clearly stated that neither parent offered a compelling reason to recommend one over the other. After all, appellee's life also was checkered by misbehavior and controversy. Appellee is now in his third marriage and demonstrated a history of unfaithfulness. He lost his police job because of a sexual affair he had with a colleague's wife. At the time of the hearing, he was in the process of establishing a restaurant business, with the typical uncertainties associated with a new venture.

However, appellant failed to show how appellee's changed circumstances affected the minor son so as to make a custody change in the child's best interest. Appellant also failed to show why a change of custody from one admittedly not so good situation to yet another not so good situation would be in the best interest of the child. Both parents appear inclined to promiscuous behavior. Testimony established that the minor was actually aware of appellant's continued change of male visitors. Appellee had repeatedly remarried and had extramarital affairs.

It further remains unclear why a change in appellant's occupation ought to lead to a change of custody. Appellee testified —and this is something else the majority opinion does not mention—that he intended to work at the restaurant only when his wife is at home with the child and that his wife, alternately, intends to work at the restaurant only when he stays home.

Appellee also testified that, in part, he went into the restaurant venture to have more time for his family. For us to now disregard those statements is tantamount to holding that appellee's statements somehow deserve less credibility than the trial court afforded them. Such a holding flies into the face of our well-established standard of review and practice of deferring to the trial court's superior position to assess witness credibility in child custody cases.

The trial court explained its decision in terms of appellant's failure to show an "adverse impact" on the child from appellee's remarriages, extramarital relationships, and new business venture (the restaurant) because appellant argued that those factors posed an "adverse impact" on the child. In each instance, the trial court merely addressed appellant's "adverse impact" contention; it did not impose a different standard from the "best interest of the child." Indeed, the trial court found that appellant failed to prove that a change of custody is in the best interest of the child despite agreeing with appellant that appellee's conduct amounted to a change of circumstances.

The fundamental flaw in the majority decision arises from its casual affirmation of an utterly indefensible proposition; namely, that the party seeking a change of custody does not face the burden of proving, by a preponderance of the evidence, that a change in custody is in the best interest of the child. The majority admits that it is not reversible error for the trial court to "consider whether there was adverse impact on the child when determining whether a material change in circumstances has occurred." The majority also does not prohibit a trial court, in determining the best interest of the child, from considering "whether the material change in circumstances had an adverse impact on the child." But the majority then asserts that "once the noncustodial parent has established a material change in circumstances, the court is to weigh the best interest of the child to determine which parent shall serve as the custodian of the child." No matter how the majority may assert otherwise, this is a new development in child custody law. It plainly does not square with the supreme court's holdings in *Llewelyn v. Llewelyn, supra,* and *Jones v. Jones, supra.*

The majority's new standard also cannot be reconciled with the judicial fact-finding process in child-custody litigation. Whether a change in custody is in the best interest of a child is a question of *fact,* not a matter of law. As such, the best-interest

criterion is susceptible of, and must be attended by, some proof. Yet, the majority today holds that the noncustodial parent, as the party seeking a change in custody, has no duty to produce proof on the best-interest criterion. Moreover, the majority holds that a trial court commits reversible error if it denies the noncustodial parent's petition to change custody because the noncustodial parent failed to carry its burden of proof on the best-interest issue. No other reasonable inference can be drawn from today's decision, especially in view of the language in the majority opinion stating that the trial court "is to weigh the best interest of the child to determine which parent shall serve as the custodian of the child."

The majority is clearly mistaken. Arkansas Code Annotated section 16-40-101 (Repl. 1999) is unmistakably plain:

> (a) The party holding the affirmative of an issue *must produce the evidence to prove it.*
>
> (b) The burden of proof in the whole action lies on the party who would be defeated if no evidence would be given on either side. (Emphasis added.)

This statute applies just as much to child custody cases as to any other litigation. Section 16-40-101(a) therefore disproves the position asserted in the majority opinion that the noncustodial parent is somehow absolved from the burden of producing evidence to prove that the best interest of the child is served by changing custody to that person. Any other interpretation mocks the plain wording of the statute, not to mention years of Arkansas case law.

Moreover, no other interpretation makes sense when one undertakes appellate review. If the best-interest criterion is a separate factor to be decided by trial courts in child-custody litigation, and if trial court decisions in such matters are subject to appellate review upon a clearly erroneous standard, then appellate judges must base our review on the evidence presented to and weighed by the trial court. If trial courts may not rule against noncustodial parents who fail to produce evidence going to the best-interest-of-the-child factor, upon what basis is the best interest to be determined and trial court decisions on that issue reviewed? The majority opinion appears oblivious, if not insensitive, to the fundamental requirement that noncustodial parents are obliged to prove "best interest" as well as "changed circumstances" by a preponderance of the evidence, and that proof of

changed circumstances does not obviate the need for or lower the burden of proof regarding best interest of the child.

This decision highlights the important work done by trial judges in weighing conflicting testimony and assessing the credibility of the competing parties in child custody litigation. Our appellate decisions have frequently declared that in no other area of the law do we defer as much to the superior position of trial judges to evaluate witness demeanor and credibility. In the present case, the trial judge has the benefit of several interactions with the disputing parents. Appellant was the custodial parent initially when the parties divorced. Custody was later changed to appellee after the trial court decided that changed circumstances and the best interest of the child justified a change in the custodial arrangement. Now the trial judge, having the benefit of that experience *plus* his firsthand assessments of the parties in this latest change of custody proceeding, is being reversed by judges who have never seen the parties or assessed their credibility (except from reading the cold record). What is worse, the appellate judges now compel the trial judge to disregard Ark. Code Ann. § 16-40-101. Given the facts of this case and our clear jurisprudence on change of custody, I would hold that the trial court was not clearly erroneous when it found a material change in circumstances, but found that appellant failed to discharge her burden of proving that a change of custody works in the best interest of the child. Even if my colleagues in the majority disagree with the decision reached by the trial judge, that disagreement does not excuse turning the principles of appellate review on their head and disregarding the enacted judgment of the Arkansas General Assembly concerning the burden of proof.

I am authorized to state that STROUD, C.J., PITTMAN and GLADWIN, JJ., join in this dissenting opinion.

Milton MISSOURI *v.* DIRECTOR, Employment Security Department and Lamb & Associates

E 03-204 137 S.W.3d 436

Court of Appeals of Arkansas
Division IV
Opinion delivered December 10, 2003

Appellant, pro se.

Phyllis A. Edwards, for appellees.

SAM BIRD, Judge. In this unbriefed pro se appeal, Milton Missouri contends that the Board of Review erred when it denied him unemployment benefits on the finding that he voluntarily left last work without good cause connected with the work. Because we hold that reasonable minds could not come to the Board's conclusion, we reverse the decision and remand for an award of benefits.

The Board's decision, which adopted and affirmed the decision of the Appeal Tribunal, cited Ark. Code Ann. § 11-10-513 and Ark. Code Ann. § 11-10-514. Under Ark. Code Ann. § 11-10-513(a)(1) (Supp. 2003), an individual shall be disqualified for benefits if he or she voluntarily and without good cause connected with the work left his or her last work. Section 11-10-514 (Repl. 2002) states that an individual shall be disqualified for benefits if he or she is discharged from last work for misconduct in connection with the work.

The decision of the Board included these findings of fact:

> The claimant was a resident at a resident center and was provided transportation to and from work while several from the center were working for the employer. All the residents of the center left the employer except the claimant. He was no longer provided transportation to work. The claimant moved to Hensley, Arkansas and rode the city buses to and from work during the week. The claimant could not work overtime because his work was done before city buses start running. The claimant could not work on Saturday due to the bus schedules. The claimant quit.

The Board found that appellant should be denied benefits under Ark. Code Ann. § 11-10-513(a).

The Board of Review's findings of fact are conclusive if they are supported by substantial evidence. *Bradford v. Director*, 83 Ark. App. 332, 128 S.W.3d 20 (2003). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id.* Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

Appellant testified on his own behalf at the hearing. When asked if he had quit his work, he responded, "Well, no, not in a way." He stated that he moved home to Hensley after the rehabilitation center quit providing transportation to his job at Lamb and Associates in Maumelle, Arkansas, where he was a laborer. He stated that after he moved back home, he began riding CAT (Central Arkansas Transit) buses from Hensley to his place of employment, but that because the buses did not run in the early morning hours on weekdays and did not run at all on Saturdays, he did not have transportation that met the employer's early-morning and Saturday overtime schedules.

Appellant testified that because the employer's assistant plant manager, Greg Fason, knew that he did not have transportation in the early mornings on weekdays or on Saturdays, Fason would assign another worker in appellant's place when overtime work was scheduled for his shift. Appellant said that one Friday when Fason was not at work, the employer's plant manager, Jason Kidder, told him that, because he was not able to get to work when he was needed, he would have to make a decision on what he could do, but that there was not much he could do because he could not get a ride. The testimony continued:

CLAIMANT: So I asked him, well, could I work this last day. He told me yeah, so I went to work and *he called me back to his office and told me that I couldn't work 'cause I was terminated.*

H. OFFICER: Because you were terminated?

CLAIMANT: Yes, sir.

H. OFFICER: Why would you be terminated?

CLAIMANT: Because I wasn't able to get there on, transportation on Saturday. See, sometime on Saturday, when I was scheduled to work the day, when they would work overtime on the time that I was scheduled to be there they'd put someone in my place but *this Saturday, I don't know, they just told me that if I couldn't be there on Saturdays when I was scheduled to work then I just wasn't able to, you know, keep the job,* so *I had been doing that for two or three years, they would put someone in my place but, all of a sudden, I just couldn't get on the bus* 'cause the bus don't run on Saturday out there, and I didn't have no other means of transportation to get there . . . and that was

> our biggest problem. I live about 40, 50 miles outside a ride, I mean, outside where my company was located at, and the only time I could get there was on the bus.
>
> . . . .
>
> The bus couldn't get me there at 7:00 in the morning and sometime we worked overtime, it'd be 4:00 in the morning so a lot of times they'd put someone in my place for those two hours and then on Saturday, put someone out there, period.
>
> So, if I had to work on Saturday, I didn't have no transportation to get out there.
>
> That was the main thing to it, *I guess he said I had to either quit or he had to let me go* because when he needed me if I couldn't be there, you know, he set up his operation, like he said, and he can't set up the operation if I couldn't be there, but I didn't have no other way to get there. The bus don't run on Saturdays so it's just out of the question. . . .

(Emphasis added.)

Jason Kidder, the plant manager, testifying on behalf of the employer, stated that appellant had worked for the company a couple of years, that the problem with appellant's job was transportation, and that appellant's employment would have continued if he "would have decided" that he could get to work. Kidder testified that the company had worked with appellant "every chance we could get," but that he was "given the option of having a job or move on" after the following event:

> He was scheduled on a Saturday, did not present to me on Friday prior to that he couldn't be here, you know, so I brought crews in on Saturday. I didn't feel it was my responsibility to go ask Milton if he was gonna be here or not. . . and brought my crews in on Saturday and I was short handed. He was part of the three-men crew, and I only had two. When I'm in here working on Saturday I'm paying premium time, as far as overtime, and it's very important that we run as efficiently as possible.
>
> And this, you know, this time Milton not here [sic], didn't call in to explain his whereabouts or anything.

After the initial presentation by each party, each was allowed to question the other's testimony or to testify in rebuttal. Appellant stated, in pertinent part:

> *Well, usually on a Saturday we had got to the point where, like his assistant, Greg, you wasn't even asking about that 'cause you know I didn't have no ride on Saturday, you would just go on and put someone in my place.* You know, you (inaudible) then it got to the point where *they knew I didn't have no way to get there on Saturday so Greg would just usually ask somebody else, or, you know, and Greg would say, "Man, just go ahead. I know you can't make it on Saturdays no way."* Other than that I should have called in or got to the point that I woulda made sure I (inaudible) but *we had been doing (inaudible), Greg Fason, so long that we had got to knowing that I couldn't be there on Saturday so they would automatically get someone put in my place. This particular Saturday I don't know why they come to me like I would have called in on Friday or I, you know, gotta go find somebody else when usually that, you know, Greg would put someone in my place automatically, and so I don't know how they, why they came to be like that on that particular Saturday because usually they would get someone else to put in my place* that had transportation to get to the company, *like they would do when I'd have to be there at four o'clock in the morning.*

(Emphasis added.)

On rebuttal, Kidder testified that he, rather than Greg Fason, was working that Saturday, and that it was his opinion as plant manager that it was not his responsibility "to bring that up." He testified that he had always told employees that if they could not find a qualified person to work overtime he would not risk productivity, and that employees were responsible for their overtime regardless of whether or not they had transportation.

The Board set forth the following reasoning as the basis of its conclusion that appellant voluntarily left last work without good cause connected with the work:

> The claimant quit his job due to not having any transportation. The claimant did not quit due to any condition of the work that would impel the average, able-bodied, otherwise qualified individual to give up the job.

The Board recognized in its decision that appellant rode public buses to get to his job in Maumelle after his residential center had stopped furnishing transportation and he had moved to Hensley. It is clear to us that appellant's job continued for some time after his move despite his inability to get to the plant for overtime work because of the bus schedule, and that on these occasions another worker was regularly assigned to work in appellant's place. It is also clear that on a day when the plant manager rather than his assistant was supervising appellant's shift, appellant was told that he would not be able to keep his job unless he could make accommodations regarding overtime work.

We hold that reasonable minds could not find that appellant quit his work because of the lack of transportation. We hold, rather, that appellant was discharged when the plant manager suddenly decided to discontinue the employer's practice of providing a substitute worker during hours that appellant could not be present for overtime work. We reverse the Board's decision that appellant is disqualified for unemployment benefits under Ark. Code Ann. § 11-10-513(a) for leaving his work "voluntarily and without good cause connected with the work."

Reversed and remanded for an award of benefits.

HART and VAUGHT, JJ., agree.

Mary RODRIGUEZ *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 03-300 137 S.W.3d 432

Court of Appeals of Arkansas
Division I
Opinion delivered December 10, 2003

[Petition for rehearing denied January 14, 2004.]

Atkinson Law Firm, by: *Richard W. Atkinson*, for appellant.

Richard Neil Rosen, Office of Chief Counsel, for appellee.

WENDELL L. GRIFFEN, Judge. Mary Rodriguez appeals from an order terminating her parental rights with regard to her two daughters. She argues that her due-process rights were violated because the case plan did not specify the actions required to be taken by her to eliminate or to correct the conditions that caused her children to be removed from her home. She further argues that the circuit court erred when it admitted a psychological report because the report contained hearsay. We reverse because the statutorily-required case plan was never admitted as part of the record, and because we agree that the circuit court erred in admitting the psychological report.[1]

[1] Pursuant to Arkansas Supreme Court Rule 1-2, we attempted to certify this case to the Arkansas Supreme Court because the case appears to involve two issues of first impression. The first issue is: does a trial court commit reversible error when it relies upon the results of a court-ordered psychological examination before the results are introduced into evidence, and where the psychologist does not testify? The second issue is: what is the proper disposition on appeal where reversal is urged based upon the failure to comply with a statute mandating

Appellant's two daughters were removed from her custody after appellee, the Arkansas Department of Human Services, filed an emergency petition for custody. Appellee alleged that appellant home-schooled her children, but was not providing a proper education; that the house was infested with fleas, mice, and other animals, and was "piled with trash"; and that one child suffered from an ear infection because appellant refused to take her to the doctor. After numerous dependency-neglect hearings and a termination hearing, appellant's parental rights were terminated.

During the February 12, 2002 review hearing, appellee objected to the admission of a written psychological profile that was performed by Dr. Paul L. DeYoub, on the ground that the report contained hearsay and did not explain the bases for his conclusions. Appellant also objected to appellee's case plan on the ground that the plan did not specify the actions that she was required to take to eliminate or correct the conditions that caused the children's removal. The circuit court overruled her objections.

During the termination hearing that was held on October 29, 2002, appellee presented no additional witnesses. Appellant presented one witness, a caseworker, who testified concerning the reunification services provided by appellee. The court thereafter terminated appellant's parental rights.

■ Appellant does not challenge the sufficiency of the evidence used to terminate her parental rights. She simply argues that her due-process rights were violated because the case plan was not specific and that Dr. DeYoub's report contained inadmissible hearsay. Grounds for termination must be proved by clear and convincing evidence, or evidence that will produce in the fact finder a firm conviction as to the allegation sought to be established. *See Dinkins v. Ark. Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). We will not reverse a finding of termination unless it is clearly erroneous. *See* Ark. R. Civ. P. 52(a); *Johnson v. Arkansas Dep't of Human. Servs.*, 78 Ark. App. 112, 82 S.W.3d 183 (2002). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence

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a case plan in parental-rights-termination cases, but the case plan is not introduced into evidence and thus, is not part of the record on appeal? The Supreme Court denied our request for certification.

is left with a definite and firm conviction that a mistake has been made. *See Gregg v. Arkansas Dep't of Human Servs.*, 58 Ark. App. 337, 952 S.W.2d 183 (1997).

I. Due Process

Appellant's first argument is that she was denied due process of law because the appellee failed to comply with Arkansas Code Annotated § 9-27-402(c)(5)(A) (Repl. 2002), which provides that when a juvenile is receiving services in an out-of-home placement, the case plan must include at a minimum, "[t]he specific actions to be taken by the parent, guardian, or custodian of the juvenile to eliminate or correct the identified problems or conditions and the period during which the actions are to be taken." Appellant maintains that her due-process rights were violated because the case plan did not provide the specific steps that she would be required to take in order to be reunified with her children.

The existence of the case plan is not in dispute. There was testimony from appellant and a caseworker that the case plan specified that appellant was to allow the children to attend school, to insure that the children received proper medical care, and to maintain suitable housing. Further, Dr. DeYoub noted in his report that there was a case plan and that appellant refused to sign it.

However, we reverse because the trial court erred in determining that appellant's due-process rights afforded by the statutorily-required case plan had not been violated, even though the case plan was not introduced into evidence. On appeal, we cannot determine whether appellant's due-process rights have been violated because appellee failed to introduce the case plan as part of the record below. Therefore, the case plan could not be introduced by appellant as part of the record on appeal. We do not consider matters outside of the record. *See Boswell, Tucker & Brewster v. Shirron*, 324 Ark. 276, 921 S.W.2d 580 (1996). Therefore, we reverse and remand as to appellant's first point.

II. Hearsay

Appellant's second argument is that the trial court improperly admitted a court-ordered psychological evaluation

report.[2] The report, prepared by Dr. DeYoub, was introduced at the February 12, 2002 review hearing. Because proceedings and orders pertaining to termination are a continuation of a dependency-neglect case, the circuit court may consider the dependency-neglect proceedings when ruling on the issue of termination. *See Bearden v. Arkansas Dep't of Human Servs.*, 344 Ark. 317, 42 S.W.3d 397 (2001).

Dr. DeYoub's report contained information based on interviews with appellant, her daughters, and others, several of whom did not testify at the termination hearing. During the review hearing, appellant's counsel conceded that Dr. DeYoub was qualified to conduct the evaluation. However, at the beginning of the termination proceeding, appellant objected to the admission of the report on the basis that it contained certain information that was hearsay and that Dr. DeYoub did not explain the bases for many of his conclusions.

The proceedings turned to the subject of whether appellant had complied with the case plan, then the trial judge returned to the issue of the psychological report, stating, "I've been reading this psychological evaluation from Dr. DeYoub, and I think he has hit the nail right on the head." The judge then quoted verbatim from several parts of the report, noting that Dr. DeYoub concluded in his report that appellant had a "personality disorder" in that she was obsessive-compulsive, paranoid, and passive-aggressive; that she was bright, difficult, demanding, obsessive, and uses rationalization and intellectualization as a defense; and that appellant "has problems getting along with people," and is impaired in "social, occupational and other important areas of functioning."

When appellant personally objected to the report on the basis of hearsay, the judge instructed her, "Ma'am — ma'am, when I've seen it right here with my very own eyes, don't call it hearsay, because I've seen it and my eyes don't lie." The judge also stated that Dr. DeYoub "put in writing what I have been thinking for

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[2] Appellant also attempts to raise the issue of authentication of the report for the first time on appeal. Generally, we do not consider arguments raised for the first time on appeal. *See Rucker v. Price*, 52 Ark. App. 126, 915 S.W.2d 315 (1996). Therefore, we do not address appellant's argument regarding authentication.

about the past eight months." Thereafter, appellee moved to admit DeYoub's report; the judge at that time admitted the report, and appellant again objected.

The error with regard to the report is twofold. First, as appellant asserts, it was inadmissible hearsay. A hearsay statement is a statement, other than one made by the declarant while testifying at the trial or hearing, that is offered in evidence to prove the truth of the matter asserted. Ark. R. Evid. 801(c). Here, Dr. DeYoub did not testify, but his court-ordered report contained information based on interviews with appellant, her daughters, and others. Because Dr. DeYoub did not testify, it is impossible to determine from the report which of Dr. DeYoub's conclusions were based on his direct observations of appellant, and which were based on the statements of other persons.

Relatedly, it is impossible to determine which conclusions relied upon by the court were based on hearsay, or even double-hearsay, let alone determine if those statements might still be admissible under one of the exceptions to the hearsay rule, such as, for example, that found in Rule 803(4) of the Arkansas Rules of Evidence. Therefore, it was error for the circuit court to admit Dr. DeYoub's report. *See New Empire Ins. Co. v. Taylor*, 235 Ark 758, 352 S.W.2d 4 (1962) (holding the report of doctor who was not present to testify, and whose deposition had not been taken, was properly excluded in action by insured against insurer on accident policy).

Second, the trial judge relied upon Dr. DeYoub's report to make judgmental statements and to reach conclusions concerning appellant *before* the report was admitted into evidence. Thus, she improperly treated the report as evidence before it became part of the official record of the case. Accordingly, we hold that the circuit court committed reversible error in admitting Dr. DeYoub's report.

Reversed and remanded.

ROBBINS and NEAL, JJ., agree.

Adam TATE *v.* STATE of Arkansas

CA CR 03-193 137 S.W.3d 404

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 10, 2003

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

Mike Beebe, Att'y Gen., by: *Brent P. Gasper*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. This case arises from the criminal conviction of appellant, Adam Tate, for manufacturing a controlled substance, possession of a controlled substance with intent to deliver, possession of drug paraphernalia with intent to manufacture, and possession of drug paraphernalia. Appellant received a twelve-year prison term. On appeal, appellant argues that

there was insufficient evidence to support his convictions and that the trial court erred in denying his motion to suppress. We reverse and dismiss based on appellant's first assignment of error.

Appellant and his co-defendants, Kerri Harris and Stacy Jester, were arrested after a nighttime search warrant had been executed at the home of Kerri Harris. At the time of the search, 3 a.m., appellant was awake in a bedroom with Stacy Jester. Kerri Harris was in the front yard at that time. The search of the bedroom where appellant was found yielded a propane torch, another torch, a torch head, a propane tank, a Pyrex glass, coffee filters with methamphetamine residue, a blister pack of pseudoephedrine, a bag with red phosphorus, an electric burner, and "meth oil." In addition, the same bedroom contained a box of new syringes, four spoons, a glass pipe, and four corners of baggies with powder methamphetamine residue. There were also several plastic baggies, $384 in small bills, and some digital scales. Most of these items were around or on the dresser, but others were scattered in the bedroom. The room also had a chemical odor consistent with the smell of meth labs.

Prior to the trial, appellant moved to suppress the contraband seized in the search on the basis that there was a lack of probable cause for the issuance of a nighttime search warrant. The trial court denied the motion. However, at the outset of the case, the trial court determined that Kerri Harris and Stacy Jester were accomplices as a matter of law.

Harris testified that she had seen methamphetamine being manufactured in her residence and that she received methamphetamine from appellant in exchange for rent. She also stated that all of the items found in the bedroom belonged to appellant and Jester.

Jester testified that none of the items found in the bedroom were hers and that the items belonged to appellant. She stated that appellant had delivered methamphetamine to her and Harris that night.

Both women testified that Harris leased the duplex residential unit. According to their testimony, appellant and Jester were romantically involved and had been living together in that duplex for two months prior to the search.

Appellant moved for a directed verdict at the end of the State's evidence and based his motion on a lack of corroboration of accomplice testimony linking him to the residence and the contraband seized. He renewed the motion at the end of all the evidence. The trial court denied both motions.

Substantial Evidence

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Peterson v. State*, 83 Ark. App. 226, 100 S.W.3d 66 (2003). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* When the defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State. *Id.* The jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Burns v. State*, 323 Ark. 206, 913 S.W.2d 789 (1996).

It is well established that testimony of accomplices must be corroborated, but evidence corroborating accomplice testimony need not be sufficient standing alone to sustain the conviction. *Miles v. State*, 76 Ark. App. 255, 64 S.W.3d 759 (2001). However, it must tend to connect the defendant to a substantial degree with the commission of the crime independent of the accomplice's testimony. *Id.*; Ark. Code Ann. § 16-89-111(e)(1). The corroborating evidence may be circumstantial so long as it is substantial. *Id.* Evidence merely raising a suspicion of guilt is insufficient. *Id.* Proof that merely places the defendant near the scene of a crime is not sufficient to corroborate the accomplice's testimony. *Id.* In the *Miles* case, we specifically held evidence — that the defendant was walking out of a bedroom used as a meth lab — to be insufficient corroboration of the accomplice's testimony to support the conviction because there was no evidence other than the accomplice's testimony to show that the defendant exercised care, control, or management over the items in the accomplice's home. *Id.*

We based our reasoning on the law of constructive possession. To establish constructive possession, the State must prove that (1) the accused exercised care, control, and manage-

ment over the contraband, and that (2) the accused knew that the matter possessed was in fact contraband. *Id.*

In the present case, we first must determine whether Harris and Jester are, in fact, accomplices with appellant. Whether or not the trial court actually ruled Harris and Jester to be accomplices with appellant, Arkansas law has long recognized that one who is jointly indicted with others, if evidence shows a connection with the commission of the crime, even though such evidence be meager and unsatisfactory, is to be regarded an accomplice for corroboration purposes. *Jackson v. State*, 193 Ark. 776, 102 S.W.2d 546 (1937). Appellant, Harris, and Jester were indicted as co-defendants. Thus, they are accomplices, and Harris's and Jester's testimony requires corroboration.

Next we must determine whether evidence independent from the accomplices' testimony tends to support appellant's convictions. Our decision in *Miles v. State, supra*, is illustrative. In that case, we held that there was an insufficient nexus between the contraband found in a bedroom and the accused who was seen walking out of that bedroom. In our case, the officers found appellant inside the bedroom containing the contraband. Given that mere joint occupancy does not by itself establish constructive possession—which is needed to connect appellant with the contraband—the State would have had to prove that appellant exercised care, control, and management over the contraband in question and that appellant knew that the matter possessed was contraband. While the State makes a strong argument that appellant should have known that the items found in that bedroom, in their entirety, constituted a meth lab, methamphetamine, and various paraphernalia used to consume and distribute methamphetamine, the record is silent on the State's proof that appellant exercised care, control, and management over those items. The test for determining the sufficiency of the corroborating evidence is whether, if the accomplice testimony were totally eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *See Martin v. State*, 346 Ark. 198, 575 S.W.3d 136 (2001); *see also Jones v. State*, 349 Ark. 331, 78 S.W.3d 104 (2002).

Appellant was found in a bedroom within a residence that was not his. As the State points out, the contraband was "scattered" over the entire room—a room that did not belong to

appellant. He was in that room together with Jester, a woman who must be deemed an accomplice with appellant and Harris. The State points to no facts that would indicate appellant's care, control, and management of the room or the contraband. There was no proof independent of the accomplice testimony that established appellant's residence at Harris's duplex. Police did not find any of appellant's personal effects, such as mail or clothing, at the Harris residence. They did not take fingerprints to establish that appellant exercised care, custody, or control over any of the contraband. The State merely points out that appellant was present. Thus, the only evidence connecting appellant with the contraband was the accomplices' testimony.

Because there is a lack of independent evidence connecting appellant with the crime, we hold that under our case law, this is insufficient evidence to establish constructive possession. With constructive possession not proved, the State failed to establish a sufficient connection with the contraband in question that would tend to corroborate the accomplices' testimony. We reverse and dismiss on this point. In light of our disposition of appellant's first point of error, we do not need to reach his remaining point.

Reversed and dismissed.

GLADWIN, NEAL, and BAKER, JJ., agree.

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

TERRY CRABTREE, Judge, dissenting. The appellant's convictions are being reversed and dismissed based on a determination that the testimony of the accomplices was not adequately corroborated. Applying the law to the facts of this case, it is my conclusion that the corroborating evidence was not deficient. Therefore, I respectfully dissent.

At 3:00 a.m. on the morning of December 11, 2001, a Tuesday, narcotics officers of the Little Rock Police Department executed a warrant for the search of a two-bedroom duplex at 205 Oak Lane # B. When the officers arrived, Kerri Harris, the lessee of the premises, was outside the duplex. Appellant and a woman named Stacy Jester were found in the front bedroom. Testimony from the officers revealed that a surveillance camera was mounted

on the front of the residence. Contraband associated with the manufacture and ingestion of methamphetamine was also discovered.

In the front bedroom where appellant and Ms. Jester were located, officers found a clear glass vase on top of the dresser that contained a bi-layer solution that proved to be methamphetamine oil. Four spoons with residue were also found on top of the dresser, as was a glass smoking pipe. Three hundred eighty-four dollars in small bills was sitting on top of the dresser as well. A Pyrex plate with methamphetamine residue, and a clear, plastic baggie containing 3.785 grams of red phosphorous were found on the floor beside the dresser. Also in that area of the floor, the officers found coffee filters, corners of plastic baggies, and small baggies, all of which visibly contained methamphetamine residue. A new electric burner was found in a box on the floor. There was also a box of syringes, an unopened blister pack of pseudoephedrine pills, two propane torches, plastic baggies, and a set of digital scales. These items were scattered on top of and within a pile of clothing. Officers testified that they detected the distinct odor associated with the manufacture of methamphetamine in this bedroom.

In the kitchen, officers found a box of Sudafed, hydrogen peroxide, salt, more coffee filters, measuring cups, different sizes of glassware, and a hookah pipe used for smoking marijuana. In the trash by the street, they discovered twenty-eight empty blister packs of pseudoephedrine which held twenty-four pills to each pack, syringes, a spoon with residue, and a device described as an HCL generator. In a trash bag under the deck to the rear of the duplex, the officers found matchbook covers with the striker plates removed, two empty boxes of pseudoephedrine tablets, and coffee filters with residue on them. A black tote bag was found in the trunk of a vehicle that belonged to Stacy Jester. The bag contained a one-gallon can of camp fuel, a quart bottle of drain opener, coffee filters, a box of salt, tubing, and four pseudoephedrine tablets. A glass jar containing a bi-layer liquid and more coffee filters with residue were located in the trunk.

Kerri Harris and Stacy Jester were charged along with the appellant, and the trial court declared them both to be accomplices as a matter of law. Harris testified that she had been living in the duplex for two years and that appellant and Jester had moved in with her two months prior to the search. She stated that appellant and Ms. Jester stayed in the front bedroom, while she slept in the

master bedroom that connected with a bathroom. Harris said that appellant paid rent and half of the utility bills in either cash or methamphetamine and that appellant had installed the surveillance camera that was connected to a television in the living room. She testified that she had seen methamphetamine being manufactured in the home. She said that she had sold methamphetamine that night, but she denied that she had ever manufactured it. She testified that nothing in appellant's bedroom belonged to her and that she had known appellant to drive Ms. Jester's vehicle.

Jester testified that appellant had been her boyfriend, that they had been living with Harris for several months, and that they had shared the front bedroom. She said that appellant routinely used her vehicle and that he had used the vehicle that night to drive to Wal-Mart. She denied that she owned the black tote bag found in the trunk, and she said that the items found in their bedroom belonged to the appellant.

Arkansas Code Annotated section 16-89-111(e)(1) (1987) provides that a person cannot be convicted of a felony based upon the testimony of an accomplice, unless that testimony is "corroborated by other evidence tending to connect the defendant with the commission of the offense." In *Martin v. State*, 346 Ark. 198, 57 S.W.3d 136 (2001), the supreme court set out the standards governing the corroboration requirement:

> Corroboration is not sufficient if it merely establishes that the offense was committed and the circumstances thereof. It must be evidence of a substantive nature since it must be directed toward proving the connection of the accused with the crime and not directed toward corroborating the accomplice's testimony. The test for determining the sufficiency of the corroborating evidence is whether, if the testimony of the accomplice were totally eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission.
>
> Circumstantial evidence may be used to support accomplice testimony, but it, too, must be substantial. Corroborating evidence need not, however, be so substantial in and of itself to sustain a conviction. Where circumstantial evidence is used to support accomplice testimony, all facts of evidence can be considered to constitute a chain sufficient to present a question for resolution by the jury as to

> the adequacy of the corroboration, and the court will not look to see whether every other reasonable hypothesis but that of guilt has been excluded.

Id at 202-03, 57 S.W.3d at 139-40 (citations omitted).

Under these standards, the State is not required to offer proof that corroborates the details of an accomplice's testimony. For purposes of corroboration, it is only necessary for the State to present substantive evidence that "tends to connect" the defendant with the commission of the crime. Since the evidence need only "tend to connect," I question the majority's statement that it was absolutely necessary for the State to prove that the appellant "exercised care, control and management" of the contraband in order to satisfy the requirement of corroboration. The testimony of the accomplices provided substantial evidence of appellant's constructive possession. In order to corroborate the accomplices's testimony, however, the State was only required to offer evidence that tended to connect the defendant with the commission of the crime. Nonetheless, as a practical matter, the constructive possession analysis is useful in this context because in both instances the standards of proof are directed toward linking the defendant with the crime. Even so, the proof required to corroborate an accomplice's testimony need not rise to the level of substantial evidence in order to be considered sufficient.

It is said that constructive possession can be inferred when the controlled substance is in the joint control of the accused and another. *Franklin v. State*, 60 Ark. App. 198, 962 S.W.2d 370 (1998). However, joint occupancy alone is not sufficient to establish possession or joint possession; there must be some additional factor linking the accused to the contraband. *Id.* Those additional factors include the proximity of the contraband to the accused; the fact that it is in plain view; and the ownership of the property where the contraband is found. *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991).

In this case, the residence itself was equipped with a surveillance camera. Appellant was located in a private area of the residence where a host of contraband was discovered. Thus, appellant was not merely caught near the scene of criminal activity — he was standing right in the thick of it. He was also there in the wee hours of the morning, a rather atypical hour for casual visitation, particularly on a week-night. The items of contraband

found throughout this bedroom were lying about in plain view, and the room stank of the odor of methamphetamine production. In my view, the evidence taken as a whole is substantive in nature and does indeed tend to connect the appellant with the commission of the offenses.

In reaching its decision, the majority emphasizes that the residence was not appellant's. However, the absence of direct proof that he lived there is not determinative of the question before us. The issue here is the sufficiency of corroborating evidence; it is not whether there is substantial evidence to support a finding of constructive possession. In deciding whether there is sufficient evidence of corroboration, we do not look to see whether every other reasonable hypothesis of guilt has been excluded. The evidence in this case is that appellant was in a private room of a residence where he was virtually surrounded by numerous items of contraband that were in plain view. This very room also smelled of methamphetamine production. That there was no positive proof of appellant's residency does not negate the tendency of this evidence to connect the appellant to the offenses.

Also, our decision in *Miles v. State*, 76 Ark. App. 255, 64 S.W.3d 759 (2001), does not compel the reversal of this case. There, the appellant was simply walking with another man out of a room where contraband was found in a residence that belonged to yet another person. The opinion does not indicate whether the contraband was found in plain view in the bedroom, or whether it was tucked away in a drawer or closet. The bedroom in that case was also not singled out as the source of the odor of methamphetamine production. Unlike the circumstances here, there was not a shred of evidence linking the appellant with the commission of the offense. *Miles* is thus readily distinguishable.

Because there is ample evidence of corroboration, I dissent.

I am authorized to state that Chief Judge John F. Stroud joins in this opinion.

Rodney DOUBLEDAY *v.* STATE of Arkansas

CA CR 03-328 138 S.W.3d 112

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered December 10, 2003

[Petition for rehearing denied January 14, 2004.]

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

Mike Beebe, Att'y Gen., by: *Brent P. Gasper*, Ass't Att'y Gen., for appellee.

OLLY NEAL, Judge. Appellant was charged and convicted of theft by receiving. He was sentenced by the trial court to five years' probation. On appeal, appellant argues that the trial court erred because the State failed to prove that the trailer in question was actually that of the victim and that appellant possessed the trailer knowing it was stolen or having good reason to believe that it was stolen. We affirm.

In 1996, Lonnie Allen purchased a white utility trailer manufactured by Wells Cargo for approximately $4,500 in Mt. Pleasant, Texas. The trailer was registered with the Arkansas Department of Finance and Administration Office of Motor Vehicles on May 21, 1997, and its Motor or Vehicle Identification Number (VIN) is 1WC200F25T2030005. Allen reported the trailer stolen on August 13, 1999.

In his report to Officer Murphy Taylor of the Fairfield Bay Police Department, Allen described his utility trailer as having several identifying marks, including a "bubble" on the front of it and a dent in the top where he had "hit it with [his] Bobcat several months before it was stolen." Further, Allen noted that he had made several alterations to his trailer that would help him in identifying it. Those alterations included drill holes in specific places for wiring of the emergency brakes and drill holes for a nose cone over the tongue of the trailer and a tool box.

While on patrol on October 10, 2000, Officer Taylor noticed a trailer at a construction site where Norman McElroy was building a house. He saw that the trailer had a "bubble on it," and was painted a "dingy, grayish looking black." Taylor also noticed that there was a "factory-baked type white" on the trailer. Taylor

decided to investigate the trailer after determining that the trailer looked strange because the colors "did not go together." He noticed holes in the tongue and observed a single door on the trailer, which he found unique since most had double doors. Taylor ran the license plate, which was registered to appellant. The plate, however, was for a 1999 homemade black utility trailer. The vehicle identification number he discovered on the tongue came back "nonexistent," meaning "not in file." Taylor testified that he had enough suspicion about the trailer that he contacted the police department and requested Allen's presence. At the site, Allen identified the trailer as his. Thereafter, appellant was linked to the trailer and charged with it theft by receiving. This appeal followed appellant's subsequent conviction.

A directed-verdict motion is a challenge to the sufficiency of the evidence. *Slater v. State*, 76 Ark. App. 365, 65 S.W.3d 481 (2002). Where the issue is sufficiency of the evidence in a criminal case, the test is whether there is substantial evidence to support the verdict. *See Austin v. State*, 26 Ark. App. 70, 760 S.W.2d 76 (1988). Substantial evidence, whether direct or circumstantial, must be of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other; it must force or induce the mind to pass beyond suspicion or conjecture. *Ashe v. State*, 57 Ark. App. 99, 942 S.W.2d 267 (1997).

In determining the sufficiency of the evidence, it is necessary to ascertain only the evidence favorable to the State, and it is permissible to consider only that testimony that supports a verdict of guilt, without weighing it against other evidence favorable to the accused. *See id.* Circumstantial evidence may constitute substantial evidence; when circumstantial evidence alone is relied upon, it must indicate the accused's guilt and exclude every other reasonable hypothesis. *Lindsey v. State*, 68 Ark. App. 70, 3 S.W.3d 346 (1999). Once the evidence is determined to be sufficient to go to the fact-finder, the question of whether the circumstantial evidence excludes any other hypothesis consistent with innocence is for the fact-finder to decide. *Ashe v. State, supra.*

On review, it is the appellate court's job to determine if the evidence excludes every other reasonable hypothesis; it is only when circumstantial evidence leaves the finder of fact solely to speculation and conjecture that it is insufficient as a matter of

law. *Lindsey v. State, supra.* Resolution of conflicts in testimony and assessment of witness credibility is for the fact-finder. *Slater v. State, supra.*

"A person commits the offense of theft by receiving if he receives, retains, or disposes of stolen property of another person, knowing that it was stolen or having good reason to believe it was stolen." Ark. Code Ann. § 5-36-106(a) (Supp. 2003); *Slater v. State, supra.* "Receives" means acquiring possession, control, or title to the property or using the property as security. Ark. Code Ann. § 5-36-106(b) (Supp. 2003); *Smith v. State*, 34 Ark. App. 150, 806 S.W.2d 391 (1991). The unexplained possession or control by a person of recently stolen property or the acquisition by a person of property for a consideration known to be far below its reasonable value shall give rise to a presumption that he knows or believes that the property was stolen. Ark. Code Ann. § 5-36-106(c) (Supp. 2003).

Proof of actual possession is not necessary in order to establish theft by receiving; proof of constructive possession will suffice. *Smith v. State, supra.* A person constructively possesses property when he has the power and intent to control it. *Id.* A person may be found guilty of theft by receiving if he is knowingly in possession of stolen property, even without proof that he took the property himself or acquired it from the actual thief. *Slater v. State, supra*; *Fortson v. State*, 66 Ark. App. 225, 989 S.W.2d 553 (1999).

Relying on *King v. State*, 250 Ark. 523, 465 S.W.2d 712 (1971), appellant first asserts that, in order to convict him, the State must prove that the trailer belonged to Allen. However, as the State points out, *King* involved a possession of stolen property charge, a crime which involved an intent to deprive the true owner of the property.[1] In order to prove theft by receiving, the State does not have to prove a defendant intended to deprive the "true owner" of the property as was required to sustain a conviction for possession of stolen property. Thus, appellant's reliance on *King* is misplaced. The State is only required to prove that appellant received, retained, or disposed of this trailer, which was

[1] Possession of stolen property, Ark. Stat. Ann. § 41-3938 (Repl. 1964), is no longer a crime under Arkansas law.

owned by someone other than appellant, knowing it was stolen or having good reason to believe that it was stolen.

The State adequately met its burden in showing that this particular trailer had been stolen and that it belonged to Allen. That evidence included Allen's testimony that the trailer was in fact his and the identifying marks of Allen's trailer, such as the "bubble," the dent in the top of the trailer, the nose cone, and the drill holes found where Allen said they would be.[2] Further, Kerry Brown, Fairfield Bay Chief of Police, testified that he participated in the investigation. He testified that he impounded the trailer and inventoried it. Once the trailer was emptied, Fairfield Bay Police found a panel in the front of the trailer that was removed and painted with a serial number. The numbers seen on the panel were "30005." Allen testified that these numbers were from the VIN on the trailer and the numbers were placed on the panel by the manufacturer.

The question that remains is whether or not appellant knew or had good reason to believe that the trailer was stolen. Norman McElroy testified that appellant worked for him at the house construction site and that the trailer belonged to appellant, although McElroy might have pulled it there with his truck. McElroy testified that appellant told him that the trailer belonged to his brother Daron Doubleday.

Daron Doubleday, appellant's brother, testified at trial that he purchased the trailer in Conway "probably in October of 1999" for $1,200. When he purchased the trailer, Daron testified that it was stripped on the outside and was "in pretty rough shape." He testified that he put new tires on it and that he did not remember from whom he purchased the trailer and that he did not get a bill of sale from that person. He testified that the trailer was titled to his mother.[3]

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[2] Although we only recognize the similarities between the trailer stolen and that found at the construction site, we do note that there were some dissimilarities between them, including Allen's testimony that somebody had spray-painted the magnesium wheels and had installed windows in the side of the panels, things that were not there prior to the theft.

[3] Although the registration for the trailer in question was listed as Defendant's Exhibit No. 1, it was not introduced at trial and is therefore not provided in the record.

Appellant contends that the State relied on the presumption of Ark. Code Ann. § 5-36-106(c) (Supp. 2003), which again sets forth that "[t]he unexplained possession or control by a person of recently stolen property or the acquisition by a person of property for a consideration known to be far below its reasonable value shall give rise to a presumption that he knows or believes that the property was stolen." We hold that the State does not receive the benefit of this presumption because Allen's trailer had not been recently stolen and because, even if the trailer was valued by Allen in excess of its purchase price, the evidence at trial gave no indication of its value a year and a half after it was stolen.

The license plate found on the trailer at the construction site did not belong to the trailer. Officer Taylor ran the license plate, which was registered to appellant; however, the plate was for a 1999 homemade black utility trailer.[4] The trailer to which the plate was attached was a manufactured white utility trailer.

Appellant testified on his own behalf that he, his brother, and his father all used the trailer and that he had no reason to believe that the trailer was stolen. He acknowledged that his boss brought the trailer to the job site where it was found. Prior to that, appellant testified that because the trailer was five times bigger than the Honda Civic he owned at the time, his brother pulled the trailer to the previous job site.

Further, appellant testified that on October 10, 2000, the day that the trailer was discovered by Officer Taylor, he checked the registration inside the trailer and learned that it did not match the tags on the trailer. Appellant explained that the registration matched the tags that he had for his double-axle trailer. He stated that he therefore went home and retrieved the other tags off the double-axle trailer and put them on the trailer in question. Appellant testified that he showed Police Chief Brown the registration and the tags that were supposed to be on the trailer and showed that it was not registered in his name. Nevertheless, appellant testified that he did not have a copy of the registration

[4] Unlike a manufactured utility trailer that is assigned an affixed VIN by its manufacturer, the Department of Finance and Administration (DFA) issues vehicle identification numbers for homemade trailers. DFA requires that the assigned number, which is embossed on a metal tab, be permanently affixed to the homemade trailer.

because it was not his trailer. Appellant acknowledged that, although he did not purchase the trailer, he did possess it.

We conclude that the evidence presented undoubtedly indicated that the trailer belonged to someone other than appellant. Further, the evidence is sufficient to prove that appellant knew or had good reason to believe that the trailer was stolen. The license plate on the trailer was registered to appellant; however, it did not match the trailer. Appellant's explanation was that there had been some sort of mix-up. Neither the bill of sale nor the registration papers were introduced for this trailer. Certainly, the court, sitting as fact-finder, could conclude that the trailer in question belonged to someone other than the appellant and that appellant knew or had good reason to believe that the utility trailer in his possession had been stolen. The trial court was not required to believe appellant or his brother, *see Slater v. State*, *supra*, and the court must have determined that appellant's improbable explanation of the circumstances sufficiently established his guilt. *See Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003) (holding that a defendant's improbable explanations of suspicious circumstances may be admissible as proof of guilt). Accordingly, viewing the evidence in the light most favorable to the State, considering only the evidence that supports the verdict, and giving due deference to the trial court's assessment of credibility as fact-finder, we affirm.

Affirmed.

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

VAUGHT and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I would reverse this conviction because I do not believe there is sufficient evidence in this case as to whether Rodney Doubleday knew or had good reason to believe the trailer had been stolen. I agree with the majority that the State was not entitled to the statutory presumptions found in Ark. Code Ann. § 5-36-106(c) (Supp. 2003). However, while Doubleday's explanation that tags on the trailer were accidently switched need not be believed by the trier of fact, it is still a circumstantial evidence case, and simply having the wrong tags on a trailer does not exclude every other reasonable hypothesis than Doubleday knew or had reason to know the trailer was stolen. I also

cannot conclude that he has given an "improbable explanation" in this instance, as asserted in the majority opinion. It is a misdemeanor to display a license plate on a vehicle when the plate is not issued for that vehicle, *see* Ark. Code Ann. § 27-14-306 (Repl. 1994). However, while it is a transgression, it is certainly not a rare, unusual or "improbable" occurrence.

The longstanding rule in the use of circumstantial evidence is that the evidence must exclude every other reasonable hypothesis than that of the guilt of the accused in order to be substantial. *Haynes v. State*, 354 Ark. 514, 127 S.W.3d 456 (2003). In *Haynes*, the supreme court quoted from *Bowie v. State*, 185 Ark. 834, 49 S.W.2d 1049 (1932), as follows:

> This demands that in a case depending upon circumstantial evidence the circumstances relied upon must be so connected and cogent as to show guilt to a moral certainty, and must exclude every other reasonable hypothesis than than of the guilt of the accused. Circumstances, however strong they may be, ought never to coerce the mind of the jury to a conclusion of guilt if they can be reconciled with the theory that one other than the defendant has committed the crime, or that no crime has been committed at all.

Once a trial court determines that the evidence is sufficient to go to the jury, the question of whether the circumstantial evidence excludes every hypothesis consistent with innocence is for the jury to decide. *Haynes*, *supra*. Upon review, the appellate court determines whether the jury resorted to speculation and conjecture in reaching its verdict. *Id.* Two equally reasonable conclusions as to what occurred merely give rise to a suspicion of guilt. The appellate court will set aside a judgment based upon evidence that did not meet the required standards, and thus left the fact finder only to speculation and conjecture. *Id.* Overwhelming evidence of guilt is not required in cases based on circumstantial evidence; rather, the test is one of substantiality. *Edmond v. State*, 351 Ark. 495, 95 S.W.3d 789 (2003).

In this case, the majority can point to no evidence, circumstantial or otherwise, to support the conclusion that Doubleday had knowledge that the trailer was stolen other than that the license plate and the trailer did not match. This may be sufficient evidence to warrant a suspicion that Doubleday might have known or suspected that the trailer was stolen, but it hardly meets the test

of substantiality required to support this conviction. I would therefore reverse and dismiss this case.

VAUGHT, J., joins this dissent.

Matthew BYRD *v.* STATE of Arkansas

CA 03-505 138 S.W.3d 109

Court of Appeals of Arkansas
Division IV
Opinion delivered December 10, 2003

Bart Zigenhorn, for appellant.

Mike Beebe, Att'y Gen., by: *Linda Blackburn*, Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. This is a juvenile case in which appellant argues that the juvenile court lacked jurisdiction to revoke his suspended sentence where the revocation petition was filed and heard outside the period of suspension. We find appellant's argument to be without merit, and we affirm.

Appellant Matthew Byrd was adjudicated delinquent on July 15, 2002, after pleading guilty to the charge of possession of a handgun by a minor. A disposition delinquency order and an order of probation were filed the same day, placing appellant on two years' probation subject to terms and conditions. On August 30, 2002, the State filed a petition for revocation of the probationary sentence alleging that appellant violated the terms of his probation. The trial court found that appellant had violated the terms of his probation, and it entered a probation revocation order on October 7, 2002, ordering appellant to serve ninety days in the Crittenden County Juvenile Detention Center. In addition, the order provided that the previous order of probation remain in effect and that a six-month review hearing be held on October 14, 2002.

After the October 14 hearing, the court entered another probation revocation order providing that appellant remain in detention until October 21, 2002, and setting a review hearing for October 21, 2002. A hearing was held on October 21, 2002, and the trial court entered another probation revocation order on October 22, 2002, providing that appellant be placed in detention upon discharge from St. Bernardo Hospital; a review hearing was set for October 25, 2002. After the October 25, 2002 hearing, appellant was ordered to serve ninety days in the Crittenden County Juvenile Detention Center, and he was given credit for seven days; review was set for November 15, 2002. Appellant was released from detention after the November 15, 2002 hearing. The remaining sixty-two days of detention were suspended and the previous orders of the court were continued.

On January 29, 2003, the State filed another petition to revoke appellant's probationary sentence stemming from the July 15, 2002 adjudication of delinquency. A hearing was held on February 21, 2003. Appellant initially entered a plea of guilty, but he objected to the sentence arguing that the court was without jurisdiction to impose any additional sentence. Appellant withdrew his plea but stipulated to the facts set out in the revocation petition. The court found that appellant had violated his probation and ordered him to serve sixty-two days in the Crittenden County Juvenile Detention Center. Appellant again objected to the sentence, arguing that his sentence had been placed into execution, that the court was without jurisdiction to impose any additional sentence, and that the imposition of a new sentence would violate double jeopardy. From that order comes this appeal.

Appellant's only issue on appeal is that the trial court lacked jurisdiction to revoke a suspended sentence of a juvenile where the revocation petition was filed and heard outside the period of suspension. He contends that: (1) pursuant to Ark. Code Ann. § 5-4-307 (Repl. 1997), a suspended sentence begins to run from the date of release from incarceration if it follows a term of imprisonment, and thus the sixty-two days of detention suspended on November 15, 2002, had expired and the trial court lost jurisdiction to revoke the suspended sentence; (2) based on Ark. Code Ann. § 5-4-309 (Supp. 2003) the State's revocation petition was untimely because it was filed outside the period of suspension; (3) based on *Bailey v. State*, 348 Ark. 524, 74 S.W.3d 622 (2002), if a court chooses to revoke probation pursuant to Ark. Code Ann. § 9-27-339(e) (Repl. 2002) and sentence the juvenile to a deten-

tion facility (even where a portion of the sentence is deferred), the sentence constitutes a disposition and deprives the court of jurisdiction to subsequently modify the sentence.

Appellant's reliance on criminal code provisions is misplaced, because the juvenile code governs. *See M.M. v. State*, 350 Ark. 328, 331, 88 S.W.3d 406, 408 (2002). Arkansas Juvenile Code section 9-27-331(c)(1) (Supp. 2003) is controlling. It provides that an order of probation shall remain in effect for an indeterminate period not to exceed two years. Under section 9-27-331(c)(2), a juvenile shall be released upon expiration of the order or upon a finding by the court that the purpose of the order has been achieved. In the present case, the order of probation had not expired and the court had not released appellant from probation. Because appellant's probation remained in effect, the juvenile court had jurisdiction to revoke his probation pursuant to Ark. Code Ann. § 9-27-339. Further, under Ark. Code Ann. § 9-27-339(e)(3), the court had the authority upon revocation to make any disposition that could have been made at the time probation was imposed, which under Ark. Code Ann. § 9-27-330(a) could include probation and detention in a juvenile facility for an indeterminate period not to exceed ninety days.

Although *Bailey v. State*, 348 Ark. 524, 74 S.W.3d 622 (2002), which appellant cites in support of his argument, is a juvenile case, it does not support reversal. In *Bailey*, the appellant pled guilty to the charges of residential burglary and theft of property and was placed on probation for twelve months on April 26, 2000. The court also ordered appellant to pay restitution in an amount to be determined within ninety days of the date of the adjudication hearing. The record did not contain an order of restitution, but the parties agreed that appellant was ordered to pay $500 in restitution. The State filed a petition to revoke appellant's probation based on an allegation of possession of a controlled substance; the State also moved to resentence appellant to make the restitution correct. Appellant pled guilty to the possession charge, and on January 17, 2001, the trial court revoked his probation and sentenced him to serve ninety days in a juvenile detention facility, with thirty days to be served and sixty days deferred. On March 28, 2001, the trial court held a subsequent hearing to address the issue of restitution, where appellant argued that the trial court was without jurisdiction pursuant to Ark. R. Civ. P. 60 to revise the amount of restitution after the original

ninety-day time period had elapsed. The trial court entered an amended order of revocation requiring appellant to pay $6,785.60 in restitution.

On appeal, the supreme court reversed, holding that Ark. Code Ann. § 9-27-339 provides four alternatives for disposition upon finding a juvenile in violation of probation. The court recognized that while the trial court could have made any disposition that it could have at the time probation was imposed, the court chose to sentence appellant to serve ninety days and then over two months later held a second hearing stemming from the *same* petition and found that appellant's failure to pay restitution was grounds to revoke and entered an amended order increasing restitution. Thus, the supreme court concluded that the lower court lacked the authority to commit appellant and then later make any disposition that could have been imposed at the time he was placed on probation. *See also Avery v. State*, 311 Ark. 391, 844 S.W.2d 364 (1993) (stating that after the juvenile court's denial of the State's petition for revocation, the juvenile code requires the State to file *another petition* for revocation and give notice to the juvenile that revocation is again being pursued before probation can be revoked).

Based on the foregoing, the juvenile court in this case had the authority to revoke appellant's probation pursuant to a second petition to revoke and to impose any disposition available at the time probation was imposed.

Affirmed.

HART and BIRD, JJ., agree.

Marie STRACENER and Teresa O'Neal *v.*
Thomas WILLIAMS, M.D.

CA 03-139 137 S.W.3d 428

Court of Appeals of Arkansas
Division I
Opinion delivered December 10, 2003
[Petition for rehearing denied January 7, 2004.]

Stephen M. Sharum; and *The Boyd Law Firm*, by: *Charles Phillip Boyd, Jr.*, and *Robert W. Allen*, for appellants.

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

TERRY CRABTREE, Judge. This is a wrongful-death case. Marie Stracener and Teresa O'Neal, the co-administratrices of the Estate of Charles Stracener, bring this interlocutory appeal from the Sebastian County Circuit Court's dismissal of their fifth amended complaint, filed August 5, 2002, which added Sparks Regional Medical Center (Sparks) as an additional defendant in the action. Sparks was named as a defendant in the original complaint, but on June 29, 2001, it was dismissed without prejudice because of the charitable-immunity doctrine. Appellants argue that the trial court erred in refusing to apply the doctrine of equitable tolling to delay the running of the one-year saving statute, Ark. Code

Ann. § 16-56-126 (1987), so that the complaint filed on August 5, 2002, could be deemed timely. The question presented in this appeal is whether the trial court erred in refusing to apply that doctrine. We hold that it did not err, and we affirm.

Procedural History

Mr. Stracener died on September 28, 1998, while he was a patient at Sparks. Alleging medical negligence, appellants filed a wrongful-death action on September 22, 2000, naming his physician, a registered nurse, Sparks, and others as defendants. In March 2001, Sparks's liability insurance carrier, Steadfast Insurance Company (Steadfast), was added as a defendant. In June 2001, Sparks moved to dismiss the complaint against it on the ground that it was a tort-immune entity, for which Steadfast was its proper substitute defendant. On June 29, 2001, the court entered an order dismissing Sparks as a defendant. The trial court denied appellants' subsequent motion to reconsider.

On May 9, 2002, the Arkansas Supreme Court decided *Clayborn v. Bankers Standard Insurance Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002). According to the parties in this suit, that decision changed the legal community's basic assumptions about the charitable-immunity doctrine and the direct-action statute. The supreme court held that nonprofit corporate entities are not necessarily immune from suit for tort and that the direct-action statute, Ark. Code Ann. § 23-79-210 (Repl. 1999), provides only for direct actions against an insurer in the event that the organization at fault is immune from suit in tort. The court noted a distinction between immunity from *suit* and immunity from *liability*; it stated that immunity from suit is the entitlement not to stand trial, while immunity from liability is a mere defense to a suit. The court stated that it knew of no authority holding that all nonprofit corporations, by virtue of their status as nonprofit corporations, are immune from *suit* for tort.

The court also stated:

> However, we note that no allegations of fact were made in the pleadings that Forrester-Davis is or claimed to be a charitable organization. Our standard of review of this case is of the trial court's grant of Bankers's motion to dismiss, and, thus, our review is limited to the facts alleged in the pleadings. Because there was no allegation in the pleadings that Forrester-Davis is a charitable

> organization, we conclude that the trial court did not err when it determined that Ark. Code Ann. § 23-79-210 is inapplicable to the facts of the present case.
>
> However, we note that appellant's argument that Forrester-Davis is not subject to suit for tort because it is a charitable organization is meritless for another reason. We have never said that charitable organizations are altogether immune for *suit*. While we affirmed the trial court's dismissal of a case on the ground that the charitable organization was immune from *liability* in *George v. Jefferson Hosp. Ass'n, Inc.*, 337 Ark. 206, 987 S.W. 2d 710 (1999), no argument was raised in that case that a charitable organization is not subject to *suit* for tort, as was argued in the present case. We have repeatedly stated that the property of a charity cannot be sold under *execution* issued on a judgment rendered for the nonfeasance, misfeasance, or malfeasance of its agents or trustees. *See, e.g., Fordyce & McKee v. Woman's Christian Nat'l Library Ass'n*, 79 Ark. 550, 96 S.W. 155 (1906) (emphasis added). We have also recognized that the charitable-immunity doctrine as promulgated in *Fordyce* and its progeny has become a rule of property. *See Williams v. Jefferson Hosp. Ass'n*, 246 Ark. 1231, 442 S.W.2d 243 (1969) (citing *Helton v. Sisters of Mercy*, 234 Ark. 76, 351 S.W.2d 129 (1961); *Cabbiness v. City of North Little Rock*, 228 Ark. 356, 307 S.W.2d 529 (1957); *Fordyce, supra*). In addition, we stated in *Crossett Health Center v. Croswell*, 221 Ark. 874, 256 S.W.2d 548 (1953), "Judge Rose, [in *Fordyce*], commented on the statutory authority for suit, drawing a distinction between the right to sue and the power to execute in satisfaction of the judgment." *Crosswell, supra* (citing *Fordyce, supra*). Our analysis indicates that a charitable organization may have suit brought against it and may have a judgment entered against it, but such judgment may not be executed against the property of the charity. We conclude that even if facts had been pled to allege that Forrester-Davis is a charitable organization, we would nevertheless affirm the trial court's finding that Ark. Code Ann. § 23-79-210 does not apply because we have never held that charitable organizations are completely immune from suit, but rather, we have only held that they are immune from execution against their property.

348 Ark. at 565-67, 75 S.W.3d at 179-80.

The issuance of the *Clayborn v. Bankers Standard Insurance Co., supra*, decision directly affected this case. On August 5, 2002, appellants filed their fifth amended complaint, stating that, based

on the supreme court's decision in that case, it was necessary to rename Sparks as a defendant. On September 3, 2002, the trial court dismissed all complaints against Steadfast. Sparks then moved to dismiss the fifth amended complaint against it on the ground that it was time-barred because the one-year limit of the saving statute had elapsed. In response, appellants argued that the running of the one-year limitation of the saving statute should be equitably tolled to prevent unfairness in this case. They relied on the doctrine that, when a plaintiff has been prevented from asserting his rights by relying to his detriment on a statutory interpretation that is subsequently judicially overruled or substantially redefined, a technical forfeiture can be avoided by application of the doctrine of equitable tolling. *See Aljadir v. University of Pa.*, 547 F. Supp. 667 (E.D. Pa. 1982), *aff'd*, 709 F.2d 1490 (3d Cir. 1983); 51 AM. JUR. 2D *Limitation of Actions* § 174 (2000).

The trial court disagreed and, on October 14, 2002, dismissed Sparks from the lawsuit with prejudice. It stated:

> The Arkansas Supreme Court has found that when a defendant[']s Motion to Dismiss is granted, it is to be treated the same as a nonsuit and under the "saving statute" the Plaintiff has one year to commence another action or the cause of action is time-barred. *West v. G.D. Searle & Co.*, 317 Ark. 529 (1994). Since the dismissal was entered on June 28, 2001, Plaintiff had until June 28, 2002, to commence a new action against SRMC or else its cause of action would be time[-]barred. While this may be harsh under the circumstances of this case it should be pointed out that the *Clayborn* decision was rendered on May 9, 2002, and Plaintiffs still had approximately a month and a half to file their 5th Amended Complaint before the limitations period ran, but for whatever reason Plaintiffs failed to timely file it.

On November 25, 2002, the court entered an order *nunc pro tunc* that included the same findings and conclusions but also included a certification for an immediate appeal under Ark. R. Civ. P. 54.

Argument on Appeal

On appeal, appellants argue that the running of the saving statute's one-year period should have been tolled between the time that Sparks was dismissed on June 29, 2001, and when the *Clayborn* case was decided on May 9, 2002. Under Ark. Code Ann.

§ 16-56-126, 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. *Sanderson v. McCollum*, 82 Ark. App. 111, 112 S.W.3d 363 (2003); *Smith v. St. Paul Fire & Marine Ins. Co.*, 76 Ark. App. 264, 64 S.W.3d 764 (2001). For the purposes of the statute, a dismissal of a complaint on a defendant's motion is the same as a nonsuit. *West v. G.D. Searle & Co.*, 317 Ark. 525, 879 S.W.2d 412 (1994).

It is "hornbook law" that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the relevant statute. *Young v. United States*, 535 U.S. 43, 49 (2002). However, even in the case of fraudulent concealment, a litigant in Arkansas must show that he was reasonably diligent to take advantage of the doctrine of equitable tolling. *See Smith v. St. Paul Fire & Marine Ins. Co., supra.* Appellants point out that they relied upon the interpretation of the direct-action statute applied by "all courts and lawyers in Arkansas" and that, because the *Clayborn* decision changed the law, the doctrine of equitable tolling should be applied. Appellants apparently concede that they were charged with knowledge of the *Clayborn* decision when it was handed down on May 9, 2002. This concession, we believe, reveals the weakness of their argument. The supreme court's decision in *Clayborn* was available online to all attorneys and the general public immediately and, within a few weeks, it was published in the advance sheets.

It is well settled that a simple lack of knowledge of a cause of action does not stop the statute of limitations from running. *See Courtney v. First Nat'l Bank*, 300 Ark. 498, 780 S.W.2d 536 (1989). It is also well settled that, ordinarily, the acts of an attorney are equivalent to the acts of the client. *Scarlett v. Rose Care, Inc.*, 328 Ark. 672, 944 S.W.2d 545 (1997). Rule 1.3 of the Model Rules of Professional Conduct states: "A lawyer shall act with reasonable diligence and promptness in representing a client." *See also Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997).

Reasonable diligence is essential in the context of equitable tolling. 54 C.J.S. *Limitations of Actions* § 87 provides in part:

> One who asserts a cause of action against another has a duty to use all reasonable diligence necessary to inform himself of facts and

> circumstances upon which the right of recovery is based, and to institute the suit within the statutory period; however, a plaintiff need not establish that he exercised due diligence to discover the facts within the limitations period unless he is under a duty to inquire and the circumstances are such that failure to inquire would be negligent.
>
> Generally, a party cannot avoid the bar of the statute of limitations if he had the means to discover the facts giving rise to his action. The statute of limitations will be tolled only for one who remained ignorant through no fault of his own. One who asserts a cause of action against another has a duty to use all reasonable diligence necessary to inform himself of facts and circumstances upon which the right of recovery is based, and to institute the suit within the statutory period. If he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired, had he made the necessary effort to learn the truth of the matters affecting his interests.

The trial court did not believe that appellants' attorney acted with reasonable diligence in filing the fifth amended complaint, and we cannot disagree. Appellants had approximately seven weeks within which to rename Sparks as a defendant. Given the facts presented, we cannot say that the trial court erred in refusing to find that appellants' attorney was sufficiently diligent so as to merit the application of the doctrine of equitable tolling.[1]

Affirmed.

GRIFFEN and NEAL, JJ., agree.

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[1] Appellants also argue that *Clayborn v. Bankers Standard Insurance Co.* should not be given retrospective application because they justifiably relied on prior case law. This argument does not advance appellants' position. Even giving *Clayborn* a prospective application, appellants had a month and a half within which to refile their complaint against Sparks.

Mark HEPTINSTALL *v.* ASPLUNDH TREE EXPERT COMPANY and Reliance National Insurance Company

CA 03-11 137 S.W.3d 421

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered December 10, 2003

[Petition for rehearing denied January 14, 2004.*]

* PITTMAN and VAUGHT, JJ., would grant.

Parker Law Firm, Ltd., by: *Tim S. Parker*, for appellant.

Frye & Boyce, P.A., by: *Andy L. Caldwell*, for appellees.

KAREN R. BAKER, Judge. The appellant employee in this case, Mark Heptinstall, worked for the employer, Asplundh Tree Expert Company, trimming and cutting trees and brush, clearing fence rows, chipping brush, and anything generally involving trimming and cutting trees and brush. Appellant and his supervisor testified that appellant routinely received scratches to his arm in the process of performing tree trimming duties related to his work. On or about November 6, 1999, a Saturday, appellant began to experience

pain and discomfort in his left arm. He testified that in addition to the pain, there was a mild redness around one of the scratches on his forearm.

The following Monday, appellant sought treatment at the emergency room of the hospital. The physician in the emergency room obtained a blood count on appellant that indicated a markedly elevated white-cell count, elevated at the time to 25,000, with about 8,000 being normal. After receiving the result of that test, the emergency room physician consulted Dr. Don Vowell, an orthopedic surgeon, who admitted appellant to the hospital and performed surgery that afternoon.

Dr. Vowell testified that the elevated white-cell count indicated the presence of infection. He was anxious to get appellant to the operating room before the pressure from the swelling could shut off the blood flow to the muscles and kill them. He explained that when a patient has something that causes pressure from swelling, such as pus or blood, the pressure from the swelling can build up greater than the arterial blood pressure pumping blood into the compartments of the arm. If that happens, then within six hours the muscle dies. Once the muscle dies, no treatment can bring it back. When Dr. Vowell operated on appellant, he found pus associated with a deep infection of the forearm. The entire forearm had to be opened to relieve the pressure and ensure that blood could get into the muscle. He testified that cultures taken from the arm subsequently grew an alpha strep (staph A), a particularly dangerous bacterial organism that sometimes does not respond well to antibiotics.

Dr. Vowell opined that within a reasonable degree of medical certainty, the scratches on appellant's arm were the entry wound through which the staph A entered his body. He described the time frame and process through which the staph A would have entered the wound. He discussed the fact that staph A is an organism that's around us on everything that we might come in contact with, but that it has to have some entrance into the body through some opening. He identified the entry time of the staph A into appellant's body as anywhere from three to six days prior to the Monday that appellant entered the hospital. His opinion was based upon his application of the organism's normal progression upon entering the body. Dr. Vowell explained that once the organism enters the body through a break in the skin, it starts growing within a day or two. It first starts growing into the soft tissues and after it is established, the patient begins to experience

pain. The pain increases substantially within forty-eight hours of the its onset resulting in severe pain for the patient. Appellant's history indicated that he had experienced pain on Saturday while lifting a battery. Dr. Vowell testified that this pain was consistent with an infection initiated a day or two before he experienced the pain while lifting. Approximately forty-eight hours after experiencing the first onset of pain, appellant sought treatment in the emergency room for excruciating pain and surgery was performed that afternoon. When asked if appellant might have received the scratches on his arm and later came into contact with the organism anywhere, Dr. Vowell confirmed that he could not say for sure where the organism was present and came into contact with the scratches on appellant's arm. However, given the length of the incubation period and the location of the infection underneath the scratches, he could state to a reasonable degree of medical certainty that the infection entered through the scratches received at work.

Dr. Vowell further explained that approximately fifty percent of the people die from infections such as the one appellant acquired. Dr. Vowell had personally changed appellant's dressing daily during the hospital stay and took appellant back to surgery a couple of times to clean the wound and close the wound. He testified that appellant would suffer some loss of strength resulting in a permanent impairment; however, he was still undergoing treatment and improving. He estimated that his permanent impairment rating would be ten-percent impairment to his upper extremity.

The Commission's Decision

The Commission denied benefits saying that appellant "seeks compensation in the present claim for an occupational disease" and denied benefits finding that he had failed to prove by clear and convincing evidence that he sustained a compensable occupational disease. However, appellant did not argue that he sought compensation for an occupational disease and the Commission erred as a matter of law when it classified the injury as an occupational disease. Therefore, we reverse and remand for further finding of fact to be made on whether appellant established the requirements, we remand the case to the Commission to make a finding of fact on whether appellant established the requirements of a compensable accidental injury under Ark. Code Ann. § 11-9-102(4)(a).

Standard of Review

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 affirm that decision if it is supported by substantial evidence. *Clark v. Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979); *Crossett Sch. Dist. v. Gourley*, 50 Ark. App. 1, 899 S.W.2d 482 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; even if a preponderance of the evidence might indicate a contrary result, if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *St. Vincent Infirmary Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). The Commission is required to weigh the evidence impartially without giving the benefit of the doubt to any party. *Keller v. L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992).

The Commission also has the duty of weighing the medical evidence as it does any other evidence. *Roberson v. Waste Mgmt.*, 58 Ark. App. 11, 944 S.W.2d 858 (1997). However, "[I]f the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the commission's refusal to make an award." *Hall v. Pittman Constr. Co.*, 235 Ark. 104, 105, 357 S.W.2d 263, 263 (1962). Furthermore, an employee is not required to prove the source of an infection with absolute certainty because that is a manifest impossibility. *See Dega Poultry Co. v. Tanner*, 259 Ark. 396, 399, 533 S.W.2d 207, 209 (1976) ("Unless a claimant must prove the source of an infection with absolute certainty—a manifest impossibility —Tanner's proof amply supports the Commission's award."). In addition, the Commission cannot arbitrarily disregard any witness's testimony. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001).

Applicable Law

First, we address the Commission's classification of appellant's infection with the staph A bacteria as an occupational disease. Where the condition involved is a disease (as opposed to an accidental injury), the claim is compensable only if the disease is an "occupational" one as defined in our Workers' Compensation Act and the claimant proves by clear and convincing evidence a causal connection between the employment and the disease. *See* Ark. Code Ann. § 11-9-102(4)—601(e) (Repl. 2002); *Osmose Wood Preserving v. Jones*, 40 Ark. App. 190, 843 S.W.2d 875 (1992). An "occupational disease" is defined as any disease that results in disability or death that arises out of or in the course of the occupation or employment. Ark.Code Ann. § 11-9-601(e)(1) (Repl. 2002).

The fact that the general public may contract a disease is not controlling; the test of compensability is whether the nature of the employment exposes the worker to a greater risk of the disease than the risk experienced by the general public or workers in other employments. *Osmose Wood Preserving v. Jones, supra; Sanyo Mfg. Corp. v. Leisure*, 12 Ark.App. 274, 675 S.W.2d 841 (1984). An occupational disease is characteristic of an occupation, process or employment where there is a recognizable link between the nature of the job performed and an increased risk in contracting the occupational disease in question. *Sanyo Mfg. Corp. v. Leisure, supra.* The increased risk test differs from the peculiar risk test in that the distinctiveness of the employment risk can be contributed by the increased *quantity* of a risk that is *qualitatively* not peculiar to the employment. *Crossett School Dist. v. Gourley*, 50 Ark.App. 1, 3, 899 S.W.2d 482, 483 (1995) (*citing* 1 Arthur Larson, The Law of Workmen's Compensation § 6.30 (1994) (emphasis in original)).

The Commission's analysis in denying benefits focused on the fact that the staph A organism can be anywhere in our environment and that anything that opens the skin can allow the bacteria to enter the body. In its opinion, the Commission relied upon the statute excluding liability of the employer unless the disease actually exists and is characteristic of and peculiar to the employment. Ark. Code Ann. § 11-9-601(g)(1) (Repl. 2002). It then stated:

> Dr. Vowell has opined that it was possible for the organism to enter

> the claimant's body through the scratches that he received at work. However, an opinion stated in the term of possibilities is not sufficient to satisfy the requirement that medical opinions be stated within a reasonable degree of medical certainty.

Two problems with the Commission's opinion are readily apparent. First, it is factually inaccurate. Dr. Vowell in fact testified that, within a reasonable degree of medical certainty, the scratches on appellant's arm were the entry wound through which the staph A entered his body. Second, a finding of causation in a workers' compensation case does not need to be expressed in terms of a reasonable medical certainty when there is supplemental evidence supporting the causal connection. *Osmose Wood Preserving v. Jones, supra; see also Sneed v. Colson Corp.*, 254 Ark. 1048, 497 S.W.2d 673 (1973) (holding medical evidence is not necessary in establishing a causal connection).

The Commission's analysis also focused on the injury as being the staph A infection, rather than the scratches on appellant's arm. When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for any natural consequence that flows from that injury. *McDonald Equip. Co. v. Turner*, 26 Ark. App. 264, 766 S.W.2d 936 (1989). The fact that an injury sustained at work can make an employee susceptible to infection is not a new concept for this court. *See Pekin Wood Products Co. v. Graham* 207 Ark. 564, 181 S.W.2d 811 (1944) (finding that irritation to eyes made them more susceptible to gonorrheal infection where it appeared that an employee, sustaining injury to eyes, thereafter contracted a gonorrheal infection in eyes, though not having gonorrhea himself). In affirming the Commission's award of benefits, the court reasoned:

> While no witness testified that the irritation to appellee's eyes made them more susceptible to gonorrheal infection, we think the Commission had the right, in the exercise of sound judgment and discretion, to make the finding in this regard that it did make. It seems to us, as it did the Commission, a reasonable assumption that an inflamed and irritated eye, a conjunctivitis as the doctor testified, would be a ready portal of entry for the germ he did get or some other destructive germ that he might have gotten.

Id., at 567, 181 S.W.2d at 812.

The situation in *Garrison Furniture Co. v. Butler,* 206 Ark. 702, 177 S.W.2d 738 (1944), is also analagous to the circumstances in this case. There O. C. Butler received scratches on his hands while at work in the factory of the furniture company on April 16-17, 1942. On April 20, he went to see Dr. Scott, and on April 21, he went to the hospital where he died on April 29 from lockjaw as a result of tetanus infection which entered the bloodstream through the so-called superficial wounds. Compensation for death benefits was awarded to the widow and child. The bacteria that roused the tetanus infection entered the body of Mr. Butler through the scratches he received while working for his employer in the factory, just as the bacteria that causes a staph A infection entered the body of appellant through the scratches he received while working for his employer trimming brush.

Therefore, appellant was not required to prove that his staph infection qualified as an occupational disease. The appellant needed only to establish a causal link between the original injury and the subsequent complications for the injury to be compensable. *See Bearden Lumber Co. v. Bond,* 7 Ark.App. 65, 644 S.W.2d 321 (1983). While we do not defer to the Commission on questions of law, we also do not act as the fact finder. *Bagwell v. Falcon Jet Corp.,* 8 Ark. App. 192, 649 S.W. 2d 841 (1983). Because the Commission made no findings with regard to whether appellant sustained a compensable accidental injury, we remand the case to the Commission to make a finding of fact on whether appellant established the requirements of a compensable accidental injury under Ark. Code Ann. § 11-9-102(4)(a).

Accordingly, we reverse and remand for further proceedings.

HART, GRIFFEN, and CRABTREE, JJ., agree.

PITTMAN and VAUGHT, JJ., dissent.

LARRY D. VAUGHT, Judge, dissenting. I dissent from the majority opinion reversing this case because I believe that there is substantial evidence supporting the decision of the Commission. The majority has correctly set forth the standard of review we employ when addressing appeals from the Workers' Compensation Commission. The issue is not whether we might have reached a different result or whether the evidence would have supported a different finding; even if a preponderance of the evidence might indicate a contrary result, if reasonable minds could reach the Com-

mission's conclusion, we must affirm its decision. *St. Vincent Infirmary Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

The majority maintains that the Commission erred by analyzing this case (through the A LJ's opinion that it adopted) as an occupational disease; however, appellant neither raised this issue below nor argued it on appeal. Before the evidence was taken at the hearing before the ALJ, appellees' counsel argued in part that the staph infection was an ordinary disease of life that anyone in the public would be susceptible of contracting. The ALJ asked appellees' counsel whether he was saying that the alleged injury should be considered under the occupational-disease statutes, and counsel responded that it might because Dr. Vowell testified that appellant may have contracted the infection from anywhere, such as a doorknob or out in the air. The ALJ asked for appellant's counsel's response, and he only maintained that Dr. Vowell opined that the infection set up in the scratches that appellant contends he received while working for Asplundh.

Clearly, appellant did not object to the injury being considered as an occupational disease. In addition, after the ALJ entered his decision finding that appellant failed to prove that he sustained a compensable occupational disease, appellant never argued that the ALJ erred in analyzing the claim as an occupational-disease case, which he could have done either in his notice of appeal to the Commission or in a brief filed with the Commission. In fact, appellant does not argue on appeal that the Commission erred as a matter of law deciding this case under the occupational-disease statutes.

Under the occupational-disease analysis, it is clear is that the Commission correctly found that the staph infection contracted by the appellant did not qualify as an occupational disease. Arkansas Code Annotated section 11-9-601(g)(1)(A) (Repl. 2002) provides in part:

> An employer shall not be liable for any compensation for an occupational disease unless:
>
> (A) the disease is due to the nature of an employment in which the hazards of the disease actually exist and are characteristic thereof and peculiar to the trade, occupation, process, or employment and is actually incurred in his employment.

The majority concludes that the injuries suffered were the scratches to the arm and that the staph infection was merely a natural consequence of the otherwise compensable injury. I dis-

agree. The appellant testified that he routinely got scratches on his arms and had never reported them before. The injury he sought compensation for was the staph infection, and the evidence supports the conclusion that it is unrelated to his employment.

The two cases cited by the majority to support reversal are both 1944 cases where the supreme court affirmed the Commission, and both were decided under the less strenuous standards in effect prior to Act 796 of 1993. While I agree that the evidence in this case could possibly support a finding of compensability, that is not a basis on which we can reverse. We must construe the Act strictly. *See* Ark. Code Ann. § 11-9-704(c)(3) (Repl. 2002). This includes the section that declares that findings of fact by the Commission are conclusive unless fraudulent or not supported by substantial evidence. Ark. Code Ann. § 11-9-711(b)(3) and (4) (Supp. 2003). I would hold that substantial evidence supports the Commission's decision that appellant failed to prove that he sustained a compensable occupational injury.

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

Johnny MANN *v.* STATE of Arkansas

CA CR 02-1012 137 S.W.3d 411

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 10, 2003

G.B. "Bing" Colvin, III, Public Defender, for appellant.

Mike Beebe, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

KAREN R. BAKER, Judge. A jury in Ashley County Circuit Court convicted appellant, Johnny Mann, of possession of methamphetamine with intent to manufacture and possession of drug paraphernalia and sentenced him to twenty years' imprisonment in the Arkansas Department of Correction. Appellant has two arguments on appeal. First, appellant argues that the trial court erred in denying his motion to suppress. Second, appellant argues that the trial court erred during the trial of this cause by allowing the State to refer to his criminal history both during testimony in the guilt or innocence phase of the trial and during closing argument in that phase. We reverse and remand.

Postal Inspector Mitchell Webb advised Officer Dennis Roberts that pursuant to a federal warrant he had intercepted a package addressed to Clark Nuss in Hamburg that contained eighteen grams of methamphetamine. On appeal, appellant does not challenge the validity of this federal warrant. The return address on the package showed that it had been sent from Crescent City, California. Officer Roberts checked out the receiver's address on the package and discovered that the residence at that address belonged to appellant. Roberts further discovered that both appellant and Nuss were former residents of Crescent City. The law enforcement agents decided to perform a controlled delivery.

Prior to the controlled delivery, appellant had approached his regular postal carrier and inquired about a package. Later, posing as a postal carrier, Inspector Webb advised appellant that he had packages too big for his mailbox and asked specifically whether the package from Crescent City belonged there. Appellant said that it did.

After appellant accepted the package and went back inside his residence, the officers waited five to six minutes to give appellant time to open the package. The officers then went through the door on the screened-porch addition and approached the front door to the trailer, which was already open. They heard someone running down the hallway on a wooden floor. They announced that they were police officers and continued further

into the residence. Officer Roberts testified that after they entered the residence, they saw the package that had been torn open sitting on the kitchen bar. The officers pursued appellant down the hallway and found appellant in the bathroom sitting on a commode that had just been flushed. Appellant was taken into custody, and Officer Roberts read him his *Miranda* rights. Appellant then signed a consent to search form. The officers recovered the methamphetamine from the drain of the commode.

Following the suppression hearing, the trial court found that the officers had probable cause to believe that appellant was in possession of methamphetamine. The trial court also found that the officers could reasonably conclude by the fact that they heard running that appellant was about to destroy evidence. The trial court thus found that exigent circumstances existed to justify the officers' warrantless entry into appellant's residence. The trial court denied appellant's motion to suppress his consent to search and the resulting evidence. The trial court also denied his motion to suppress his statement because the court found that the statement was voluntarily made with full knowledge of his rights.

Appellant argues that the trial court erred in denying appellant's motion to suppress. When reviewing a denial of a motion to suppress evidence, 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. *See Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003).

Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. *See Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999) (citing *Welsh v. Wisconsin*, 466 U.S. 740 (1984)). However, the Eighth Circuit has recognized that when police officers themselves create the situation of urgency generally protected by the exigent circumstances exception, those same exigent circumstances cannot justify their warrantless entry. *United States v. Duchi*, 906 F.2d 1278, 1283-85 (8th Cir. 1990). This fact situation is very similar to the facts in *Duchi*. In *Duchi*, the warrantless entry into the defendant's residence was not supported by exigent circumstances even

though the officers knew that the defendant had picked up a package containing what the officers knew to be cocaine, and the defendant had removed contraband from his residence prior to a previous search. *See also United States v. Templeman*, 938 F.2d 122 (8th Cir. 1991) (finding that exigent circumstances did not support police officers' warrantless entry into defendant's home where an informant delivered a package of cocaine to the defendant at his, home the defendant opened the package, the trailer home was under surveillance so that it was unlikely that defendant would escape, and there was no indication that the informant was in danger or that the defendant was about to destroy the contents of the package). The court further relied on the ease with which the officers could have started the warrant application process or even completed it by radio or phone when the package was taken to the defendant's home. *Duchi, supra.*

Although the opportunity of an officer to obtain a warrant is not determinative, it is certainly relevant when exigent circumstances are claimed to be present. *See Templeman, supra.* If the independent evidence shows the delivery of contraband will or is likely to occur, an anticipatory search warrant can be obtained conditioned upon the delivery of the contraband. *See Sims v. State*, 333 Ark. 405, 969 S.W.2d 657 (1998) (citing *U.S. v. Bieri*, 21 F.3d 811 (8th Cir.1994)).

Instead, the officers in this case first entered a screened-in porch area that was under construction, through a closed screened door, and then proceeded through an open door into the trailer. It was not until after the officers had entered the screened-in porch that they heard "running." The fact that the officers themselves created the sense of urgency in this case does not justify their warrantless entry into appellant's home. The officers decided upon this investigative strategy, and they are responsible for its likely result. *See United States v. Munoz-Guerra*, 788 F.2d 295, 298-99 (5th Cir. 1986). We hold that this is a case of exigent circumstances manufactured by law-enforcement agents. Thus, the trial court erred in denying appellant's motion to suppress.

Appellant's second argument is that the trial court erred in failing to grant his motion for mistrial when the State elicited testimony concerning his prior criminal history during the guilt or innocence phase of the trial, and again referred to his criminal

history during closing argument. Appellant argues that because his criminal history had no independent relevance, had no probative value, and was highly prejudicial a mistrial should have been granted. We do not address whether the trial court erred in failing to grant a mistrial, as we do not expect this mistake to recur on retrial.

We reverse and remand.

PITTMAN, HART, and ROAF, JJ., agree.

GLADWIN and CRABTREE, JJ., dissent.

ROBERT J. GLADWIN, Judge, dissenting. I dissent because appellant created the exigent circumstances himself. The majority opinion correctly states the facts surrounding the controlled delivery of the methamphetamine to appellant's residence. The exigent circumstances occurred when appellant continued to run away from the officers after he was made aware of their presence.

Police may make a warrantless felony arrest in the home if they act on probable cause and exigent circumstances. *See Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999). Probable cause exists where there is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that a crime has been committed by the person suspected. *Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 860 (1997). Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. *Norris, supra,* citing *Welsh v. Wisconsin,* 466 U.S. 740 (1984). Exigent circumstances are those requiring immediate aid or action, and while there is no definite list of what constitutes exigent circumstances, the risk of removal or destruction of evidence is one. *See Humphrey, supra.*

Appellant had questioned his postal carrier about a package prior to the controlled delivery. The package containing the methamphetamine with appellant's address on it was delivered to and accepted by him. The officers could reasonably conclude that appellant would open the package. Officer Roberts testified at the suppression hearing that he saw the package, which had been torn open, sitting on the kitchen bar. He later testified that "Immediately, immediately after I heard running and I can't tell you where

I was, whether I was in the screened-in area or the doorway where I could see the package, I, when I heard the running, I stated, 'state police.' " In addition, Officer Jim Culp testified that he heard the commode being flushed when the officers announced their presence. Although Officer Roberts was not certain of exactly where he was standing, it is clear that he saw the open package and heard appellant running before he or the other officers entered the home.

The majority opinion states that the officers decided upon this strategy and that they are responsible for its likely result. If, when the police approached appellant's home and announced themselves, appellant had declined to talk with the officers and refused entry, but they then entered anyway, I would join the majority. However, after the officers' presence was made known to appellant, he chose to run, thus creating the exigent circumstances.

It is clear that the contraband was in the house and that both the police and appellant knew this. The police could reasonably conclude that appellant was about to destroy the evidence when they heard him running. Under these specific facts and considering the totality of the circumstances, the trial court did not err.

Sharon Kay EDMONDSTON *v.* The ESTATE of Oral W. FOUNTAIN, *Deceased*

CA 02-842 137 S.W.3d 415

Court of Appeals of Arkansas
Division III
Opinion delivered December 10, 2003

Leroy Blankenship, for appellant.

Tom Thompson, *Bill Walmsley*, and *Jerrie Grady*, for appellee.

ANDREE LAYTON ROAF, Judge. This case involves the trial court's denial of a petition to probate an instrument as the holographic will of Oral W. Fountain. Sharon Kay Edmondston, Mrs. Fountain's daughter, appeals. Ms. Edmondston argues that the trial court erred because the decedent clearly intended that the instrument she wrote be her last will. We agree, and reverse and remand.

The instrument at issue in this case, a copy of which is attached to this opinion as an Appendix, was written entirely by

the decedent, Mrs. Oral W. Fountain, and was signed by her and by two witnesses at her request. The instrument was prepared in January 1997. Mrs. Fountain died in April 1998, and her estate was initially probated as intestate in 1998. Mrs. Fountain was survived by five adult children, all of whom are listed in the instrument at issue in this case, with the majority of her estate going to Ms. Edmondston, who lived next door to her and continued helping her after the other children moved away. When Ms. Edmondston discovered the will in June 1999 and sought to admit it to probate, the other children filed an objection, contending that the document was not in their mother's handwriting.

At trial, numerous witnesses testified, including family members and handwriting experts. Verlin Harris, Mrs. Fountain's sister, testified that she and Mrs. Fountain spoke on the phone every night. Ms. Harris stated that in April during one of their conversations, she told her sister that she had a will. According to Ms. Harris, Mrs. Fountain responded that she too had a will. Ms. Harris testified that she explained to Mrs. Fountain the importance of writing a will and having two witnesses sign it. She also explained that a lawyer said that she could write her own will if she had two witnesses sign it. Ms. Harris testified that Mrs. Fountain again stated that she had a will.

Ricky Smithson and Justin Veach McAlister were the witnesses who signed Mrs. Fountain's will. Smithson referred to Fountain as "Granny," and testified that he had known her since he was four or five years old. He stated that when he arrived at her house, she asked him for a favor. She then went in, returned with a piece of paper, and asked the men to sign it. Smithson said he read it and it appeared to be a will, and that he thought he was signing a will. McAlister testified similarly at a deposition. He also stated that the instrument appeared to be a will and that he signed it. He identified the instrument presented during the deposition as the same document he recalled signing at Mrs. Fountain's request.

The trial court found that the will was in Oral W. Fountain's handwriting and that the signature on the instrument was Mrs. Fountain's. The court held, however, that the instrument could not be admitted to probate because it lacked testamentary intent. Specifically, the trial court found "no testamentary language whatsoever within the instrument." The court found that the instrument contained no dispositive wording and was thus defec-

tive on its face because it lacked testamentary intent. The court denied Ms. Edmondston's petition to probate, and she appeals.

On appeal, Ms. Edmondston argues that Mrs. Fountain clearly intended the instrument to be her will, and that the trial court erred in denying admission to probate because it lacked testamentary language. She contends that Mrs. Fountain's intent could not have been more clear and that testamentary language should not be the *sine qua non* when such intent is clear. In this regard, the supreme court has held that intent of the maker is the primary consideration in determining the validity of a will:

> The law has not made requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however, irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and, if this appears to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded.

Chambers v. Younce, 240 Ark. 428, 431, 399 S.W.2d 655, 657 (1966) (quoting *Arendt v. Arendt*, 80 Ark. 204, 96 S.W. 982 (1906)). Thus, no matter the form, if an instrument discloses the intent of the testator with regard to her property, then the instrument is a will. The *Chambers* court cited a number of cases in support of the proposition that a valid will may take many forms. *Chambers*, 240 Ark. at 431-32, 399 S.W.2d at 657.

Testamentary intent is necessary to the validity of a holographic will. *Chambers*, 240 Ark. at 430, 399 S.W.2d at 657. No particular words, however, are necessary. "*Inquiry may be made into all relevant circumstances where the existence of testamentary intent is in doubt.*" *Id.* (Emphasis in original). Customarily, Arkansas courts have admitted extrinsic evidence testimony to establish testamentary intent. *Id.* 240 Ark. at 430-31, 399 S.W.2d at 657.

In *Chambers*, the decedent's wife sought to probate an alleged holographic will. On the back of a blank check, the decedent wrote, "I Boyd Ruff request that all I own in the way of personal or real estate property to be my wife Modene." 240 Ark. at 429, 399 S.W.2d at 656. The check was admitted into probate, and the decedent's sister challenged the order. Noting that the

appellant did not dispute that the instrument was in the decedent's handwriting, the *Chambers* court held that the blank check was properly admitted as a holographic will. Concluding that there was testamentary intent, the court stated that there was evidence that the decedent was sincerely attached to his wife. Further, the language of the note, written under impending death, was testamentary in character.

Here, however, the validity of Mrs. Fountain's will turns on the narrower issue of whether words of a testamentary nature are absolutely required by our case law for the instrument to be admitted to probate. Ms. Edmondston argues that they are not, while the appellee contends that the trial court was correct in finding that they are required. In its order, the trial court relied primarily on two cases in finding that testamentary language is required, *Dunn v. Means*, 304 Ark. 473, 803 S.W.2d 542 (1991) and *In the Matter of Estate of O'Donnell*, 304 Ark. 460, 803 S.W.2d 530 (1991). Ms. Edmondston argues that these authorities are distinguishable factually from her case and do not compel the court to place words or "verbs" of a dispositive nature above the clear intent of the decedent as evidenced by the instrument itself and the admitted extrinsic evidence. We agree.

In *Dunn v. Means*, *supra*, the appellant sought to probate her mother's holographic will as the will of Claude Rogers, an unmarried man who lived with appellant's mother. The will had the following notation appended beneath her mother's signature: "Judee Dunn — Claude & I give you full power to do & take care of all our Business & do as you wish with, with it, with no problems from anyone. You can sell or dispose of all property & monies." 304 Ark. at 474, 803 S.W. at 542. Appellant's mother, Mr. Rogers, and two witnesses signed this notation. The supreme court affirmed the denial of probate, stating:

> Further, where a document sets forth no words of a dispositive nature, it is defective on its face because it lacks the required intent to make a will, and extrinsic evidence is not admissible to prove the necessary intent.
>
> In this case, we find no testamentary intent whatsoever within the passage that Ms. Dunn claims to be the will of Mr. Rogers. Certainly, it cannot be said that this instrument's expressions are so

> clearly stated that, without inference, no mistake can be made as to the existence of testamentary intention.

Dunn, 304 Ark. at 475-76, 803 S.W.2d at 543. In *Dunn*, the court clearly found that the wording *used* did not evidence testamentary intent, not that such words were completely *absent*, as there were two complete sentences purporting to address the disposition of Rogers' estate. In the case relied on by the *Dunn* court, *McDonald v. Petty*, 262 Ark. 517, 518, 559 S.W.2d 1, 1 (1977), the supreme court did state that "since the document sets forth no words of a dispositive nature, it was defective on its face because it lacked the required animus testandi or intent to make a will," and that extrinsic evidence was thereafter not admissible to prove intent. However, the court described the instrument in question, although signed and dated, as "merely a sketch or drawing on the back of a used envelope with names in individual squares," and stated that there was "absolutely nothing indicating an intent that this instrument serve as a testamentary disposition" of the property. *Id.* at 519, 559 S.W.2d at 2. Here, the carefully written instrument prepared by Mrs. Fountain, and captioned "Last Will," obviously bears no resemblance to such a drawing, and there is evidence of her intent by the caption she used.

The second case primarily relied upon by the trial court, *Estate of O'Donnell*, 304 Ark. 460, 803 S.W.2d 530 (1991), while closer factually to the case before us, is likewise distinguishable. *O'Donnell* also involved a handwritten listing of names and items of property without dispositive language, that was signed, dated and bore the words "Last Will & Testament." 304 Ark. at 463, 803 S.W.2d at 531. However, it was not witnessed and the decedent had given the list to his lawyer to prepare a will, but died before executing the typewritten instrument prepared by the lawyer. The trial court set forth the following factors in denying the instrument's admission to probate:

Factors Favoring Holographic Instrument as Will

1) Montgomery told decedent what to do, and he hands it to Montgomery saying, "Here it is."

2) Decedent's habit as acting in cursory and abbreviated way.

3) Instrument signed and dated.

4) Instrument has "Last Will and Testament."

5) Decedent never told wife he had a 1979 will.

6) Decedent never told wife he revoked 1979 will.

7) Decedent never told wife home just in his name.

Factors Indicating Holographic Instrument Not a Will

1) So brief, perfunctory, truncated and cursory as to be meaningless.

2) Written part in pen, part in pencil—seems to be on scratch paper.

3) Strikeovers.

4) No real urgency or hurry in getting a willBnot sick.

5) All property not disposed of.

6) Shelton said Montgomery called it a list, until some 10 days later.

7) Decedent knew Montgomery going to make a written will.

8) Decedent showed typewritten will to his wife, but did not tell her he had a handwritten will.

9) Discussed with wife in detail the provisions of typewritten will.

10) *Has no words of a dispositive nature.*

11) Wife's name not mentioned.

Id., 803 S.W.2d at 531-32. (Emphasis added.) The trial court further stated that the "court's mind must be settled as to the writer's testamentary intent," and that "[t]he document itself, along with all the attending circumstances, must overcome all doubt about testamentary intent." *Id.* at 464, 803 S.W.2d at 532. The supreme court agreed with the reasoning of the probate judge, found that it was within the framework of the applicable law, and recited the factors listed by the trial court in affirming the denial of admission to probate.

In this regard, the trial court clearly considered much extrinsic evidence in reaching its decision, and the lack of words of a testamentary or dispositive nature was merely one of eleven adverse factors recited. This case does not stand for the proposition that the lack of such language, standing alone, will be fatal to a holographic will on the issue of testamentary intent. Accordingly, we agree that these authorities do not constitute a basis for denial of the admission to probate of Mrs. Fountain's will, or for the exclusion of extrinsic evidence of her intent, and reverse and remand with directions to admit the will to probate.

Reversed and remanded.

NEAL, J., agrees.

STROUD, C.J., concurs.

APPENDIX

Exhibit 1

Last Will Jan. 1 1997

Kay Edmonston
160 acre farm & contents remaing
37 head of cattle at this time
1972. truck
Wayne Fountain
Cattle on Wayne's Farm
+ Fiddle
Shirley Washington
200.00
E.W. Fountain
200.00
Nell Harris
200.00

Ora L.W. Fountain

Witness

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Gloria D. ALLEN *v.* DIRECTOR, Employment Security Department

E 03-172 139 S.W.3d 138

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 17, 2003

Appellant, pro se.

Allen Franklin Pruitt, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant in this unemployment-compensation case filed a claim for benefits. After a hearing, the Board of Review found that she voluntarily left her last employment without good cause connected with the work, and was thus disqualified for benefits pursuant to Ark. Code Ann. § 11-10-513(a)(1) (Supp. 2003). Appellant filed a timely appeal with this court. We affirm.

The Board concluded its opinion by stating that "[t]he claimant is denied benefits until, subsequent to filing the claim, the claimant has had at least thirty days of employment covered by an unemployment compensation law of this state, another state, or

the United States." *See* Ark. Code Ann. § 11-10-513(a)(3) (Supp. 2003). Appellant filed a petition for judicial review with this court quoting the above-mentioned language from the Board's opinion and stating that:

> I Gloria D. Allen have been employed with Employment Solution, 2900 Horizon Dr., Suite 18, Bryant, Arkansas Telephone (501) 847-5800 since April 22, 2003. I have had thirty days of employment covered by an unemployment compensation law of this State.

Notably, appellant does not assert that the Board's decision was wrong, and therefore there is no question before us regarding the sufficiency of the evidence to support the Board's decision. *See* Ark. Code Ann. § 11-10-529(a)(2)(A) (Supp. 2003). Instead, she asserts that certain facts occurred subsequent to the hearing before the Appeal Tribunal and appears to suggest that, by the terms of the Board's decision, these subsequent facts (which she never attempted to present to the Board) entitle her to benefits. However, we cannot grant appellant the relief she seeks because her argument depends upon facts not in evidence that were presented for the first time in her petition for judicial review. Pursuant to Ark. Code Ann. § 11-10-529(c)(2)(A) (Supp. 2003), we are precluded from receiving additional evidence on appeal. Nor could we remand for the Board of Review to reopen its decision, even on a showing of good cause. This question was presented in *Arkansas Employment Security Dep't v. Mellon*, 322 Ark. 715, 910 S.W.2d 699 (1995), where our supreme court said that:

> [Section] 11-10-524(c) provides the Appeal Tribunal may reopen a decision upon a showing of good cause. But that procedure does not apply to the next tier of appellate review before the Board of Review. At that stage, there is no statutory provision for reopening a decision, but only a provision for judicial review:
>
> > The decision [of the Board of Review] shall be final unless within twenty (20) days after the mailing of notice thereof to the party's last known address, or, in the absence of the mailing, within twenty (20) days after the delivery of the notice, a proceeding for judicial review is initiated pursuant to § 11-10-529.
>
> Ark. Code Ann. § 11-10-525 (1987). The letter received by the Board of Review on the twentieth day from its decision was a

> request for still another hearing based on allegations of good cause for missing the January 18, 1994 hearing. That is a remedy which the employment security statutes simply do not provide at the Board of Review level.

Arkansas Employment Security Dep't v. Mellon, 322 Ark. at 718-19, 910 S.W.2d at 701. Because appellant does not challenge the correctness of the Board's decision, and because we lack the authority to grant the relief she requests by reopening the Board's decision for additional evidence, we must affirm.

Affirmed.

HART, GLADWIN, and BIRD, JJ., agree.

ROBBINS and GRIFFEN, JJ., concur.

WENDELL L. GRIFFEN, Judge, concurring. I respectfully concur in this result, but in doing so I do not abandon the views expressed in my recent dissenting opinion in *Bradford v. Dir. Employment Sec. Dep't.*, 83 Ark. App. 332, 128 S.W.3d 20 (2003).

COULSON OIL CO., Inc., and Coulson Properties, LLC *v.* Christopher TULLY and Michelle Tully

CA 03-555 139 S.W.3d 158

Court of Appeals of Arkansas
Division II
Opinion delivered December 17, 2003

Barber, McCaskill, Jones & Hale, P.A., by: *R. Kenny McCulloch* and *Perry L. Wilson*, for appellants.

Lovell & Nalley, by: *John Doyle Nalley*, for appellees.

JOHN MAUZY PITTMAN, Judge. Coulson Oil Co., Inc., and Coulson Properties, LLC ("Coulson"), have taken an interlocutory appeal from the Saline County Circuit Court's imposition of sanctions, including the striking of their answer, for lying in their responses to discovery propounded by appellees Christopher Tully and Michelle Tully. On appeal, the primary issue is whether, under the facts presented, the trial court abused its discretion in imposing these sanctions. We hold that the trial court did not abuse its discretion, and we affirm.

Procedural History

In August 2001, Mr. Tully was injured in an accident at a Sherwood convenience store leased by Coulson to Robert Baynes when his pickup truck dropped into a hole in the pavement caused by a broken metal cover for an underground gasoline tank. He and his wife filed this negligence action in April 2002, alleging that Coulson was negligent in maintaining its property. The Tullys propounded interrogatories to Coulson requesting information about maintenance and repairs of the tank cover that had caused the accident. In their responses filed August 20, 2002, and September 4, 2002, Coulson denied having any responsibility for the maintenance or repairs of the tank covers and stated that they were the responsibility of Robert Baynes. The August 20, 2002, responses stated in part:

> INTERROGATORY NO. 6: Attached as Exhibit "A" is a photograph showing the metal cover, which caused Plaintiff's damages and injuries, in regards, please state:
>
> a. The date the cover was broken, and how it was broken;
>
> b. The name, address and telephone number of all persons with knowledge concerning how the cover was broken and/or repaired;
>
> c. The name, address, phone number of the person or persons who discovered that the metal cover described in the Complaint was missing or broken;
>
> d. The date and time the metal cover was replaced or repaired, and the name, address and home number of the person or persons making such repair; and
>
> e. If there was an incident or accident report made.
>
> RESPONSE: Coulson Oil Co. was not aware the metal cover was broken until this lawsuit was filed.

The September 4, 2002, responses included the following statements:

> INTERROGATORY NO. 2: Please state the name, address and telephone number of the person(s) and/or entity which was

responsible for maintaining the fuel tank covers at the location where this accident took place as of the date of the accident.

RESPONSE: Robert Baynes.

REQUEST FOR PRODUCTION NO. 1: Please produce and attach all documentation concerning maintenance and/or repair of the fuel tanks and fuel tank covers where this accident took place from two (2) years preceding the date of the accident to-date.

RESPONSE: Defendant does not have this information.

INTERROGATORY NO. 3: Please state the name, address and telephone number of the person(s) responsible for inspecting the fuel tank covers where this accident took place as of the date of this accident.

RESPONSE: Robert Baynes and/or his employees.

INTERROGATORY NO. 4: Please state whether any repairs were made to the fuel tanks, fuel tank covers and/or surrounding areas after the day of Plaintiff's accident.

RESPONSE: Defendant was not responsible for upkeep of the fuel tanks, fuel tank covers, or surrounding areas, therefore, this information is unknown to Defendant.

INTERROGATORY NO. 5: If your answer to the preceding Interrogatory was affirmative, please state the name, address and telephone number of each person(s) and/or entity which made any such repairs.

RESPONSE: See response to Interrogatory No. 4.

REQUEST FOR PRODUCTION NO. 2: Please produce and attach all documentation evidencing the repairs referenced in Interrogatory Number 5 & 6 above.

RESPONSE: Defendant is not in possession of this information, please see response to Interrogatory No. 4.

INTERROGATORY NO. 6: Does the Defendant contend that any person(s) or entity was responsible for maintaining the fuel

> tanks and/or fuel tank covers on the date of the accident, other than Defendant and its employees? If so, please provide the name, address, telephone number, and place of employment of any such person or entity.
>
> RESPONSE: Yes, Robert Baynes.

The Tullys filed an amended complaint in September 2002 naming Mr. Baynes as a defendant. During a deposition taken of Mr. Baynes on January 15, 2003, the Tullys learned that Coulson had made repairs to the tank cover involved in this accident. The Tullys' attorney immediately sent a letter to Coulson's attorney requesting information about Coulson's repairs to the property. A few days later, Coulson's attorney sent a letter supplementing its earlier responses to discovery by listing additional witnesses with knowledge of Coulson's repairs to the tank cover and copies of repair bills paid by Coulson. He stated:

> I am writing to your recent inquiry as to the identity to [sic] certain individuals who may have knowledge of repairs made to the parking lot area after the August 8, 2001 accident. Please consider this letter as supplementation to Interrogatory Nos. 6 and 8 of the Interrogatories propounded to Coulson Oil Company, Inc.
>
> INTERROGATORY NO. 6(b) — should be supplemented to show that there are individuals that have information concerning the repair of the "manway" area. To Defendant's knowledge, the cover was not broken but a repair was made to the area. The individuals with the information concerning the repair include Mark Simpson, Larry McArthur, Francis Bright, and Dick Kohler of Coulson Oil Company and Cruzen Equipment Company, Inc., 9100 Interstate 30, Little Rock, Arkansas, (501) 374-1515.
>
> INTERROGATORY NO. 6(d) — should be amended to reflect that Cruzen Equipment Company, Inc. performed the above stated repair some time after October 5, 2001.
>
> INTERROGATORY NO. 8 — should be supplemented to show that Mark Simpson, Larry McArthur, Francis Bright, Dick Kohler, representatives of Cruzen Equipment Company, Inc., John K. Jones of John K. Jones & Associates Tax Service, 154222 Interstate 30, Benton, Arkansas, may be called to testify at the trial of this matter. These individuals will testify concerning the condition of the

manway/ monitoring well prior to Plaintiff's accident and repairs made to the manway/ monitoring well following the accident. Cruzen Equipment Company, Inc. employees may testify as to the repairs made to the manway/monitoring well which were discovered following the Plaintiff's accident.

. . . .

INTERROGATORY NO. 10 — Defendant may introduce various photographs taken of the subject area at various times. In addition, Defendant may introduce copies of work orders from Pollution Management, Inc. referencing installation of a verter route tank monitoring system in May of 2001. (See attached work orders and invoice from Pollution Management, Inc.) Also see attached invoices from Cruzen Equipment Company, Inc. concerning repair work on the manway/monitoring well. In addition, Defendant reserves the right to introduce copies of Plaintiff's income tax returns filed prior to and following the accident, as well as copies of Plaintiff's medical records.

The Tullys filed a motion for sanctions against Coulson for having lied in their responses to discovery. In response, Coulson denied that it had lied and asserted that it had made diligent inquiry of the matters requested in discovery. At a hearing on the motion, the trial court found that Coulson had lied:

THE COURT: Well, the problem I have with that position ... is you put the parties submitting interrogatories in a position of having to assume that the responses are probably not truthful, and, therefore, you need to go find people who will reveal that they're not truthful and take their deposition or ask them questions so that you can force the person to tell the truth, and while I understand what you're saying, and I agree, I'm sure Mr. Nalley's accurate, it's no wrongdoing on your part, I think it's a flagrant disregard for our whole system to allow a litigant to attempt to get away with that. If he hadn't taken that deposition, they would have. They would have absolutely gotten away with telling a lie. As far as I'm concerned, they lied to the Court. They just flat out lied. There's an unequivocal answer in there that says, it's not our responsibility, absolutely unequivocal. There's nothing to supplement that with. There's nothing incomplete about that. That is a flat out, no, it's not our responsibility, and now you tell me, whoops you caught us, it's okay, we can fix it, it is our responsibility, no, that is absolutely

> wrong, fundamentally wrong to our whole system. If I can find a way, I will definitely sanction Coulson Oil for flat out lying in this lawsuit, just absolutely flagrantly telling a lie and trying to get away with it. Apparently, they have up to a point but if there's a sanction available, they are going to be subject to it, I can assure you.
>
> . . . .
>
> Two questions in particular really bother me beforehand and still do, "Please produce and attach all documentation concerning maintenance and/or repair to the fuel tanks and fuel tank covers where this accident took place from two years preceding this date to the date of the accident." Response: "Defendant does not have this information." The next one — I skipped one, Number four, "Please state whether any repairs were made to fuel tanks, fuel tank covers and/or surrounding areas after the day of the Plaintiff accident." "Defendant was not responsible for the upkeep of the fuel tanks, fuel tank covers or surrounding areas, therefore, this information is unknown to the Defendant." How can you say that the Rules provide them an opportunity to supplement that by saying, that's not true, we are responsible. And although they don't say it, the only reason we're telling you, is because you found out. That's the only reason we're telling you. It didn't come to light accidentally and us say, oh, we forgot, we've discovered this on our own. That would be a different case if the party answering the interrogatory on their own concluded we've misled, we've made an error and come forth on their own without any incentive on the part of the other side, that would be different and I would agree with you. They should be cut some slack. That's not the case here at all. I mean, they came forward with the truth when they got caught and that's the only time they did anything. Sure it's a month before trial. That had nothing to do with it whether it was a week before or a year before. They weren't going to do anything apparently unless they got caught.

The trial court asked the parties to brief the question of whether it could sanction Coulson under Ark. R. Civ. P. 37. In its brief, Coulson argued that it could not be sanctioned because it had not violated a court order, had not acted out of willfulness or bad faith, and had not failed to respond to the Tullys' requests for discovery. It also asserted that it had properly supplemented its

responses under Ark. R. Civ. P. 26(e). Along with its brief, it filed the affidavit of Mary Ann Dawkins, Coulson's corporate secretary. She stated:

> 3. I was responsible for compiling the information requested by counsel for the Plaintiff in his Interrogatories and Requests for Production.
>
> 4. In compiling the information requested by counsel for the Plaintiff, I quickly gathered the information that I could find, and I was not entirely thorough in my research.
>
> 5. When I provided the information stating that Coulson Oil Company, Inc. was not responsible for upkeep of the fuel tanks, fuel tank covers, or surrounding areas in question, my statements were based upon the information obtained in my less than thorough research.
>
> 6. Upon further request by our attorneys, I performed a more thorough search of the records, and I discovered repair records related to the Sherwood store location concerning the monitoring well at that location; I first learned of this information on January 16, 2003. Upon finding this documentation, I immediately forwarded it to out [sic] attorneys by facsimile on January 16, 2003.
>
> 7. At no time was my intention to lie or to hide any information from the Plaintiff, Plaintiff's counsel, or the Court.

The court issued a letter opinion, stating:

> The defendant, Coulson Oil Company, Inc., failed to comply with the intent or spirit of discovery. In fact, it is clear to me in this case the defendant wilfully made false representations, not simply omissions or misleading statements, but absolute untruths on at least two separate occasions during the discovery process. It is equally clear to me that the defendant's conduct warrants severe sanctions. As such, Coulson's Answer shall be stricken, and the case should proceed to trial against Coulson on damages only.

On February 27, 2003, the court entered an order striking Coulson's answer and directing that only the issue of damages would be tried. It also ordered Coulson to reimburse the Tullys for the costs of taking Mr. Baynes' deposition. This interlocutory

order was immediately appealable under Ark. R. App. P. 2(a)(4), which provides that an appeal may be taken of an order that strikes out an answer, any part of an answer, or any pleading in an action. *See Allen v. Greenland*, 347 Ark. 465, 65 S.W.3d 424 (2002).

In the present case, the trial court struck Coulson's answer and awarded the Tullys their costs of deposing Mr. Baynes as a result of Coulson's failure to provide truthful discovery. Coulson argues that the trial court erred in imposing the sanctions that it did because (1) it violated no court order compelling discovery and (2) it answered the Tullys' requests for discovery. Coulson points out that it provided "supplemental" discovery "immediately upon its realization that incomplete and incorrect information had been furnished" to the Tullys. Coulson argues that the trial court went "beyond the parameters" of Ark. R. Civ. P. 37 in imposing sanctions because Coulson's "omission" of information in response to the Tully's requests for discovery was simply "a result of the less than thorough research" that it had performed in answering those requests. According to Coulson, this means that "a party can be severely sanctioned for supplementing a previously incorrect response to discovery."

Coulson completely mischaracterizes what actually happened. It is true that Coulson did not fail to respond to requests for discovery — it unequivocally responded, denying any responsibility for the maintenance and repair of the tank covers. However, the trial court made express findings of fact that Coulson had lied and that it had supplied the correct information only because its lies had been discovered. Coulson did not act, on its own initiative, to supplement incorrect information that it had provided in good faith; according to the trial court, it got caught lying and then produced accurate information.

■ ■ Rule 37 and the cases following it support the sanctions imposed in this case. The imposition of sanctions for failure to provide discovery rests in the trial court's discretion; the supreme court has repeatedly upheld the trial court's exercise of such discretion in fashioning severe sanctions for flagrant discovery violations. *Calandro v. Parkerson,* 333 Ark. 603, 970 S.W.2d 796 (1998). "There is no requirement under Rule 37, or any of our rules of civil procedure, that the trial court make a finding of willful or deliberate disregard under the circumstances before sanctions may be imposed for the failure to comply with the discovery requirements." *Id.* at 608, 970 S.W.2d at 799; *accord*

National Front Page, LLC v. State, 350 Ark. 286, 86 S.W.3d 848 (2002); *Viking Ins. Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992); *see also Rodgers v. McRaven's Cherry Pickers, Inc.*, 302 Ark. 140, 788 S.W.2d 227 (1990).

The severe sanctions that may be imposed include the striking of a claim or a defense. In David Newbern and John Watkins, *Arkansas Civil Practice & Procedure*, § 17-13, at 263 (3d ed. 2002), the authors state:

> Obviously, some of the available sanctions for failure to comply with a discovery order may be devastating to a claim or defense. Dismissal and judgment by default fall into that category, as do orders refusing to permit a position to be advanced or supported and prohibiting the introduction of designated evidence. The Supreme Court has described sanctions of this type as "extraordinary" and said that they should be used "sparingly and only when other measures fail because of the inherent danger of prejudice." However, the Court has "repeatedly upheld" the discretion of trial judges "in fashioning severe sanctions for flagrant discovery violations."

In *Cagle v. Fennel*, 297 Ark. 353, 761 S.W.2d 926 (1988), the court found that the trial court had acted well within its discretion in entering its final order dismissing the appellant's suit with prejudice in light of her failure to attend two depositions and her subsequent failure to pay the costs and fees assessed by the judge in lieu of and to avoid the dismissal of her case. The court held that the rules of civil procedure do not require a finding of willful or deliberate disregard before sanctions may be imposed for failure to comply with the discovery rules.

In *Dunkin v. Citizens Bank of Jonesboro*, 291 Ark. 588, 727 S.W.2d 138 (1987), the supreme court affirmed the striking of a party's partial answer because she had not answered all of the interrogatories propounded to her, even though she had been ordered to do so. The court stated:

> Authority for the trial court's action can be found in our rules of civil procedure. Arkansas R. Civ. P. 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the issues in the pending actions, ..." Ark. R. Civ. P. 37(d) states that if a party fails to serve answers or objections to interrogatories "the court in which the action is pending on motion

> may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b)(2) of this rule." Rule 37(b)(2)(C) then permits the court to enter an order "striking out pleadings or parts thereof."

291 Ark. at 590, 727 S.W.2d at 139-40.

The supreme court's final comments in *Calandro v. Parkerson*, 333 Ark. at 612, 970 S.W.2d at 801, bear repetition here:

> Accordingly, we cannot say that the trial court abused its discretion in dismissing the case for Appellants' flagrant failure to comply with the court's directive to provide full and complete discovery to Appellee. The trial court was in a superior position to judge the actions or motives of the litigants, and we will not second-guess its ruling. The fact that the sanction imposed by the trial court was undoubtedly final and severe is of no consequence, as Rule 37 specifically provides for dismissal of the action where a party fails to comply with an order to provide discovery. Appellants were the plaintiffs in this case and, as such, they chose to utilize the court system to attempt to redress alleged wrongs. To allow them to bog down the judicial system through their delay and willful noncompliance with the trial court's order would be imprudent. We thus affirm the trial court's dismissal with prejudice of Appellants' deceit claim.

Arkansas Rule of Civil Procedure 37 provides two methods of imposing sanctions. Under Rule 37(b), sanctions may be imposed for failure to comply with an order compelling discovery. Rule 37(d) also provides that sanctions may be imposed for failure to respond to interrogatories or other discovery requests. Sanctions issued under Rule 37(d) do not require an order compelling production as a prerequisite. Because no previous discovery order was entered, Rule 37(d) is applicable to this case. Rule 37(d) states in relevant part:

> If a party, or an officer, director or managing agent of a party or person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party, fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written

> response to request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b)(2) of this rule....
>
> The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided in Rule 26(c).

Thus, Rule 37(d) allows the court to impose the sanctions that are allowed in subsections (A), (B), and (C) of Rule 37(b)(2), which permit the court to enter such orders as the following:

> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party....

The supreme court has upheld the imposition of Rule 37(d) sanctions in the absence of a prior order to compel production where a defendant has failed to answer interrogatories or otherwise failed to comply with discovery. In *Cook v. Wills*, 305 Ark. 442, 808 S.W.2d 758 (1991), Ms. Cook repeatedly agreed to the production of her 1988 income tax return. However, on the day of trial, and after the jury had been impaneled, defense counsel advised the trial court that Ms. Cook had not produced her 1988 tax return as she had promised on prior occasions. In light of her conduct, the trial court imposed sanctions under Rule 37(d) and struck her third-party complaint even though no prior order to compel had been issued. Noting that, pursuant to Rule 37(d), the court "may make such orders in regard to the failure as are just," the supreme court held on appeal that the trial court did not abuse

its discretion in imposing severe sanctions under that rule. The court also rejected Ms. Cook's argument that Rule 37 requires a showing of willful disregard of the discovery rules before sanctions can be imposed.

Also, in *Harper v. Wheatley Implement Co.*, 278 Ark. 27, 643 S.W.2d 537 (1982), the appellants did not complete answers to interrogatories or to questions on deposition, and the appellees filed a motion to compel. Although the trial court did not issue an order compelling discovery, it struck the appellants' pleadings relating to certain claims on the day of trial. The supreme court held that, under Rule 37(d), the trial court had the authority to take that action.

The supreme court relied upon its decisions in *Cook v. Wills* and *Harper v. Wheatley Implement Co.* in *National Front Page, LLC v. State, supra*, where it affirmed the trial court's imposition of 37(d) sanctions, including striking the appellants' answer and entering a default judgment, based on their failure to timely respond to discovery requests, to appear at a hearing on a motion to compel, and to appear at trial. The supreme court held that the circuit court had the authority to issue sanctions, including default judgment, under Rule 37(d), and that it could do so without an order to compel discovery having been entered.

Given the court's authority to impose such sanctions under Rule 37(d) in the absence of an order to compel discovery, the next question is whether, under the facts presented, the circuit court abused its discretion in doing so. Coulson argues that the Tullys were not prejudiced by its incorrect responses to discovery because it provided correct information one month before trial. It asserts that its "supplementation," as provided by Ark. R. Civ. P. 26(e), cured any problems its false responses to discovery might have caused. We disagree. Rule 26(e) provides for the supplementation of "incomplete or incorrect" responses — it does not provide that untruthful responses are sufficient so long as they are corrected if and when the responding party's deceit is discovered. Further, the trial court did not base its decision on whether the Tullys were prejudiced — it based it on the seriousness of Coulson's behavior and the consequences that should result from that behavior. Deliberately untrue responses to discovery are, in our view, worse than an outright refusal to answer. If a party

refuses to provide discovery, the other party is, at least, aware of the problem. Dishonest responses, however, prevent the party seeking discovery from learning the true situation. Additionally, one cannot say that the Tullys were not prejudiced by Coulson's lack of veracity, because it is obvious that the Tullys would have been better able to prepare for Mr. Baynes's deposition if Coulson had been truthful in its responses. Although the striking of Coulson's answer was extreme, it was appropriate in this case, where the trial court's finding that Coulson lied is soundly supported by the record.

We therefore hold that the trial court did not abuse its discretion in imposing these sanctions.

Affirmed.

BIRD, J., agrees.

STROUD, C.J., concurs.

FORDYCE CONCRETE and Safeco/American States Insurance *v.* Charles GARTH (*Deceased*)

CA 03-689 139 S.W.3d 154

Court of Appeals of Arkansas
Division I
Opinion delivered December 17, 2003

Friday, Eldredge & Clark, by: *Guy Alton Wade*, for appellants.

Roberts Law Firm, P.A., by: *Matthew C. Hutsell*, for appellee.

ROBERT J. GLADWIN, Judge. Claimant Charles Garth suffered a fatal injury on July 14, 1999, that was admittedly compensable. His representatives sought workers' compensation benefits for his widow and two minor sons, Tavarie Lamar Stewart and Tavorie Lamar Garth. The Administrative Law Judge (ALJ) awarded benefits to the minor children, but denied benefits to the widow on the grounds that she was not dependent on claimant. The widow did not appeal. The respondents appealed as to the benefits awarded to the children. The Commission affirmed the ALJ's award of benefits. Appellants argue on appeal to this court that the Commission's decision that the minor children were wholly and actually dependent on claimant at the time of his death is not supported by substantial evidence. We affirm.

The Commission gave the following history of events leading up to the claim for benefits. Tiffany Stewart began a relationship with claimant in 1988, when they lived next door to one another in Las Vegas, Nevada. Their child, Tavarie Lamar Stewart, was born on August 26, 1989. Claimant had moved from Las Vegas before Tavarie was born, but later returned for about one year. Ms. Stewart testified that Tavarie spent alternating weeks with his father until the claimant moved back to Arkansas in late 1992 or early 1993. She stated that although their visits became sporadic after that, claimant maintained consistent contact with Tavarie, regularly sending money and gifts through his brother and other family members. She further testified that claimant occasionally telephoned Tavarie, his last call being approximately one week before his death. Ms. Stewart said that claimant's family allowed Tavarie to attend claimant's funeral with them, that they continue to acknowledge him as claimant's son, and that they have maintained a relationship with him following claimant's death. Ms. Stewart applied for, but never received, formal child support. Although claimant's name does not appear on Tavarie's birth certificate, Ms. Stewart testified that he had always acknowledged Tavarie as his son and that he had asserted paternity of Tavarie on

forms he filled out for the Social Security Administration when he had applied for disability benefits.

Tavorie Lamar Garth was born on April 4, 1991, in Monroe, Louisiana, a few weeks after claimant had married the boy's mother, Felecia Garth. Claimant and Mrs. Garth separated in December of 1991, and claimant moved back to Arkansas, where he died in 1999. Mrs. Garth remained in Louisiana, and the parties never divorced. Mrs. Garth testified that Tavorie visited his father once or twice each month in either Arkansas or Louisiana and that Tavorie spent time with claimant and claimant's mother when claimant came to Louisiana. Mrs. Garth applied for, but never received, formal child support. However, she testified that claimant did give his son money and buy food and clothing for him when they were together.

Arkansas Code Annotated section 11-9-527 (Supp. 2001) provides death benefits for dependents of workers who die in work-related accidents. It states, in pertinent part, that "compensation for the death of an employee shall be paid to those persons who were wholly and actually dependent upon the deceased employee . . . ." Appellants contend that a finding that the children were "wholly and actually dependent" is not supported by substantial evidence.

Before the adoption of Act 1227 of 1976, which added the requirement of being "actually dependent," benefits were payable to persons "wholly dependent." In *Chicago Mill & Lumber Co. v. Smith*, 228 Ark. 876, 310 S.W.2d 803 (1958), the supreme court stated its belief that the Legislature used the term 'wholly dependent' in the sense of applying to those ordinarily recognized in law as dependents, and thus created a conclusive presumption that a minor child is wholly dependent upon a parent. *See Doyle's Concrete Finishers v. Moppin*, 268 Ark. 167, 594 S.W.2d 243 (1980).

In interpreting the effect of the 1976 amendment, the supreme court noted in *Roach Mfg. Co. v. Cole*, 265 Ark. 908, 582 S.W.2d 268 (1979), that by inserting the phrase "and actually," the legislature apparently intended to change the conclusive presumption of dependency established under prior case law. The court concluded that when a widow and child are not living with the employee at the time of his death, there must be some showing of actual dependency. Because the widow in *Roach* had elected to support herself and made no effort during her husband's eleven-month absence preceding his death to enforce whatever legal right

to support she may have had, the court affirmed the Commission's finding that she had failed, in the language of the amended statute, to "establish in fact some dependency" upon her husband at the time of his death. However, the court also affirmed the Commission's finding that with respect to the parties' minor child, who was being supported by her mother, the same time period without legal action did not demonstrate that there was no longer any "reasonable expectation of support" from the father to the child.

In *Doyle's Concrete Finishers, supra,* the supreme court addressed the issue of whether a minor child, not living with the claimant-parent and receiving only a part of his support from that parent, was entitled to maximum death benefits. The claimant in *Doyle's Concrete* had been obligated to make child support payments, and there was testimony that he also provided child care on occasion, bought clothing and gifts for the child, and paid for the child's medical expenses. The court noted that the child's sole source of income since his father's death was a monthly social security check; that his necessary expenses would naturally increase as he grew older; and that the widow had become unable to work due to severe health problems. In affirming the Commission's decision to award maximum benefits to the child, the court stated, "Certainly, if, as in *Roach*, the child who received no financial support was entitled to maximum benefits, it must be said that a child, as here, who receives some financial support, should be entitled to no less than the maximum benefits." 268 Ark. at 171, 594 S.W.2d at 245.

In *Porter Seed Cleaning, Inc. v. Skinner*, 1 Ark. App. 230, 615 S.W.2d 380 (1981), we affirmed the Commission's award of maximum dependency benefits to the child where the deceased employee was voluntarily contributing $100 a month to the support of the child, who resided with the deceased's estranged wife, and was also providing insurance for the child. We summarized the definitions of "wholly dependent" and "actually dependent" as follows:

> Under the holding in *Chicago Mill*, and *Roach*, . . . persons who are ordinarily recognized in law as dependents, including a wife and children, and to whom the employee owes a duty of support, are "wholly dependent" under our Workers' Compensation Law.

> "Actually dependent," in light of the prior cases, does not require total dependency. All that is required is a showing of actual support or a reasonable expectation of support.

1 Ark. App. at 234, 615 S.W.2d at 382 (1981).

Subsequent to the passage of Act 796 of 1993, the supreme court decided *Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998), in which the Commission had awarded death benefits to a deceased employee's three children where the deceased did not have custody and did not pay child support, but was found to have contributed to the children's support in other ways, such as buying food, school clothes and supplies, and helping pay for their travel arrangements. The respondent employer and insurer appealed, arguing that the strict construction of the workers' compensation statutes, as required by Act 796 of 1993, compelled a holding that the children were not "wholly and actually" dependent on the deceased at the time of the injury, and that they were therefore not entitled to dependents' benefits.

Appellants in *Lawhon* sought to have the court define the words "wholly" and "actually" according to their dictionary definitions. The supreme court stated that appellants' view of a strict construction of this part of the statute would require the children to prove that, at the time of their father's death, they were entirely or completely dependent upon him for support. The court concluded that "[a]pplying the dictionary definitions urged by Lawhon would mean that a minor child would never be entitled to the death benefits specified in 11-9-527(c)(3) where the parents were divorced and the child received any support whatever from the surviving parent. That would be an absurd result, and we will not adopt such an interpretation. . . . We are confident our General Assembly could not have intended the result suggested by [appellants]." 335 Ark. at 281, 984 S.W.2d at 5 (1998).

Appellants in *Lawhon* further contended that our case law dealing with dependents' benefits was in conflict with Ark. Code Ann. § 11-9-527 and should not be applied to cases arising after the effective date of Act 796, which was July 1, 1993. Our supreme court held that the previous decisions interpreting the statutory language in question were not inconsistent with Act 796 of 1993 and remained controlling as the wording of Ark. Code Ann. § 11-9-527 was not changed by the Act.

The court in *Lawhon* also noted that the General Assembly is presumed to be familiar with the court's interpretations of its statutes, and if it disagrees, it can amend the statutes, as it did when the word "actually" was added to the provisions of Ark. Code Ann. § 11-9-527 subsequent to the court's decision in *Chicago Mill & Lumber Co. v. Smith, supra.* Without such amendments, however, the appellate courts' interpretations of the statutes remain the law. *Lawhon Farm Servs., supra.*

Appellants herein contend that the finding of the Commission is not supported by substantial evidence. Dependency is a fact question to be determined in the light of the surrounding circumstances. *Robinson v. Ed Williams Constr. Co.*, 38 Ark. App. 90, 828 S.W.2d 860 (1992). When the Commission makes a finding of fact, that finding carries the weight of a jury conclusion. *Bankston v. Prime West Corp.*, 271 Ark. 727, 610 S.W.2d 586 (Ark. App. 1981). The decision of the Commission must stand if supported by substantial evidence. *Id.* The issue on appeal is not whether this court would have reached the same results as the Commission on this record or whether the testimony would have supported a finding contrary to the one made; the question is whether the evidence supports the findings made by the Commission. *Robinson, supra.* We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have reached the same conclusion reached by the Commission. *Id.*

Here, it was shown that the deceased had acknowledged both boys as his sons; that he had visited with them or maintained telephone contact with them; and that he had contributed, albeit sporadically, to their welfare by spending money for gifts and for certain needs such as food and clothing. The fact that the boys' mothers did not secure child-support payments or more consistent and substantive contributions from the boys' father did not mean that the boys no longer had any reasonable expectation of support from the father. *See Roach Mfg. Co., supra.* As noted in *Robinson, supra,* the test of "actual dependency" does not require a showing of total dependence; a finding of some measure of actual support or a reasonable expectation of support will suffice.

In light of all the attendant circumstances, we conclude that there was substantial evidence to support the finding of the

Commission that Tavarie Lamar Stewart and Tavorie Lamar Garth were wholly and actually dependent upon the deceased claimant, Charles Garth. Accordingly, the award of dependency benefits pursuant to Ark. Code Ann. § 11-9-527 is affirmed.

Affirmed.

GRIFFEN and ROAF, JJ., agree.

Frederick R. DANIELS *v.* STATE of Arkansas

CA CR 03-398 139 S.W.3d 140

Court of Appeals of Arkansas
Division IV
Opinion delivered December 17, 2003

John F. Gibson, Jr., for appellant.

Mike Beebe, Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant Frederick Daniels was convicted by a jury of second-offense driving while intoxicated. He was sentenced to 104 days in jail and fined $400.00. Mr. Daniels appeals from his DWI conviction, arguing that the trial court erred in admitting evidence that he failed a portable breath test. Mr. Daniels further argues that the trial court erred in admitting the result

of the breathalyzer test taken at the police station. We agree with both of appellant's arguments, and we reverse his DWI conviction.

Prior to trial, Mr. Daniels filed a motion in limine asking the trial court to suppress evidence of the breathalyzer test result, which was .10. A pretrial hearing was held on appellant's motion, and at the hearing Mr. Daniels argued that the test result was inadmissible because there was not full compliance with Ark. Code Ann. § 5-65-204(e) (Supp. 2003), which provides:

> (e)(1) The person tested may have a physician or a qualified technician, registered nurse, or other qualified person of his own choice administer a complete chemical test in addition to any test administered at the direction of a law enforcement officer.
>
> (2) The law enforcement officer shall advise the person in writing of this right and that if the person chooses to have an additional test and the person is found not guilty, the arresting law enforcement agency will reimburse the person for the cost of the additional test.
>
> (3) The refusal or failure of a law enforcement officer to advise a person of this right and to permit and assist the person to obtain a test shall preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer.

At the hearing, Mr. Daniels acknowledged that he was advised in writing that he could have another test at his own expense, and that he declined any additional test. However, he testified that he was not advised that he would be reimbursed for the additional test if found not guilty, and that had he been given this advice he would have taken an additional test. At the conclusion of the hearing the trial court denied appellant's motion to suppress the evidence, stating, "There may have been a technical failure here, but I don't consider it to be a substantial failure to comply with the statute, such that would in all cases require the court to refuse to let the test results in."

At the trial, Officer Matthew Williams testified for the State. He stated that on October 14, 2001, he stopped Mr. Daniels for speeding. Officer Williams stated that, after he stopped the car, Mr. Daniels crawled over his wife in the passenger's seat and exited from the passenger's side of the vehicle. When Officer Williams made contact, he smelled an odor of intoxicants on Mr. Daniels,

and noticed that Mr. Daniels was swaying, had bloodshot eyes, and his speech was slurred. Mr. Daniels admitted to Officer Williams that he had drunk several beers. According to Officer Williams, Mr. Daniels "had all six clues on the HGN test." Officer Williams attempted to perform other field sobriety tests, but did not do so because Mr. Daniels told him he had a leg injury.

Over appellant's objection, Officer Williams was permitted to testify that Mr. Daniels failed a portable breath test. Officer Williams further testified that the result of the breathalyzer taken at the station was .10.

Mr. Daniels and his wife testified on his behalf. Both of them testified that he had been drinking beer, but was not drunk, on the night of his arrest.

Mr. Daniels's first argument for reversal is that the trial court erred in admitting evidence that he failed a portable breath test. He acknowledges that it may not be error to permit an officer to testify that he used a portable breath test in his investigation. However, Mr. Daniels asserts that testimony that he failed the breath test raised the unfair inference that the results exceeded the legal limit.

Mr. Daniels also argues that the result of the breathalyzer test administered at the police station should have been suppressed. He cites Ark. Code Ann. § 5-65-203(b)(2) (Supp. 2003), which provides:

> If the person tested requests that additional tests be made, as authorized in § 5-65-204(e), the cost of the additional tests shall be borne by the person tested, unless the person is found not guilty, in which case the arresting law enforcement agency shall reimburse the person for the cost of the additional tests.

Arkansas Code Annotated section 5-65-204(e)(2) (Supp. 2003) provides that the officer shall advise the person in writing of his right to an additional test, and further advise that if the person chooses to have an additional test and is found not guilty, he will be reimbursed for the cost of the additional test. Because the police failed to inform him that he would be reimbursed for the cost of an additional test upon being found not guilty, Mr. Daniels contends that the result of the test taken at the direction of the law enforcement officer was inadmissible under the clear provisions of Ark. Code Ann. § 5-65-204(e)(3).

We agree that the trial court erred in allowing the State to introduce evidence that Mr. Daniels failed the portable breath test. A chemical analysis that has not been certified by the Department of Health is not admissible as evidence of driving while intoxicated. Ark. Code Ann. § 5-65-206(c) & (d) (Supp. 2003); *see also Patrick v. State*, 295 Ark. 473, 750 S.W.2d 391 (1988). Portable breathalyzer tests have not been certified by the Department of Health. *Massengale v. State*, 319 Ark. 743, 894 S.W.2d 594 (1995). Thus, the ruling of the trial court admitting evidence of the portable breathalyzer test result was erroneous. *See id.*

We further hold that the trial court erred in admitting the .10 result of the breathalyzer test administered at the police station. In 2001, our legislature amended Ark. Code Ann. § 5-65-204(e). The amended version of the statute explicitly provides that the officer shall advise the person "that if the person is found not guilty, the arresting law enforcement agency will reimburse the person for the cost of the additional test," and that failure to advise a person of this right "shall preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer." Ark. Code Ann. § 5-65-204(d)(2) & (3) (Supp. 2003).

The trial court ruled, and the State argues on appeal, that the breathalyzer result was admissible because there was substantial compliance with the applicable statute. Substantial compliance with the statutory provision about the advice that must be given is all that is required. *Lampkin v. State*, 81 Ark. App. 434, 105 S.W.3d 363 (2003). In the instant case, the officer complied with part of the statute by advising Mr. Daniels that he could have an additional test at his own expense, and by offering to assist him in obtaining one. However, it is undisputed that there was no compliance at all with requirement that appellant be advised that he would be reimbursed for the cost of the test if found not guilty. Thus, we reject the substantial-compliance argument now being raised by the State.

If the language of a statute is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion to resort to rules of statutory interpretation. *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003). The supreme court construes criminal statutes strictly, resolving any doubts in favor of the defendant. *Id.* The provisions of Ark. Code Ann. § 5-65-204(e) (Supp. 2003)

are clear, and because there was a failure of compliance, we are constrained to reverse the trial court's admission of the breathalyzer test result.

Finally, we address the State's contention that, even if admission of the portable breath test was error, such error was harmless in light of the overwhelming evidence of appellant's guilt. For this proposition, the State relies on *Massengale v. State, supra.* The State asserts that there were other factors indicative of appellant's guilt, including the .10 breathalyzer result.

We do not agree that admission of the portable breath test result amounted to harmless error. In *Massengale v. State, supra,* the supreme court held that admission of an unsatisfactory portable breathalyzer test was harmless in light of other overwhelming admissible evidence, which included Mr. Massengale's refusal to submit to a certified breathalyzer test. In the case at bar, Mr. Daniels submitted to the certified test, but we now hold that the result should not have been admitted. Arkansas Code Annotated § 5-65-103 (Supp. 2003) criminalizes driving while intoxicated, and provides:

> (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 the alcohol concentration in the person's breath or blood was eight-hundredths (0.08) or more based upon the definition of breath, blood, and urine concentration in § 5-65-204.

Pursuant to our resolution of the evidentiary issues presented in this appeal, the State failed to offer any competent evidence to prove a violation of subsection (b) of the above statute. While the State did introduce competent evidence of Mr. Daniels's intoxication, we hold that this evidence was not so overwhelming as to render the trial court's errors harmless.

Reversed and remanded.

VAUGHT and CRABTREE, JJ., agree.

Wade Matthew CEOLA *v.* Ashley (Ceola) BURNHAM

CA 03-574 139 S.W.3d 150

Court of Appeals of Arkansas
Division II
Opinion delivered December 17, 2003

Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd., by: *Sam Hilburn* and *Traci LaCerra*, for appellant.

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

SAM BIRD, Judge. Wade Matthew Ceola brings this appeal contending that the court abused its discretion by following the child-support guidelines and ordering him to pay a percentage of his salary as child support. Ceola's income exceeds the amount of income shown on the family-support chart, and, pursuant to *In Re: Administrative Order No. 10, Arkansas Child Support Guidelines*, 347

Ark. 1064 (2002), he was ordered to pay 15 percent of his monthly income in child support. Ceola contends that the child's mother, appellee Ashley Burnham, is able to adequately support their child and provide for all of the child's reasonable needs; therefore, Ceola contends that the court abused its discretion in not deviating from the family-support guidelines and in not ordering him to pay less than 15 percent of his monthly income in child support. We disagree, and we affirm.

Burnham and Ceola were divorced in 1999, at which time both were in their residencies at the University of Arkansas for Medical Sciences. Burnham was awarded custody of the parties' minor child, Jacob, and Ceola was awarded visitation. At the time of the divorce, Ceola was ordered to pay $390.00 per month based upon his take-home pay at that time. Following the parties' divorce and at the conclusion of his residency, Ceola moved to Springfield, Missouri, to practice as a neurosurgeon. At the conclusion of her residency, Burnham moved to Russellville, where she is a radiologist.

Burnham filed a petition seeking an increase in child support. Ceola conceded that an increase was in order, but requested that the court deviate from the support guidelines. A hearing was held in January 2003 involving the issues of visitation and child support.

Ceola testified that in 2002, he earned $400,000, and he stated that he expected to earn more in the future. He also testified that he had remarried. Kevin Moore, a certified public accountant, testified that based upon financial statements that he had been given, Ceola's net income after taxes was $225,248.00. Ceola testified that he had established a trust fund for Jacob and was in the process of establishing a fund for Jacob's education expenses. He stated that he would like to put some of the money that he pays in child support into a trust fund managed by him rather than Burnham.

Ashley Burnham testified that her annual salary is $320,000. She also stated that she makes sufficient money on her own to support Jacob. She stated that she has no intention of using the money she receives as child support for her own support. She stated that all of the money she receives for child support will be spent on their child or placed into a trust fund. She stated that if she saved all of the child support paid by Ceola in a trust fund, the sum would amount to $390,000 by the time Jacob turned eighteen. She

testified that the divorce decree stated that she and Ceola would each be responsible for one half of the expenses of sending Jacob to college.

The court found that no deviation from the support guidelines was necessary and ordered Ceola to pay 15 percent of his net income as child support, which amounted to $2,650.98 a month. The court wrote that Ceola "should provide a standard of living for the minor child which is consistent with his own standard of living." Based upon Ceola's affidavit of financial means, the court found that he enjoys a "very high standard of living." The court also considered Ceola's pay in comparison to Burnham's pay and found that Burnham's weekly take-home pay represents seventy percent of Ceola's weekly pay. It found that although Ceola had established an educational trust for the minor child, that act does not diminish the fact that considerable expenses are being incurred by Burnham to provide the minor child with a good standard of living. In addition, the court found that there had been no evidence that the child support is not being used by Burnham for the benefit of the child. The court wrote, "The child should not be penalized because the [appellee] has sought to prepare in advance for his education by using her own funds to provide for his housing, clothing, food, entertainment, medical and transportation needs." The court noted that appellee incurred considerable expenses each month in providing the minor child with a good standard of living.

Ceola brings this appeal contending that the court should have deviated from the support chart. He states that he should not have to pay $2,650.98 a month in child support because the child is being well provided for. He argues that because Burnham testified that she did not intend to use the child support for monthly expenses associated with supporting Jacob, then Ceola should not be forced to contribute to his support in the amount of $2,650.98. He argues that by saving the money in an educational IRA, Burnham will not have to pay for one half of the college expenses for Jacob as required by the divorce decree. He asks this court to limit his child-support obligation to the actual amount needed for the child's monthly expenses, which he alleges is $1,700.

The amount of child support lies within the discretion of the court and the court's findings will not be disturbed on appeal, absent a showing of an abuse of discretion. *Smith v. Smith,*

341 Ark. 590, 19 S.W.3d 590 (2000). A trial judge may deviate from the chart amount if it exceeds or fails to meet the needs of the children. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003). The Legislature has provided that a family-support chart is the appropriate method for determining the amount of support for children by their noncustodial parent. Arkansas Code Annotated section 9-12-312 (Repl. 2002) states:

> In determining a reasonable amount of support 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.

The courts begin with a presumption that the chart amount is reasonable. *Smith v. Smith, supra.* Reference to the chart is required, and the chart establishes a rebuttable presumption of the appropriate amount that can only be modified on the basis of written findings stating why the chart amount is unjust or inappropriate. *Smith v. Smith, supra.* 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. *Williams v. Williams, supra.* The court may grant more or less support if the evidence shows that the needs of the children require a different level of support. *See In Re: Administrative Order No. 10, Arkansas Child Support Guidelines, supra.*

Section V of *In Re: Administrative Order No. 10, Arkansas Child Support Guidelines, supra,* sets forth the following factors to be considered when deviating from the amount set by the chart: food, shelter and utilities, clothing, medical expenses, educational expenses, dental expenses, child care (including day care or other expenses for supervision of children necessary for the custodial parent to work), accustomed standard of living, recreation, insurance, transportation expenses, and other income or assets available to support the child from whatever source. The guidelines then list what are called additional factors. They are: the procurement and maintenance of life insurance, health insurance, dental insurance

for the children's benefit; the provision or payment of necessary medical, dental, optical, psychological or counseling expenses of the children; the creation or maintenance of a trust fund for the children; the provision or payment of special education needs or expenses of the child; the provision or payment of day care for a child; the extraordinary time spent with the noncustodial parent, or shared or joint custody arrangements; the support required and given by a payor for dependent children, even in the absence of a court order; and where the amount of child support indicated by the chart is less than the normal costs of child care. The Family Support Chart is revised every four years to ensure that the support amounts are appropriate for child-support awards. *See Smith v. Smith, supra.*

In this case, the court made substantial findings that a deviation from the chart was not required. The court stated that Jacob should be supported in a lifestyle similar to the one Ceola has established for himself. He also stated that Jacob should not be punished because Burnham has sought in advance to prepare for his college education. In addition, Burnham's testimony was that she intended to save most of the money, but that she would also spend it on other necessary expenses, such as a car for Jacob when he turns eighteen. One of the factors the court may consider in determining whether or not to deviate from the guidelines is the creation or maintenance of a trust fund for the child. In this case, appellee stated that if she did not spend the money immediately on Jacob, she would not spend it on herself, but would invest it in a trust fund.

The court also considered the pay of both of the parents and found that Burnham made seventy percent of the pay of Ceola. The court found Burnham's monthly expenses total $5,109.73 for housing, gas, electricity, water, telephone, food, clothing, laundry, child care and medical expenses. Her monthly costs associated with transportation are $1,356.65. The court stated that in light of the expenses associated with Burnham's expenditures in maintaining a good standard of living, $2,650.98 per month in child support is neither unjust nor inappropriate.

The court found that Ceola's monthly income amounted to $17,659.65. His expenditures included a $3,043.45 monthly.house payment, and a monthly car payment of $2,524.76. His monthly expenditures include $904.51 on clothing, $25.00 on meals outside the home, $1,304.35 on furniture, $187.08 for lawn

and pool care, and $301.50 per month for entertainment. He also spends $207.46 per month on a video monitor for DVD movies and $10.52 for satellite radio. Under the circumstances, we cannot say that the judge abused his discretion in not deviating from the child-support guidelines. *See Williams v. Williams, supra.*

Affirmed.

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

Glenn E. GEORGE *v.* STATE of Arkansas

CA CR 02-1001 140 S.W.3d 492

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 17, 2003

[redacted]

T.B. Patterson, Jr., P.A., by: *T.B. Patterson, Jr.*, for appellant.

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

WENDELL L. GRIFFEN, Judge. This case arises from the criminal conviction of Glenn E. George of nine counts of possessing visual or print medium depicting sexually explicit conduct of minors. The conviction resulted in a sentence of ninety years' imprisonment and $78,000 in fines. Appellant argues that the trial court erred in denying (1) his motion to suppress evidence seized pursuant to an invalid warrant; (2) his motion to suppress evidence not described in the warrant or in the affidavit incorporated into the warrant; (3) his motion to dismiss the charges for violation of the speedy-trial rule; and (4) his motions for directed verdicts for failure of proof on three counts. We hold that the search warrant was invalid because the affidavit upon which it was based failed to state a time reference for when the criminal activity occurred or the contraband to which it referred was observed. Accordingly, we reverse and remand.

Factual and Procedural History

In this case, the affidavit for a search warrant stated that B.T., fourteen years of age, reported to her mother on March 21, 2001, that appellant had provided her and some of her friends with alcohol and that she had seen nude photographs of girls about B.T.'s age in his apartment. On March 27, 2001, Hot Springs Police Department Detective Paul Norris interviewed B.T. and her mother and learned that, while in appellant's apartment, B.T. saw photographs of nude girls that she knew to be fourteen to fifteen years of age on appellant's computer. Subsequently, Norris also interviewed J.T., who confirmed that appellant had supplied the girls with alcohol at his apartment. J.T. also told Norris that she had found a video on appellant's computer, while she was there, depicting a friend named K.T. dancing nude.

Norris then wrote an affidavit for a search warrant. In that affidavit, Norris alleged that at appellant's specifically described residence,

> there is now being concealed certain property, namely: the evidence associated with the producing, directing, or promoting sexual performances and employing or consenting to use of child in sexual performances.

> Which are[:] evidentiary items in a sexual exploitation investigation and in direct violation of Arkansas State Statute 5-27-402 and 5-27-403.
>
> And that the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: That on 03-22-01 [B.T.'s mother] reported her fourteen year old daughter, [B.T.], revealed to her Glenn George provided alcohol to her and other friends and that she observed nude photographs of other girls she knows to be age fourteen or fifteen. [B.T.] was interviewed and stated Glenn George gave her an alcoholic beverage to drink and she saw nude photographs on George's computer of girls she knows to [be] fourteen or fifteen years old. That a friend of [B.T.'s], [J.T.], was also interviewed and stated George provided her with an alcoholic beverage and she found a video on George's computer of a friend, [K.T.], dancing nude.

The affidavit was signed by Norris. The issuing magistrate signed below, with a handwritten date of March 26, 2001. The affidavit was file-stamped April 2, 2001. The warrant itself, however, also signed by the magistrate, shows the date of April 27, 2001, but was also filed on April 2, 2001. In relevant parts, the warrant reiterated the descriptions and allegations contained in the affidavit, and otherwise expressly incorporated the "attached affidavit" by reference.

Norris executed the warrant that same day (March 26, 2001). Police officers found photographs of minor girls and videotapes, all of which appeared to the officers to be lewd material. Some of the material showed appellant engaging in sexual activity with some of the minors.

Appellant was arrested on March 28, 2001. His trial commenced on May 15, 2002. At a pretrial hearing, appellant moved to suppress the evidence seized in the search. One of his arguments was that the affidavit failed to establish a time frame when the observations leading to the allegations had been made. The trial court denied the motion to suppress, reasoning as follows:

> [L]ooking at the four corners of the [affidavit for the search warrant], there is sufficient time frame alleged that the court could feel that there was just cause for the issuance of the warrant. The matters that were being sought were not consumables; they were not items that were normally moved in the course of illegal commerce; there's nothing to indicate that the items would not

> remain in place for a substantial period of time; they were being kept by [appellant] for what appeared to me off the facts alleged for his personal use, primarily; and the time frame is set out on the warrant I think to give me sufficient cause to believe that this illegal material remained on his premises on the date that the warrant was issued.

Appellant also made a number of technical challenges to the warrant, none of them to any avail.

At the end of the State's case-in-chief, appellant moved for a directed verdict on counts three through five of the criminal information. Count three alleged that appellant engaged in deviate sexual activity with another person not his spouse who was less than fourteen years old. Counts four and five alleged that appellant possessed visual or print medium depicting minors participating or engaging in sexually explicit conduct. Counsel for appellant stated the following:

> [A]s to each of the counts that involve these young girls just baring their breasts for the video camera. At least two of them testified that they took them, and there was nothing to show that [appellant] knowingly possessed the items, even if they met the definition of sexual behavior. I don't think they do, because they don't qualify as a lewd exhibition. It's the same sort of flashing behavior you see maybe in New Orleans for the Mardi Gras where they toss jewels and silly things like that. It's more akin to mooning [than] to lewd behavior.

The trial court denied the motion. Appellant then rested and renewed his motion, which was again denied. The resulting convictions were based on the offense of possessing visual or print medium depicting sexually explicit conduct involving children.

Sufficiency of the Evidence

Appellant challenges the sufficiency of the evidence underlying his conviction of possessing visual or print medium depicting sexually explicit conduct of minors. He does so as his last point of error. However, out of concern for double-jeopardy, we must consider this point first. *Winbush v. State*, 82 Ark. App. 365, 107 S.W.3d 882 (2003).

In his motion for directed verdict, appellant argued that there was insufficient proof of his knowledge and insufficient proof of the allegation that the contents of the visual or print media constituted in fact lewd exhibition. We note in passing that appellant now argues only the latter point. We also recognize that appellant did not offer a constitutional challenge to the statutes in question, and does not do so now on appeal.

We review challenges to the sufficiency of the evidence by determining whether substantial evidence, direct or circumstantial, supports the guilty verdict. *Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003). Substantial evidence is evidence of sufficient certainty and precision that compels a conclusion and passes beyond mere suspicion or conjecture. *Id.* In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the verdict and consider only that evidence supporting it. *Id.*

The Arkansas Code forbids the knowing possession of "any visual or print medium depicting a child engaging in sexually explicit conduct." Ark. Code Ann. § 5-27-304(a)(2) (Repl. 1997). Among the statutory definitions pertinent to the term "sexually explicit" we find the "[l]ewd exhibition of . . . [t]he breast of a female." Ark. Code Ann. § 5-27-302(2)(E)(ii) (Repl. 1997). Our case law has defined "lewd" to mean "obscene, lustful, indecent, lascivious," as well as "offensive to common propriety," or "offending against modesty or delicacy." *Gabrion v. State*, 73 Ark. App. 170, 173, 42 S.W.3d 572, 574 (2001).

In fact, our decision in *Gabrion* is quite to the point, in that that case involved a videotape depicting two minor girls. We noted in our opinion that the video tapes involved in that case contained "full frontal nudity." *Id.* at 172, 42 S.W.3d at 573. In addition, the videotape showed Gabrion directing the girls to undress and "assume suggestive poses that showed off their breasts and buttocks." *Id.*, 42 S.W.3d at 573. We found that the jury could properly deem the videotape to be lewd and noted further that Gabrion apparently wanted us to ignore the fact that the girls on the tape were underage and not adults. *Id.*, 42 S.W.3d at 574.

In the present case, we hold that the jury had substantial evidence before it to convict appellant of possessing visual or print medium depicting sexually explicit conduct of minors. The images in question were found within a videoclip on two CD-

ROMs. The CD-ROMs were introduced at trial as State's Exhibits A and B. Still images from those videoclips were introduced separately as State's Exhibits E, F, and J. Among those images, one was labeled "[B.T.'s] Tits." Most of the pictures show young girls displaying their breasts.

B.T. testified at trial that she was the girl depicted in the pictures referred to as Picture 37 and "[B.T.'s] Tits." She also testified that the pictures were taken on August 10, 2000, and that her date of birth was June 12, 1986. Another witness identified herself and two other girls on Picture 166. She stated that she was fourteen years of age when that picture was taken.

In Exhibits E and F, the girls can be seen dancing and posing provocatively. In Exhibit J, the images mostly show the girls smiling and posing. However, the first image of that series is labeled "Goodbigdicksuckers." That same image shows the girls with their mouths wide open. The captions of other images reveal titles such as "My pussy is so hot," "Please fuck me," and "I'll fuck you or suck you."

While appellant attempts to characterize the images as something akin to mere nude photos or something that could be seen at a Mardi Gras party, the evidence leads us to a different conclusion. The various labels, especially when taken together with the specific kind of posing, dancing, and frontal nudity, establish very well the lewd nature of the material. In particular we point out that appellant's case really appears indistinguishable from *Gabrion v. State, supra*, where we held that frontal nudity of minors, along with suggestive posing and directing, was sufficient evidence for the same offense. Furthermore, the crucial fact, and most relevant for the conviction in both cases, remains that both this case and *Gabrion* involve minors, not adults. Thus, it was not error for the trial court to deny appellant's motions for directed verdict.

Defective Affidavit

Appellant next argues that the affidavit for the warrant contained an insufficient reference to time, that the warrant itself contained an inadequate description of property to be seized, that the warrant contained a number of technical irregularities, and that property not specified in the warrant was seized. We reverse the trial court's denial of the motion to suppress based on the insufficient time reference in the affidavit.

We review a trial court's determination of questions of probable cause or reasonable suspicion *de novo*, based on the totality of the circumstances, reviewing the findings of historical fact for clear error and determining whether those facts gave rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Cummings v. State, supra.* The magistrate who issues the warrant must make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Sanders v. State*, 76 Ark. App. 104, 61 S.W.3d 871 (2001).

Where the affidavit for a search warrant makes no mention of the time during which the alleged criminal activity occurred or was taking place, the affidavit is considered insufficient to support the issuance of a search warrant, leading to the suppression of the evidence seized in the resulting search. *Collins v. State*, 280 Ark. 453, 658 S.W.2d 877 (1983). Pursuant to Ark. R. Crim. P. 13.1(b) (2003), some mention of time in the affidavit is crucial because a magistrate must know that criminal activity or contraband exists where the search is to be conducted at the time of the issuance of the warrant. *Heaslet v. State*, 77 Ark. App. 333, 74 S.W.3d 242 (2002). We have held that suppression is not required if the time-frame can be inferred from the affidavit itself. *Id.*

The State argues that appellant's claim regarding insufficient time-frame is akin to what is known as a staleness claim. We disagree. A staleness claim does not challenge the complete lack of any time reference, or inference, within the four corners of the affidavit for the search warrant, but bases the challenge on the period of time that has passed between observation of the criminal activity or contraband — as set forth in the affidavit for the search warrant — and the execution of the search. In its argument, the State cites several cases that all correctly hold that, beside the time factor, we must consider other factors, such as the nature of the criminal activity involved and the kind of property subject to the search. *See, e.g., Lacy v. United States*, 119 F.3d 742 (9th Cir. 1997); *United States v. Maxim*, 55 F.3d 394 (8th Cir. 1995); *United States v. Rugh*, 968 F.2d 750 (8th Cir. 1992); *Chrobak v. State*, 75 Ark. App. 281, 58 S.W.3d 387 (2001); *Hause v. Commonwealth*, 83 S.W.3d 1 (Ky. Ct. App. 2001).

None of those cases involve the situation we face. This case involves an affidavit that omits any reference to when the informant observed the alleged criminal activity and contraband in appellant's home. The affidavit merely sets out the date when the informant told her mother about the allegations. Every case cited by the State, however, involves a true staleness claim, where the affidavit or warrant made a specific reference to a date when the criminal activity or contraband was observed. At issue in those cases was whether the nature of child pornography give a magistrate reason to believe that images would remain in an accused's possession for longer periods of time so as to justify the various time gaps between observation of the alleged crime and the execution of the search warrant. *See, e.g., Lacy v. United States, supra.*

Thus, the State's argument is inapposite to the claim involved in the instant case. We do not now need to distinguish between cases involving child pornography on the one side and drugs on the other. The nature of the contraband in question becomes an issue where the challenge goes to the staleness of the information contained in the affidavit. Instead, the case law we must apply to the instant case is clear. When an affidavit does not provide any reference of time for when the criminal activity or the contraband was observed, the affidavit fails. *See Collins v. State, supra; Heaslet v. State, supra.*

Under Arkansas law, a further question is whether the affidavit, within its four corners, provided a sufficient basis for an inference of time. *See Heaslet v. State, supra.* In *Heaslet*, we held an affidavit insufficient that mostly contained dates referring to the time when the affiant received a report, not when the activity was observed. *Id.* We held that the affidavit must provide direct or circumstantial evidence that the alleged contraband indeed is at the place to be searched. *Id.* We further stated that circumstantial evidence alone that a suspect may be a drug dealer was insufficient evidence that anything is in his home. *Id.*

In the case at bar, the affidavit merely states the date when the informant, the minor and alleged victim, informed her mother of the allegations. There are no dates referring to when the alleged criminal activity or contraband was observed. Specifically, the affidavit does not state or suggest when appellant allegedly supplied alcohol to minors. It does not state or suggest when B.T. and/or J.T. saw nude photographs of minor-aged girls on appel-

lant's computer. By analogy to *Heaslet*, we hold that the mere allegation that a suspect may be a child pornographer, without some time reference as to when the observations were made, is insufficient circumstantial evidence to conclude that contraband will be found at his home no matter when it may have been formerly observed. Consequently, the affidavit fails for lack of a time reference and the search warrant was invalid.

To hold otherwise would amount to judicial approval of a most unusual proposition, namely that mere conjecture concerning the time of observation of the contraband suffices under the Fourth Amendment of the United States Constitution to justify a search and seizure. As stated above, the law requires for an affidavit to include either a reference of time or a basis upon which one can draw an inference. Inference, however, is not the same as conjecture. The affidavit before us contains no information that would allow us to draw a permissible inference about when the minor saw the contraband in appellant's home. Any assumptions that she might have seen the contraband shortly before she told her mother are unsupported by the facts as they were alleged in or could be inferred from the affidavit.

Good-Faith Exception

The remaining question is whether we can uphold the trial court's decision about the search and seizure pursuant to the good-faith exception found in *United States v. Leon*, 468 U.S. 897 (1984). The good-faith exception re-validates a police officer's search and seizure even though the warrant underlying the search action is later found invalid. *Id.* However, the good-faith exception cannot cure certain errors, namely: (1) when the magistrate is misled by information the affiant knew was false; (2) if the magistrate wholly abandons his detached and neutral judicial role; (3) when the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) when a warrant is so facially deficient "that the executing officers cannot reasonably presume it to be valid." *Id.*

Our supreme court has held that the good-faith exception saves the warrant in question if we can determine from the four corners of the affidavit that the officers could infer from the affidavit itself with certainty the time during which the criminal activity was observed. *Herrington v. State*, 287 Ark. 228,

697 S.W.2d 899 (1985). In that case, the affidavit lacked any direct reference to the time of observation. *Id.* There were no terms such as "recently" or "now," and no reference to an urgent situation. *Id.* Accordingly, our supreme court declared the affidavit defective and the warrant invalid.

In the present case, we hold that the good-faith exception cannot save the search warrant because the affidavit was defective in that it, too, lacked any reference to the time of observation of the alleged criminal activity. As such, reliance on the warrant by the police officers executing the search warrant was unreasonable. To say otherwise would essentially mean that a police officer could reasonably rely on a search warrant based on an affidavit that does not contain any reference or ground for inference as to when the criminal activity happened or the contraband was observed. We see no legitimate reason to reach that conclusion in the face of a decade of court decisions requiring warrants to have such information and declaring them invalid without it. *See Collins v. State, supra.* Any reliance on a search warrant that is so fundamentally defective cannot be deemed reasonable under the *Leon* good-faith exception.

Speedy Trial

Finally, appellant claims error in the trial court's decision to deny his motion to dismiss for lack of a speedy trial. Arkansas Rule of Criminal Procedure 28.1(b) (2003) requires the State to try a criminally accused within twelve months from the time provided in Ark. R. Crim. P. 28.2. Rule 28.2 generally provides for the twelve months to run from the time the charge is filed. However, periods of delay resulting from a continuance granted at the request of the defendant or his counsel must be considered when calculating the twelve months period. Ark. R. Crim. P. 28.3) (2003). Here, appellant was arrested on March 28, 2001. His trial did not start until May 15, 2002. However, appellant moved for a continuance on January 10, 2002. The trial court granted the continuance until May 15, 2002. Pursuant to our rules, we hold that there was no violation of the speedy-trial requirement.

Conclusion

The dissenting opinion expresses indignation at our decision to reverse appellant's conviction and asserts that "[c]ommon sense tells us that [his] illegal activity occurred recently and was likely continuing to occur." As our opinion reports, however, the affidavit for the search warrant that the police used to seize the incriminating evidence from appellant's residence does not provide a single objective clue about when the minor informants observed illegal evidence or activity. Apparently, the police failed to ask them basic questions of criminal investigation such as,"When did you see this?" or "When did these things happen?" Had they done so and made the answers obtained from those basic queries part of the affidavit for the search warrant, the staleness cases relied on by the State would certainly be germane to our analysis and decision.

The Fourth Amendment does not permit judges to assume or imagine missing details into search warrant affidavits about when illegal activity occurred or was observed merely because we deplore criminal conduct, whether affecting minors or anyone else, or because of some subjective notion of "common sense" and "indignation." Recognizing and respecting that reality is by no means a "hyper-technical approach" as claimed by our dissenting brethren. Rather, it keeps faith with time-honored principles and procedures that underlie and give life to the Fourth Amendment.

The fact that the police have the *might* to seize material from a person's residence does not, under the Fourth Amendment, ever create the *right* to do so. Otherwise, the whole notion of probable cause, which the Fourth Amendment requires be demonstrated to an independent judicial officer before a search warrant can be issued, is a farce. Given the record now before us and a line of court decisions from this court and our supreme court declaring that to omit temporal information in a search warrant application about when alleged illegal activity occurred or was observed renders a search warrant unconstitutionally and fatally flawed, we unapologetically refuse to treat probable cause and the Fourth Amendment with such disdain.

Reversed and remanded.

GLADWIN, NEAL, and BAKER, JJ., agree.

PITTMAN and ROBBINS, JJ., dissent.

JOHN B. ROBBINS, Judge, dissenting. Many times a reversal of a criminal conviction is met with undeserved public criticism resulting from a lack of understanding that individual liberties guaranteed by our federal and state constitutions not only protect the best of us but the worst of us as well. Sometimes, however, criticism is deserved and public indignation justified. The result of the majority opinion today reverses the conviction of a man who apparently invited young girls to his apartment, doled out alcohol to make the girls more pliable, and recorded lewd acts for his and others' viewing pleasure. This reversal rests on the failure to insert the exact date that the teenagers were in the apartment. Common sense tells us that this illegal activity occurred recently and was likely continuing to occur. We do nothing to further the interests of the Fourth Amendment with the majority's hyper-technical approach and by punishing the State with suppression in this instance. If the trial judge erred by finding probable cause to exist, the good-faith exception supports denial of suppression.

After receiving a citizen complaint, the Hot Springs police officers did what they should have done. They investigated, obtained statements from persons with knowledge, prepared an affidavit in support of a request for a search warrant naming the sources of information, and presented the affidavit to a magistrate, Judge John Homer Wright, for a probable cause determination. Judge Wright concluded that the affidavit established probable cause for believing that pornographic photographs of minors were indeed located at the appellant's residence. Today, four judges of our court hold that, notwithstanding these efforts of law enforcement to comply with supreme court rules and constitutional safeguards, Mr. George's conviction must be reversed and the evidence seized may not be used against him in any subsequent trial. In arriving at this decision I submit that not only does the outcome appear unjust, but we resort to an unreasonable construction of constitutional standards to reach that result. I would affirm the suppression issue because the officers were entitled to place good-faith reliance on the warrant.

In reviewing a trial court's ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances, and reverse only if the ruling is clearly against the preponderance of the evidence. *Chrobak v. State*, 75 Ark. App. 281, 58 S.W.3d 387 (2001). Critical to this inquiry is the uniform rule that some mention of time must be included in the affidavit for a

search warrant. *Hartsfield v. State*, 76 Ark. App. 18, 61 S.W.3d 190 (2001). Although the supreme court and this court have reversed cases based upon the failure of affidavits for search warrants to mention time, *Herrington v. State*, 287 Ark. 228, 697 S.W.2d 899 (1985), and *Ulrich v. State*, 19 Ark. App. 62, 716 S.W.2d 777 (1986), the appellate courts have also held that time can be inferred from the information in the affidavit. *See Collins v. State*, 280 Ark. 453, 658 S.W.2d 877 (1983); *Fouse v. State*, 73 Ark. App. 134, 43 S.W.3d 158 (2001).

Time is crucial because a magistrate must know that criminal activity or contraband exists where the search is to be conducted at the time of the issuance of the warrant. *Hartsfield v. State, supra.* It is clear that the time that is critical is the time during which the criminal activity was observed. *Id.* For a search warrant to issue, evidence, either direct or circumstantial, must be provided to show that the contraband or evidence sought is likely to be found in the place to be searched. *Yancey v. State, supra.* In *Herrington*, our supreme court held that when the omission of any reference of time in the supporting affidavit is so complete that none can be inferred, a police officer's reliance on the search warrant is unreasonable, *i.e.*, the good-faith exception will not apply. *See also Smith v. State*, 79 Ark. App. 79, 84 S.W.3d 59 (2002). I am persuaded that in this case the time element can be inferred and that, therefore, the officers could legitimately rely on the issuance of the warrant by the magistrate, even if the magistrate was incorrect to find that probable cause existed.

I refer back to the four corners of the affidavit as set forth in the majority opinion. On March 26, 2001, the officer swore out the affidavit; stating in it that there is "now" being concealed evidence associated with child pornography. The facts in the affidavit referred to a report to police on March 22, 2001, by a mother that her fourteen-year-old daughter revealed to her that appellant gave her and her friends alcohol and that while there the daughter saw nude photographs of other girls she "knows" to be fourteen or fifteen. The officer confirmed the mother's report by interviewing the daughter, who confirmed the information and added that the photos were seen on appellant's computer. The officer followed this up with an interview with the girl's friend, who stated that she was also given alcohol by appellant and that she saw a nude video of another friend on appellant's computer. There are at least two references to time — (1) the March 22 report of this illegal activity, followed by two interviews within four days

thereafter of the teenage girls who were present in appellant's apartment, and (2) the statement by the officer that there was "now being concealed" nude photos of girls presently known to be fourteen or fifteen.

In *Collins v. State*, 280 Ark. 453, 658 S.W.2d 877 (1983), the supreme court expressed approval of denying a motion to suppress in the face of a failure to state a time of criminal activity where the affidavit recited that the contraband was "now" in the suspect's possession and that the search was urgent, *Coyne v. Watson*, 282 F. Supp. 235 (D.C. Ohio 1967), and where the affidavit said that contraband was "recently" seen, coupled with the use of present tense as to the location of the contraband, *Sutton v. State*, 419 S.W.2d 857 (Tex. Crim.1967). In the present appeal, the affidavit stated that "there is *now* being concealed" pornographic evidence, and that one of the girls interviewed stated that she saw photos depicting "girls she *knows* to be fourteen or fifteen." The context of the affidavit permits the inference of present tense, as was approved in *Collins, supra.*

I also disagree with the majority opinion that the cases on "staleness" of probable cause have no relevance to this inquiry. In an internet pornography case on appeal to this court, we upheld the warrant in the face of a staleness argument even though the information came through the internet reportedly three months prior to the issuance of a search warrant. The court in *Chrobak v. State*, 75 Ark. App. 281, 58 S.W.3d 387 (2001) noted that "the tendency of pedophiles to retain child pornography for a long period of time minimized the lapse of time between information in the affidavit and the execution of a search warrant." *Id.* at 294, 58 S.W.3d at 395. This court also held in *Cardozo & Paige v. State*, 7 Ark. App. 219, 646 S.W.2d 705 (1983), that when the criminal activity is of a continuing nature, one may utilize his or her common sense regarding the relative staleness of the information on which the warrant is sought. The supreme court in *Gilbert v. State*, 341 Ark. 601, 19 S.W.3d 595 (2000), reiterated and approved of the following rationale adopted in *Cardozo*:

> The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: The character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transfer-

> able or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc.

Cardozo, 7 Ark. App. at 222, 646 S.W.2d at 707.

While the issue in this case is whether probable cause ever arose, and not whether the State allowed the probable cause to become stale or evaporate, the situation is analogous. Probable cause to believe that the child pornography would be present is guided by the common-sense reason that pedophiles tend to retain child pornography for a long period of time. *See Chrobak, supra.* This kind of contraband is not a consumable like drugs but is more in the nature of a personal collection, unlikely to be removed. The trial judge recognized this in his findings when denying the motion to suppress. The totality of the circumstances, and reason, indicate that when an early teenage girl reports that appellant has given her alcohol and she has viewed pictures of naked peers on his computer, one may reasonably infer that this occurred in the recent past. *See also Watson v. State*, 308 Ark. 643, 826 S.W.2d 281 (1992).

The majority is wrong when it states that one must rely on conjecture to decide when the contraband was possessed. Officers must be able to legitimately infer time of criminal activity, but they are not required to have a date certain in order to withstand scrutiny upon review. If we hold the general belief that child pornographers tend to keep their materials for long periods of time, *see Chrobak, supra,* and if we are permitted to use common sense to decide that teenage girls who are consuming alcohol at a man's apartment probably were there within the recent past, we can reasonably infer that criminal activity had occurred and was continuing to occur until the warrant was executed.

I submit that even if the time frame as analyzed by the magistrate was defective, the denial of the motion to suppress would survive under the *Leon* good-faith exception. The basis for the exclusionary rule is not to deter objectively reasonable law enforcement activity, such that in the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. *Id.* The purpose of the exclusionary rule is to punish wrongdoing by an officer. Suppression is appropriate only if the officer was dishonest or reckless in preparing the affidavit or could not have harbored an objectively reasonable belief in the

existence of probable cause. *See Crain v. State*, 78 Ark. App. 153, 79 S.W.3d 406 (2002). In making the probable-cause determination, we are liberal rather than strict. *Bennett v. State*, 345 Ark. 48, 44 S.W.3d 310 (2001). Highly technical attacks on warrants are not favored, *see Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987), and suppression should issue only if a violation is substantial, *see* Ark. R. Crim P. 16.2(e).

I would affirm the denial of the motion to suppress because the officer could harbor an objectively reasonable belief that there was a legitimate inference of time in the affidavit to support probable cause for the issuance of the search warrant. Therefore, I dissent from the majority's conclusion to the contrary. The majority's holdings on the sufficiency of the evidence and speedy trial are correct, however, and as such, I would affirm appellant's convictions.

PITTMAN, J., joins.

Lynne PITTMAN *v.* Claude PITTMAN

CA 03-212 139 S.W.3d 134

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 17, 2003

Steven R. Jackson, for appellant.

Jim Rose, for appellee.

WENDELL L. GRIFFEN, Judge. This case arises from a judicial construction of a clause in a property, child custody, and support agreement between appellant, Lynne Pittman (now Gordy), and appellee, Claude Pittman. Appellant argues that the trial court erred by interpreting the parties' contract rather than giving effect to the plain language of the contract. We reverse and remand.

The parties were divorced in July 1998. Prior to the divorce, they executed the property, child custody, and support agreement now in question. The trial court incorporated that agreement into the final divorce decree. In December 2001, appellee filed a

petition to modify the provisions of that agreement as they related to spousal support. Appellant eventually filed a motion for summary judgment on that petition.

Before that litigation was put to rest by the trial court, the parties began a new disagreement over one particular clause of the existing property, child custody, and support agreement. Section Twelve of the Agreement states:

> Husband [that is appellee] agrees to provide and be solely responsible for the payment of the costs associated with an undergraduate degree for the minor child of the parties. Said expenses shall include tuition, books, lab fees, room, board, and other legitimate educational expenses.

Appellant filed a petition for contempt and breach of contract on September 10, 2002. The petition alleged that appellee had failed to make payments according to Section Twelve. Appellee denied that he was in contempt or that he breached the agreement.

On November 3, 2002, a trial on the matter took place. Appellee testified that he acknowledged the text of Section Twelve of the agreement. He stated that their mutual daughter, Hayley Pittman, for whose benefit Section Twelve existed, was at Johnson and Wales University at the time of the hearing. He admitted that he had not paid for any of her tuition, books, room, or board, but stated that he had not done so because no one had informed him how much to pay. He sent her seven hundred dollars. He stated that he knew that his daughter's apartment cost about $1,000 per month, but that he had not taken any action to determine any of the other expenses. Specifically, appellee acknowledged in court that under the agreement he was required to pay whatever it cost to put the daughter through school.

Appellee next testified that he, a veterinarian, made about $120,000 the previous year. Appellant is a teacher and makes approximately $20,000 per year. Appellee stated that he recently had become seriously ill and had hired his son, whom he paid about $60,000 per year. Appellee received $32,400 in disability and stated that his overall income had dropped to $92,000. He stated clearly that, if he "had to," he "can afford to send my daughter to the school." He also stated that the previous year he had sent his daughter to the University of Arkansas.

On cross-examination, appellee also stated that the cost of tuition at his daughter's current school was about $18,000 per year. He expressed a willingness to pay whatever it was he paid "last year."

Appellant testified that her daughter was pursuing a degree in culinary arts and restaurant management. She stated that her ex-husband, appellee, had agreed to pay all of their daughter's educational expenses rather than paying continuing child support. Neither of the parties had agreed to modifying the agreement in question. Appellant then introduced a chart of their daughter's living and school expenses, but we do not have that chart in the abstract or addendum. She also stated that their daughter had some scholarships and a grant to cover part of the cost.

The trial court subsequently ruled that Section Twelve did not clearly define the extent of the obligation to pay for the child's education. The trial court reiterated appellee's position that he had paid $12,000 the previous year and that this obligation should continue throughout the daughter's undergraduate studies. The court found that Section Twelve spoke only in "general terms," and that it used the words "legitimate educational expenses." The trial court found further that those words implied "reasonable" educational expenses. Based on Section Eight of the agreement, according to which appellee was obligated to pay appellant, inter alia, the sum of $1,500 per month for support, maintenance, and education of the parties' minor child, the trial court deemed Section Eight instructive concerning the parties' intent at the time they formed the instant agreement and that $1,500 would be a reasonable sum to support the daughter.

The final, written order of the trial court reiterated that, under the agreement, appellee had to pay spousal support to appellant in the amount of $3,500 per month (for a period of 96 months from the execution of the agreement filed July 9, 1998). The order further stated that the daughter had attended the University of Arkansas for one year, for which appellee had paid all expenses, and then relocated to a culinary school at the east coast. The order reiterated that the language of Section Twelve is very general in nature and sets no limits to be expended. The order equated "other legitimate educational expenses" with "reasonable expenses." The trial court emphasized in writing that its order did not constitute a modification of the agreement. The order fixed

appellee's obligation for education at $1,500 per month, for three years. From this order appellant now appeals.

Analysis

It is true that independent property settlement agreements such as the one involved here remain subject to judicial interpretation. *Rogers v. Rogers*, 83 Ark. App. 206, 121 S.W.3d 510 (2003); *Sutton v. Sutton*, 28 Ark. App. 165, 771 S.W.2d 791 (1989). In the *Rogers* case, the trial court found that the appellant had agreed to pay for "some other expenses" in addition to the child's tuition and books not covered by scholarships, and ordered him to pay $300 monthly. This court disagreed and held that there was "simply no provision in the agreement for such an allowance, and no evidence to support this award." *Id.*

However, even though the right to interpret existing agreements may exist, we still must follow the rules of contract construction. When contracting parties express their intention in a written instrument in clear and unambiguous language, it is our duty to construe the written agreement according to the plain meaning of the language employed. *Coble v. Sexton*, 71 Ark. App. 122, 27 S.W.3d 759 (2000). Where the meaning of the words is ambiguous, parol evidence is admissible to explain the writing. *Id.* When, on the face of the document, the reader can tell that something must be added to the written contract to determine the parties' intent, the ambiguity is patent. *Id.* Conversely, a latent ambiguity arises from undisclosed facts or uncertainties of the written instrument. *Id.* The initial determination of the existence of an ambiguity in a written contract rests with the trial court, and if an ambiguity exists, then parol evidence is admissible and the meaning of the term becomes a question for the fact finder. *Id.* On appeal, then, we do not set aside a trial court's finding of fact unless it is clearly erroneous, but the determination of whether a contract is ambiguous is a matter of law. *Id.* We do not defer to the trial court's determinations of law.

The trial court ruled that Section Twelve did not clearly define the extent of the obligation to pay for the child's education. It found that Section Twelve spoke in "general terms" only and that the section used the words "legitimate educational expenses." The trial court reasoned that those words meant "reasonable" educational expenses. Consequently, the trial court referred to

Section Eight of the parties' agreement, according to which appellee had obligated himself to pay appellant, *inter alia*, $1,500 per month for support, maintenance, and education of the child. As such, the trial court entered an order that appellee had to pay $1,500 per month for the child's college education.

The pertinent text of Section Eight reads as follows:

> Husband shall pay to Wife the sum of one thousand five hundred dollars ($1,500.00) per month for the support, maintenance, and education of the parties['] minor child. Husband's support obligation has been determined by agreement of the parties and by referring to the Child Support Chart in effect at the time of the execution of the Agreement and shall become effective upon entry of a Decree of Divorce in this matter. . . . Husband's support obligation will continue until any of the following events occur:
>
> a. The death of the child;
>
> b. The attainment of the child's eighteenth birthday or graduation from high school, whichever occurs later;
>
> c. The child becomes emancipated, as defined by the laws of the State of Arkansas.
>
> . . . .

First, Section Eight of the parties' agreement has nothing to do with Section Twelve. By its plain language, appellee's obligation to pay $1,500 in child support ceased when Hayley reached the age of 18 or graduated from high school, whichever occurred later. As such, Section Eight concerned itself with a different phase in her life. Section Twelve, on the other hand, concerns itself solely with Hayley's post-secondary-school education. Therefore, the $1,500 mentioned in Section Eight cannot serve as a basis to construe a purported ambiguity of Section Twelve.

Second, Section Twelve is not ambiguous. To the contrary, Section Twelve is quite clear in its meaning. Appellee agreed, wisely or otherwise, to pay for "the costs associated with an undergraduate degree," including "tuition, books, lab fees, room, board, and other legitimate educational expenses." There is nothing ambiguous about these terms. The very last phrase, "and other legitimate educational expenses," is admittedly open to interpretation. However, there is no reason to deem that phrase ambiguous where the rest of the language is clear and explicit, and

where the proof is uncontradicted that appellee paid nothing toward Hayley's tuition, books, room, or board, at the culinary school.

Even if we assume that this last phrase means "reasonable expenses," if one follows the syntax of Section Twelve, we disagree with the conclusion by the trial court that "reasonable expenses," which in the trial court's opinion should be $1,500, ought to replace the entire Section Twelve. If "legitimate educational expenses" means "reasonable expenses," then it follows that the end of Section Twelve reads: "including tuition, books, lab fees, room, board, *and other* reasonable expenses." In other words, interpreting this last phrase does not relieve appellee of those expenses that precede the term in question. As such, allowing the trial court's construction to stand would be tantamount to rewriting the agreement so appellee can walk away from a deal to which he had freely agreed, even though the deal itself is anything but ambiguous, merely because appellee has what amounts to buyer's remorse.

Reversed and remanded.

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

NEAL and CRABTREE, JJ., dissent.

OLLY NEAL, Judge, dissenting. I respectfully dissent from the majority opinion reversing this case because I believe that under the facts of this case the trial court's interpretation of Section 12 of the parties' "Property, Child Custody, and Support Agreement" was not clearly erroneous. Appellee estimated that Hayley's tuition at Johnson and Wales University was $18,000 per year and that her rent was $1,000 per month. The trial court, therefore, ordered appellee to pay $1,500 per month towards Hayley's educational expenses. This amount equals $18,000 per year. Appellant's testimony established that Hayley received scholarships and grants to attend Johnson and Wales. The scholarships and grants surely reduced the total cost of Hayley's education. Therefore, under the facts of this case, I believe that the trial court's decision was not clearly erroneous, and I would affirm.

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

Eric HOLLOWAY v. RILEY'S OAK HILL MANOR, INC.

CA 03-294 139 S.W.3d 144

Court of Appeals of Arkansas
Division IV
Opinion delivered December 17, 2003

William M. Howard, Jr., for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *L. Kyle Heffley* and *Derrick W. Smith*, for appellee.

LARRY D. VAUGHT, Judge. Appellant appeals from the circuit court's order determining the amount of attorney's fees, costs, and interest due on a breach of contract judgment, which was previously appealed to this court in *Holloway v. Riley's Oak Hill Manor*, CA02-74 (Oct. 9, 2002), and affirmed. Appellant contends that the trial court erred in modifying the original judgment. We affirm.

In the first appeal, we affirmed the trial court's award of a judgment in favor of appellee Riley's Oak Hill Manor based on a breach of contract claim filed against appellant Eric Holloway. The

judgment involved in the first appeal was against appellant in the amount of $6,664.20, plus costs, attorneys' fees, pre-judgment interest, and post-judgment interest. On December 3, 2002, the trial court entered a "modified final judgment," which provided that appellants shall pay $6,664.20 in compensatory damages, $350 in costs, $7,672 in attorney's fees, $2,333.42 in pre-judgment interest, and post-judgment interest at the statutory rate of ten percent on the amounts previously set forth or $4.6698 per day from June 26, 2001, until paid. Appellant filed a timely notice of appeal from the modified final judgment.

Appellant does not challenge the amounts established for the fees, costs and interest, but argues that the trial court erred in modifying the original judgment. It seems clear that the trial court did not modify the original judgment, but merely determined the dollar amount of costs, fees, and interest. Matters that are collateral to the trial court's judgment are left within the trial court's jurisdiction even though an appeal has been docketed. *Harold Ives Trucking, Co. v. Pro Transp., Inc.*, 341 Ark. 735, 19 S.W.3d 600 (2000). An award of attorney's fees and the accrual of interest on a judgment are collateral matters. *See id.*; *U.S. Bank, N.A. v. Milburn*, 352 Ark. 144, 100 S.W.3d 674 (2003). Similarly, an award of costs is also a collateral matter. The original order, which concluded the rights of the parties to the subject matter at issue, was appealed and this court affirmed. The only issues that remained were the amount of the costs, fees, and interest to be awarded to appellees. Although the order appealed from is styled "modified final judgment," it merely determined the amount of the costs, fees, and interest that appellant was to pay. Thus, the trial court did not erroneously "modify" the final judgment as appellant suggests.

Affirmed.

ROBBINS and CRABTREE, JJ., agree.

Lonnie Wayne COPELAND *v.* Barbara Elaine COPELAND

CA 03-482 139 S.W.3d 145

Court of Appeals of Arkansas
Division III
Opinion delivered December 17, 2003

Osment Law Firm, by: *Pamela Osment*, for appellant.

Cullen & Co. PLLC, by: *Tim Cullen*, for appellee.

ANDREE LAYTON ROAF, Judge. Lonnie Copeland has appealed from an order of the Faulkner County Circuit Court dividing the parties' retirement and pension plans in a divorce. On appeal, Lonnie Copeland argues that the trial court erred in (1) failing to divide the retirement and pensions equally and, (2) failing to give reasons for an unequal division. We agree that the trial court erred, and therefore, reverse and remand.

Lonnie Copeland and Barbara Copeland divorced on April 11, 2002, after twenty-four years of marriage. Prior to the divorce, the parties entered into a property-settlement agreement on March 13, 2002, purporting to distribute all marital property equally, except for their retirement accounts. Paragraph six of the agreement states:

> The parties have reserved the issue of the division of the Plaintiff's SBC Savings and Security Plan; the Plaintiff's SBC Pension/Retirement Benefit; the Southwestern Bell Stock; and any retirement, 401K and/or pensions benefits the Defendant may have earned until the parties can gather some more information on these

> benefits. The Defendant shall make a good faith effort to determine whether he has retirement benefits and provide this information to his attorney so that it may be provided to the Plaintiff's attorney within thirty (30) days of the date of this hearing. Upon receipt of this information, if the parties cannot agree on the division of the retirement benefits herein referred to, they shall seek relief from the Court and the Court retains jurisdiction until this matter is adjudicated.

The pension plans that are the subject of this appeal include an annuity that will pay Barbara $946.68 per month upon retirement; Barbara's SBC Savings and Security Plan worth approximately $32,000; Barbara's Paysop Plan valued at approximately $2,000; and an annuity from Safeway Stores that would pay Lonnie $250.13 per month. The trial court also considered pension funds of approximately $93,000, which Lonnie took as an early withdrawal in 2000, prior to the filing of the divorce action.

At the hearing on the division of the retirement and pension plans, Barbara testified that she had worked for Southwestern Bell (SBC) for twenty-five years. She stated that through her employment with SBC she has earned the retirement benefits, to which she does not have access until she retires. She stated that she has not withdrawn anything from the funds and does not have any other retirement or stock-option benefits. Barbara also testified that for the majority of the marriage she was the primary provider, supplying medical insurance, providing "most of the monthly income for financial stability" and payment for bills, and that this allowed Lonnie to "pursue his other interests." She asked that the court allow her to keep all of her retirement benefits in light of the above circumstances and the fact that Lonnie received a meat business in the settlement, and because the pension that she receives at retirement will be her only source of income. She also has custody of the parties' minor daughter, and the parties' older daughter and grandchild also currently reside with her. Barbara also indicated that Lonnie had not been forthcoming about his retirement benefits from his previous employment with Safeway Stores, Inc., and that only after the divorce did she discover that he was entitled to retirement benefits from Safeway Stores.

Lonnie also testified at the hearing. He testified that he has an annuity benefit from his employment with Safeway that will provide him with $250.13 per month upon retirement. He also

stated that he does not have any other retirement funds that he had not disclosed. Lonnie testified that he took early distribution from a retirement fund in 2000 from his employment with Tinken Company, where he worked for thirteen years until the company closed and moved its operations to Mexico. He testified that after federal taxes, the $93,000 distribution amounted to "seventy something," and that the couple paid an additional $14,000 in state taxes on the funds. He testified that of what was left, seventy-five percent of it was used to pay off "our stuff that my ex-wife now has possession of, her Jeep, the furniture, two credit cards that she had possession of, uh, two Sears bills, and, I kept five thousand ($5,000) for my business, and I paid off my three thousand dollar ($3,000) truck, and the rest of it, we spent." Lonnie stated that he had always held a job throughout his twenty-four years of marriage. He requested an equal division of the pension funds remaining after the divorce was filed, "considering [his] was divided equally."

After hearing the testimony, the trial court purported to divide all plans "equally," including Lonnie's early distribution. The court first stated that the property division statute does not require mathematical precision, but requires an equitable division of the marital property. The court then explained that it had added the two retirement funds ($90,000 and $30,000) and divided them evenly, and that a fifty-fifty split would thus be $60,000. The court stated that after considering taxes and the use of 75% of the $90,000 for marital debt, the retirement funds would in effect be equally distributed if each party retained their remaining separate retirement funds. The court concluded that Barbara was therefore entitled to keep her roughly $30,000 in pension funds and that Lonnie had, essentially, received the benefit of his half from the early distribution. The court noted that after taxes Lonnie was left with $60,000 net, that the parties had paid some marital debts and that Lonnie retained $15,000 for himself, and finally concluded that "everybody walks out of here like they walked in today." The trial court made no reference whatsoever to the parties' two vested annuities, and when asked for findings as to why there should be an "inequitable division," the trial court stated:

> Oh, I'm thinking it is equitable. That's what I'm ruling that I do think, after it's all said and done, it was an equitable division of the ninety thousand dollars. I added the ninety thousand plus the thirty-two thousand. *If you split that fifty/fifty*, that's sixty thousand apiece. She takes her thirty thousand. After taxes, *he had sixty*

> *thousand* out of the ninety thousand is what I'm coming up with. *And, so I do think they're equal.* It may not be exactly to the penny, *but I think it's an equitable division as it is now.* I think he used the money to acquire marital assets prior to the divorce, which were split and agreed in a property settlement. *So, I think that issue's out of there.* I think they used that money to acquire- and that leaves us with—where we are today, and I think that's—I guess my ruling is that I think it's an equitable split. [Emphasis added.]
>
> I can give you a more formal ruling, later on, if you want that, and findings of fact. I'll be happy to do that. But, I think that's where I am right now. I do think it's an equitable division.

The trial court did not make formal findings of fact, however, the order entered by the trial court states in pertinent part:

> That each party shall keep as their own separate property their respective retirement and pension plans. This Court specifically finds that this is an equitable division of the marital property, considering all of the facts, including but not limited to the fact that the Defendant withdrew his pension plan prior to the dissolution of the marriage.

Lonnie Copeland appeals from the trial court's order purporting to equitably divide the parties' retirement and pension funds.

On appeal, Lonnie argues that the trial court abused its discretion in failing to divide the funds equally, and in failing to give its reasons for making such an unequal division. In this regard, Lonnie contends that the trial court used the terms "equal" and "equitable," interchangeably, and that it included his retirement funds, already divided in the parties' agreement and no longer in existence, in its calculations in such a way as to count those funds twice. Lonnie further contends that the trial court gave Barbara her $34,000 retirement funds plus the $946.68 monthly annuity, and only the $250.13 monthly to him, called it "equitable" yet gave no reason for the unequal division. We agree with all of Lonnie's contentions.

This court reviews division of marital property cases *de novo. Glover v. Glover*, 4 Ark. App. 27, 627 S.W.2d 30 (1982). The trial court has broad powers to distribute property in order to achieve an equitable distribution. *Keathley v. Keathley*, 76 Ark.

App. 150, 61 S.W.3d 219 (2001). The overriding purpose of Arkansas Code Annotated section 9-12-315 is to enable the court to make a division of property that is fair and equitable under the specific circumstances. *Id.* Arkansas Code Annotated section 9-12-315 (Repl. 2002) provides that marital property is to be divided equally unless it would be inequitable to do so. *Harvey v. Harvey*, 295 Ark. 102, 747 S.W.2d 89 (1988). If the property is divided unequally, then the court must give reasons for its division in the order. Ark. Code Ann. § 9-12-315(a)(1)(B) (Repl. 2002); *Harvey v. Harvey*, *supra*. The code also provides a list of factors the court may consider when choosing unequal division. Ark. Code Ann. § 9-12-315(a)(1)(A)(i)-(ix) (Repl. 2002). This list is not exhaustive. A trial judge's unequal division of marital property will not be reversed unless it is clearly erroneous. *Keathley v. Keathley*, *supra*.

■■ Arkansas Code Annotated section 9-12-315 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 trial court is vested with a measure of flexibility in apportioning the total assets held in the marital estate upon divorce, and the critical inquiry is *how the total assets are divided*. *Id.* (Emphasis added.) The trial court is given broad powers, under the statute, to distribute all property in divorce cases, marital and non-marital, in order to achieve an equitable distribution. *Id.*

From our review of the record, we cannot say whether the trial court intended to make an equal, or unequal and equitable, division of the parties' pension funds. Although the trial court's written order states that allowing the parties to keep their respective retirement and pension plans is an "equitable" division of the marital property, we note that the trial court, in making his calculations, first purported to make the parties' cash funds "equal," and did so by including Lonnie's funds withdrawn prior to the filing of the divorce. The trial court's written order did state that it considered the early withdrawal of Lonnie's pension as a factor. However, the trial court in its oral ruling stated that Lonnie's funds were "split and agreed to in a property settlement. So I think that issue's out of there." Further, the trial court included all of the federal and state taxes assessed for early withdrawal in its calculations, and, inexplicably, made no mention of or attempt to factor in the wide disparity in monthly benefits between the parties' two vested annuity plans. Lonnie's monthly annuity

was approximately one-fourth of the value of Barbara's, and it appears that the trial court simply ignored the disparity in these benefits in its findings and in making its calculations.

Furthermore, the retirement benefits remaining to be divided by the court comprised only part of the total amount of marital property owned by the parties. The parties' settlement agreement purported to divide all marital property equally except Barbara's retirement benefits, and any benefits Lonnie "may have earned," in connection with which Lonnie was to make a good faith effort to determine whether he had any retirement benefits. It is undisputed that both parties were aware that Lonnie's benefits through his employment with Tinken Company had been disposed of prior to the filing of the divorce and were not among the assets to be divided by the trial court. Barbara instead sought an unequal division in her favor of the remaining funds. In this respect, there is no evidence in the record to establish the value of the substantial amount of marital property divided between the parties by agreement, including businesses and race horses, and little evidence on the parties' respective incomes or the other factors that the trial court is to consider pursuant to Ark. Code Ann. § 9-12-315(a)(1)(A) (Repl. 2002) when it makes a distribution other than one-half to each party.

■■ On *de novo* review of a fully developed record, when we can plainly see where the equities lie, we may enter the order that the trial court should have entered. *Reaves v. Reaves*, 63 Ark. 187, 975 S.W.2d 882 (1998). However, from the record before us, we cannot say whether it was error for the trial court to make what was essentially a grossly disproportionate distribution of the marital retirement assets remaining after the settlement in favor of Barbara. The record is simply not fully developed. Accordingly, we reverse and remand this case for further proceedings. On remand, the trial court may permit the introduction of such additional evidence as is necessary to make findings regarding the valuation of all of the parties' assets and the factors to be considered pursuant to Ark. Code Ann. § 9-12-315 (Repl. 2002). We also remand in order that the trial court may clearly articulate whether it is making an equal or unequal distribution of assets, and if unequal, the reasons why such distribution is equitable.

Reversed and remanded.

PITTMAN and ROBBINS, JJ., agree.

ANDERSON GAS & PROPANE, INC., and Don Anderson *v.* WESTPORT INSURANCE CORPORATION

CA 03-859 140 S.W.3d 504

Court of Appeals of Arkansas
Division II
Opinion delivered January 7, 2004

[Petition for rehearing denied February 11, 2004.]

Everett Law Firm, by: *Jason Harris Wales*, for appellants.

Watts, Donovan & Tilley, P.A., by: *David M. Donovan*, *Richard Nathaniel Watts*, and *Michael McCarty Harrison*, for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellant Anderson Gas & Propane, Inc., sells and distributes gasoline, gasoline tanks, propane, propane tanks, and fertilizer; appellant Don Anderson is a shareholder and an officer of the company. (We will refer to both parties as "Anderson.") Anderson appeals from the award of summary judgment to Westport Insurance Corporation in its action seeking a declaration that Westport owed it a defense of several lawsuits filed by third parties against Anderson and reimbursement for the damages incurred therein. In granting summary judgment, the trial court held that the insurance policy's pollution exclusion unambiguously barred recovery. We hold that the exclusion is ambiguous and that this case must be reversed and remanded for trial.

Factual and Procedural History

Coppermine Lodge, a fishing resort on Beaver Lake in Benton County, was one of Anderson's customers. The lodge had a gasoline-distribution system that included an above-ground tank that was connected to a dispensing pump by an underground pipe. In January 2000, the owners of the lodge discovered gasoline

percolating out of the ground and called the Arkansas Department of Environmental Quality, which found a leak in the underground pipe. The leaked gasoline migrated to the wells of adjoining landowners, who sued the lodge's owners, its former owners, and Anderson for bodily injury and property damage.

Anderson had a general commercial-liability insurance policy with Westport during the relevant time period. The policy obligated Westport to pay Anderson those sums that Anderson became legally obligated to pay as damages because of bodily injury or property damage to which the coverage applied and to defend Anderson against any suit seeking such damages. The policy contained the following exclusion, on which Westport relied to deny coverage:

> This insurance does not apply to:
>
> f. Pollution
>
> (1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.
>
> (2) Any loss, cost or expense arising out of any:
> (a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or
> (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants."

The policy defined the term "pollutants" as follows: " 'Pollutants' mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

Anderson requested that Westport defend the lawsuits filed against it by the neighboring landowners and that it provide coverage for the loss. Relying on the pollution exclusion, Westport refused to provide Anderson with a defense or coverage.

According to Anderson, it has settled fifteen of the sixteen lawsuits filed against it and is currently defending one remaining lawsuit. Anderson sued Westport for breach of contract and sought a declaratory judgment affirming Westport's duty to defend and provide coverage for this loss. It also sued the insurance agent that sold the policy but later nonsuited that claim. In granting summary judgment to Westport, the circuit court stated:

> 1. That the Total Pollution Exclusion in the policy is applicable and enforceable consistent with its plain and ordinary meaning as the Court finds it not to be ambiguous.
>
> 2. That the Total Pollution Exclusion is applicable as the damages at issue are resultant from the dispersal, seepage and migration of gasoline which is a "pollutant" as defined by the policy.

It is from this order that Anderson has appealed.

Standard of Review

In reviewing summary-judgment cases, we determine whether the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Alberson v. Automobile Club Interins. Exch.*, 71 Ark. App. 162, 27 S.W.3d 447 (2000). The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* All proof submitted with a motion for summary judgment must be viewed in the light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *McWilliams v. Schmidt*, 76 Ark. App. 173, 61 S.W.3d 898 (2001). Summary judgment is not appropriate where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. *Lee v. Hot Springs Village Golf Schs.*, 58 Ark. App. 293, 951 S.W.2d 315 (1997).

Construction of the Exclusion

In reviewing an insurance policy, the appellate court follows the principle that, when the terms of the policy are clear, the language in the policy controls. *Castaneda v. Progressive Classic Ins. Co.*, 83 Ark. App. 267, 125 S.W.3d 835 (2003). The language in an insurance policy is to be construed in its plain, ordinary, popular sense. *Id.* If a policy provision is unambiguous, and only one reasonable interpretation is possible, the court will give effect to the plain language of the policy without resorting to rules of construction. *Id.* Language is ambiguous if there is doubt or uncertainty as to its meaning and it is fairly susceptible to more than one reasonable interpretation. *Elam v. First Unum Life Ins. Co.*, 346 Ark. 291, 57 S.W.3d 165 (2001). If the policy language is ambiguous, the policy will be construed liberally in favor of the insured and strictly against the insurer. *Castaneda v. Progressive Classic Ins. Co., supra.* Under Arkansas law, the intent to exclude coverage in an insurance policy that has been drafted by the insurer without consultation with the insured should be expressed in clear and unambiguous language. *Pizza Hut of America, Inc. v. West Gen. Ins. Co.*, 36 Ark. App. 16, 816 S.W.2d 638 (1991). Whether the language of a policy is ambiguous is a question of law to be resolved by the court. *Castaneda v. Progressive Classic Ins. Co., supra.* If ambiguity exists, parol evidence is admissible and the meaning of the ambiguous term becomes a question for the fact-finder. *Deal v. Farm Bureau Mut. Ins. Co. of Ark., Inc.*, 48 Ark. App. 48, 889 S.W.2d 774 (1994).

An insurer may contract with its insured upon whatever terms the parties may agree upon that are not contrary to statute or public policy. *Jordan v. Atlantic Cas. Ins. Co.*, 344 Ark. 81, 40 S.W.3d 254 (2001). Absent statutory strictures to the contrary, exclusionary clauses are generally enforced according to their terms. *Id.* The terms of an insurance contract are not to be rewritten under the rule of strict construction against the company issuing it so as to bind the insurer to a risk that is plainly excluded and for which it was not paid. *Id.*

The Arkansas decision most relevant to the question presented here is *Minerva Enterprises, Inc. v. Bituminous Casualty Corp.*, 312 Ark. 128, 851 S.W.2d 403 (1993), wherein the supreme court held that a pollution exclusion in an insurance policy (similar to the one at issue here) was ambiguous and that the trial court had

erred in granting summary judgment to the insurance company. The court held that it was unclear from the policy language that the single back-up of a septic tank in a mobile-home park was necessarily the kind of damage that the clause was intended to exclude. The parties' disagreement concerned the interpretation of the word "pollutants" as it was used in the exclusion, which stated:

> It is agreed that the exclusion relating to the actual, alleged or threatened discharge, dispersal, release or escape of pollutants is replaced by the following:
>
> (1) Bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants.
>
> . . . .
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

312 Ark. at 129-30, 851 S.W.2d at 404.

The insured argued on appeal that the definition of pollutants was intended to exclude industrial wastes, not common household wastes, and at best, the definition was ambiguous. The supreme court reviewed several decisions from other states that dealt with this issue and stated:

> The pollution exclusion is a recent innovation of the insurance industry that has spawned considerable litigation. Among the cases we find a group that deals with the definition of pollution. This line of cases supports the premise that the exclusion is intended to prevent persistent polluters from getting insurance coverage for general polluting activities, whether the insured or a third party, and was never intended to cover those who are not active polluters but had merely caused isolated damage by something that could otherwise be classified as a "contaminant" or "waste."
>
> . . . .

> We are persuaded by these cases and their rationale and find the pollution exclusion in the case before us is, at least, ambiguous. It is not clear from the language of the policy that the single back-up of a septic tank in a mobile home park is necessarily the kind of damage the clause was intended to exclude. We find appellant's interpretation that it was intended for industrial polluters to be a plausible one. Further, while the word "waste" is used as one of the examples of pollutants in the policy definition, as mentioned in [*Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 So.2d 95 (Ala. 1977)], under the rule of *ejusdem generis*, the term "waste" must be considered within the context of the entire list, all of which are pollutants related to industrial waste.
>
> We hold there was an unresolved disputed issue of fact. *See Tillotson v. Farmers Insurance Co.*, 276 Ark. 450, 637 S.W.2d 541 (1982). The initial determination of the existence of an ambiguity rests with the court, and if ambiguity exists, then parol evidence is admissible and the meaning of the ambiguous terms becomes a question for the fact finder. *Pizza Hut of America Inc. v. West General Insurance Co.*, 36 Ark. App. 16, 816 S.W.2d 638 (1991).

312 Ark. at 130-34, 851 S.W.2d at 404-06.

Citing *Minerva Enterprises, Inc. v. Bituminous Casualty Corp.*, Anderson argues that, as a matter of law, the term "pollutants" does not include gasoline because pollution exclusions like the one involved here are aimed at industrial, persistent polluters. Also relying on that case, Westport asserts that the gasoline leak that occurred was exactly the type of situation to which such exclusions apply. That case, however, does not hold that, as a matter of law, either position is correct. The court found the term "pollutants" to be ambiguous and remanded the case for trial. We believe that the same result must occur in this appeal.

The general rule is that the pleadings against the insured determine the insured's duty to defend. *Madden v. Continental Cas. Co.*, 53 Ark. App. 250, 922 S.W.2d 731 (1996). The duty to defend is broader than the duty to pay damages, and the duty to defend arises where there is a possibility that the injury or damage may fall within the policy coverage. *Id.* The insurer must defend the case if there is any possibility that the injury or damage may fall within the policy coverage. *Id. See also Murphy Oil USA,*

Inc. v. Unigard Sec. Ins. Co., 347 Ark. 167, 61 S.W.3d 807 (2001). At this point, there is a possibility that the injury or damage may fall within the policy coverage.

In the policy involved in this action, Westport failed to include the term "gasoline" in the policy's definition of "pollutants." Also, the terms "irritant" or "contaminant" can reasonably be construed as including "gasoline" — or not including it. We believe, therefore, that the language of the exclusion is fairly susceptible to more than one reasonable interpretation and, thus, is ambiguous. Accordingly, a genuine issue of material fact remains for trial, and the summary judgment for Westport must be reversed.

Reversed and remanded.

PITTMAN and BIRD, JJ., agree.

Gregory FISHER *v.* STATE of Arkansas

CA CR 03-323 139 S.W.3d 815

Court of Appeals of Arkansas
Division I
Opinion delivered January 7, 2004

[redacted]

[redacted]

[redacted]

[redacted]

Charles E. Waldman, for appellant.

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

ANDREE LAYTON ROAF, Judge. Gregory Fisher was convicted of possession of cocaine with intent to deliver and possession of marijuana with intent to deliver by a jury and sentenced to forty years and fifteen years, respectively, to be served consecutively. Fisher was also fined $150,000. Fisher appeals both convictions, arguing (1) that the trial court erred in allowing extraneous

material, an atlas that was not introduced at trial to be presented to the jury during deliberations, (2) that the sentence imposed was excessive, and the terms for repayment of his fine unreasonable, and (3) that there was insufficient evidence to support the verdict. Fisher's arguments regarding the sufficiency of the evidence and the length and terms of his sentence are not preserved for appeal, and he has failed to demonstrate prejudice in the presentation to the jury of the extraneous, non-evidentiary material. We affirm.

Because Fisher's sufficiency challenge is not preserved for appeal, it is not necessary to recite at length the testimony and evidence presented at his trial. Fisher was the passenger in a commercial truck operated by co-defendant Kevin McKenzie[1] that was stopped at a truck weigh station in Alma, Arkansas. An officer at the weigh station in Arkansas noted that the truck's refrigerated unit was operating at an unusually high temperature, and a search of the truck revealed pallets of produce and several backpacks containing approximately 300 pounds of marijuana and two kilos of cocaine. The truck was en route from California with a load of refrigerated produce. McKenzie testified that he was originally from Jamaica and that he had worked as a driver for the owner of the truck for several months. McKenzie stated that on this trip he left from Anaheim and made stops at three other cities in California; Riverside, Oxnard, and Fowler, to pick up produce to be delivered to Maryland. McKenzie stated that he did not have access to the refrigerated unit, and received a key to the refrigerated unit only at the last pickup. He testified that Fisher rode along with him because he had not been in the country very long and wanted to "see what California is like." The evidence with regard to Fisher's involvement came through his testimony and the testimony of McKenzie and the officers involved, and reflects that he was related to the owner of the truck, was also from Jamaica, claimed to have come to California "just to see California," and had two IDs when arrested, in the names of Gregory Anton Fisher and Patrick Henry. Fisher denied that his name was Gregory Fisher during his testimony, and claimed that was his cousin's name and ID.

[1] Kevin McKenzie was also charged and tried in the same trial for possession of cocaine and marijuana with intent to deliver; however, the jury was unable to reach a verdict as to McKenzie.

The trial concluded, and at 10:15 a.m. the jury retired to deliberate. At 1:20 p.m., the jury returned to the courtroom with two questions. After a sidebar with counsel for Fisher and the State in which defense counsel objected to the court answering the questions posed by the jury, the trial judge instructed the jury to base its decision on the evidence presented. At 3:25 p.m. the jury again returned to the courtroom. This time the foreperson requested a map of California. Counsel for the defendant again objected, arguing that a map was not admitted into evidence, and the court should not furnish one. The trial judge asked the foreman why the jury requested a map. The foreman explained that the jury wanted to see the proximity of the three pickup cities to each other. The trial court responded that the jury's request was a simple one, overruled defense counsel's objection, and permitted the jury to view an atlas. The jury returned with a guilty verdict one hour and twenty-two minutes later.

Fisher was sentenced to forty years' imprisonment and a $150,000 fine for the possession of cocaine conviction. He was sentenced to fifteen years' imprisonment for the possession of marijuana conviction. The jury recommended that the sentences run consecutively, and the judge, stating that he was following the recommendation of the jury, ordered Fisher to serve the sentences consecutively. The court also ordered Fisher to begin paying the $150,000 fine at a rate of $100 per month, beginning sixty days following his release from the Arkansas Department of Correction.

We first note that Fisher's challenges to the sufficiency of the evidence and to his sentence are not preserved for appellate review. Fisher relies on the "plain error doctrine." However, as the State points out, Arkansas only recognizes the plain error doctrine in four limited circumstances, *see Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), none of which apply to this case.

Fisher challenges the sufficiency of the evidence. The abstract and record show that Fisher did not move for a directed verdict during the trial. Arkansas Rules of Criminal Procedure 33.1 governs the procedure for challenging the sufficiency of the evidence at a jury trial and provides that a motion for directed verdict must be made at the close of the State's case, and renewed at the close of all of the evidence. Fisher's arguments are not preserved for appellate review because he failed to make a directed verdict motion at the close of the State's evidence and again at the

close of all of the evidence as required by Ark. R. Crim. P. 33.1. *McClina v. State*, 354 Ark. 384, 123 S.W.3d 883 (2003).

Fisher also challenges his sentence, arguing that it is excessive. Fisher also argues that it was unreasonable for the trial court to order him to commence payment of $100 per month toward his fine just sixty days after his release from a lengthy prison sentence. He did not object to either the sentence or terms of payment of the fine below and this court does not consider arguments raised for the first time on appeal. *Walker v. State*, 330 Ark. 652, 955 S.W.2d 905 (1997).

Fisher's third argument is that the trial court erred in allowing a document that was neither introduced at trial nor entered by the court to be presented to the jury during deliberations. He contends that to allow the jury to view any document, regardless of what it is, that was not in evidence is a clear violation of the rules of evidence. He argues that in allowing the jury access to extraneous information at a very crucial time during the trial, when the jury had been in deliberation for several hours, violated his right to a fair trial.

Arkansas Code Annotated section 16-89-125(e) (1987) provides that trial courts must call juries into open court in order to communicate with them when they have a query during deliberations. It is well-settled that noncompliance with this statutory provision gives rise to a presumption of prejudice, and the State has the burden of overcoming the presumption. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002); *Clayton v. State*, 321 Ark. 602, 906 S.W.2d 290 (1995); *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986). The failure of a defendant and his counsel to be present when a substantial step occurs, such as the judge's answering questions of the jury, violates the defendant's fundamental right to be present at any stage of the criminal proceeding that is critical to the outcome. *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997). Here, however, the procedural requirements of the statute were followed, and Fisher's argument goes to the propriety of the trial court's decision to allow the jury to have information not introduced into evidence during the trial.

We have found no Arkansas case addressing the issue of whether, when the statutory procedure is followed, it is error to allow a jury to have extraneous new information during jury

deliberations in a criminal trial.[2] In *Dickerson Construction Co., Inc. v. Dozier*, 266 Ark. 345, 584 S.W.2d 36 (1979), a bailiff provided the jury with one of two charts used by appellee to display damage computations, without the trial court or the appellant's knowledge. The jury returned a verdict for appellee ten minutes later, and appellant moved for new trial after learning what happened. The supreme court held that the trial court abused its discretion in denying the motion, and reversed and remanded for new trial because the statutory procedure was not followed, stating:

> The procedure to be followed when a jury, which has retired for deliberation, requests additional information or clarification of some point is established by Ark. Stat. Ann. 27-1734 (Repl. 1962). The statute reads:
>
> > Further instruction. After the jury has retired for deliberation, if there is a disagreement between them as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of or after notice to the parties or their counsel.

[2] A number of other jurisdictions have addressed the issue of whether it is error to allow the jury to use material not admitted into evidence. *See State v. Lihosit*, 131 N.M. 426, 38 P.3d 194 (2002) (holding that the trial court did not abuse its discretion by granting jury's request for calculator to use during deliberations in complicated embezzlement prosecution involving multiple pieces of evidence and where calculator was merely a substitute for pencil and paper and not used to perform independent tests or create evidence); *State v. McCarty*, 271 Kan. 510, 23 P.3d 829 (2001) (holding that it was an abuse of discretion, but not prejudicial to allow the jury to use a piece of string not introduced as evidence during deliberation to examine the trajectory of bullets); *Worcester v. State*, 30 P.3d 47, 2001 Wy. 82 (2001) (holding that trial court should not have allowed jury to have demonstrative evidence of watercraft models during deliberation when models were not admitted into evidence); *Com v. Lilliock*, 740 A. 2d 237, 1999 PA Super. 244 (1999) (holding that jury was properly allowed to use magnifying glass not admitted into evidence to examine photographic evidence because use of the magnifying lens was merely to view the evidence presented during trial); *State v. Pichay*, 72 Haw. 475, 823 P.2d 152 (1992) (holding that allowing jury permission to use two dolls and a calculator brought in by a juror, over objections by the State and the defense, was egregious error for which the presumption of prejudice was not rebutted by the State); *Grooms v. Com.*, 756 S.W.2d 131 (Ky. 1988) (holding that jury should not be allowed to take Bibles into jury room with them).

> An identical procedure to be followed in criminal trials has been held to be mandatory. The considerations in those cases are just as relevant in this case. The appellant's attorneys had no opportunity to object to the jury receiving a chart which, in essence, summarized the appellee's closing argument relating to damages. There was no opportunity for the appellant's attorneys to request that an instruction be given which would limit the effect of the chart upon the jury's deliberation or remind the jury that the chart was not evidence. The fact that the chart had not been admitted into evidence is itself of no small significance. Ark. Stat. Ann. § 43-2138 (Repl. 1977) provides: "(u)pon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause." *We decline, however, to hold that allowing the jury to have access to something which has not been admitted into evidence will necessarily, without more, constitute an abuse of discretion.* Other jurisdictions prohibit the jury access to anything which has not been introduced into evidence. Although the amount of time spent in deliberations is not in and of itself indicative of possible prejudice or lack of fair trial, the fact that the jury returned its verdict only ten minutes after receiving the chart, is a factor to consider in a determination of whether the appellant's cause may have been prejudiced. (Citations omitted.) (Emphasis added.)

Id. at 356, 584 S.W.2d at 42.

In *Williams v. First Security Bank of Searcy*, 293 Ark. 388, 738 S.W.2d 99 (1987), the trial court, over appellant's objection, allowed the jury to have a tablet on which appellee's expert wrote certain figures during his testimony. In holding that no prejudice resulted and affirming the judgment, the court stated:

> While we have made a distinction between evidence admitted and not admitted which is taken into deliberation by the jury, that is not the determining factor. Rather, if the item is an accurate reflection of the testimony that will be a legitimate memory aid to the jury and affords no prejudice to the opposing party, we have found it within the discretion of the trial court to allow it.
>
> * * *
>
> In determining that no prejudice resulted from this incident, we note that the matter dealt with an issue which was not in testimonial dispute, as with the issue of liability for example. Here there was no contention that the figures given to the jury were not exactly what

> the witness had testified to, nor had the appellant even objected to or contested the accuracy of any of the figures when they were presented by the witness. The figures were a legitimate memory aid for the jury and there was no abuse of discretion by the court in allowing the jury to review the figures. (Citations omitted.)

Id. at 393, 394, 738 S.W.2d at 102, 102-103.

Thus, our supreme court has held that if the statutory procedure is followed, it is within the discretion of the trial court to allow material not admitted into evidence, if the item is an accurate reflection of testimony that will serve as a legitimate memory aid for the jury. *Williams, supra.* The civil and criminal statutory procedures are identical, as noted by the supreme court in *Dozier.* Consequently, it was not error as a matter of law for the trial court to allow the jury to have the atlas during deliberation in Fisher's trial. However, there was no testimony or evidence presented concerning the proximity of the three California cities in question, and the jury's request for the map was thus a request for extraneous information not introduced during the trial. It was neither a legitimate memory aid nor an aid, such as a magnifying lens or calculator, to examine or assemble evidence presented at trial. While the supreme court has held that there is a presumption of prejudice when the statutory procedure for such jury requests is not followed, *Atkinson, supra,* the court declined to hold that allowing the jury to have access to material not introduced into evidence will necessarily, without more, constitute an abuse of discretion. *Dozier, supra.* Here, the trial court complied with the statutory procedure and prejudice is not presumed, even if the court abused its discretion in allowing the jury to have the extraneous information. In this case, unlike in *Dozier,* where the jury deliberated only ten minutes after receiving a chart it requested, Fisher's jury continued to deliberate at some length after receiving the atlas before reaching a verdict. Fisher contends only that he suffered prejudice because the extraneous information came at a "crucial time" in his trial. However, there was no inquiry to see how or even whether the map was used by the jury, and we cannot see, nor does Fisher say, given the evidence presented in this case, how he may have suffered prejudice by allowing the jury to have it.

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.

Lee Charles LEWIS *v.* STATE of Arkansas

CA CR 01-1327 139 S.W.3d 810

Court of Appeals of Arkansas
Division I
Opinion delivered January 7, 2004

John F. Gibson, Jr., for appellant.

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

ANDREE LAYTON ROAF, Judge. Appellant Lee Charles Lewis was convicted of possession of cocaine with intent to deliver and possession of marijuana with intent to deliver. Lewis was sentenced to ten years' imprisonment on the cocaine charge and four years' imprisonment on the marijuana charge, with the sentences to be served concurrently. Lewis's counsel previously filed a motion to withdraw, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals, alleging that an appeal from his convictions would be without merit; however, this court ordered rebriefing in an unpublished opinion entered on November 20, 2002, because counsel failed to abstract and discuss all adverse rulings. Lewis's counsel then submitted a second *Anders* brief, which again failed to abstract

and discuss all adverse rulings. After reviewing the record, this court found that Lewis's *Batson* challenge to the voir dire of the jury may not be wholly frivolous and directed his counsel to rebrief the case on the merits of that issue in an unpublished opinion entered on May 14, 2003. Lewis's counsel has now submitted a merit brief in accordance with this court's directive.

On appeal, Lewis argues that the trial court erred in overruling his *Batson* challenge to the State's peremptory removal of two black venirepersons from the jury panel. Specifically, Lewis argues that the trial court improperly cut off the State's attempt to give a race-neutral reason for striking one juror and supplied a reason on behalf of the State for the second strike. Because Lewis's argument concerning the trial court's improper conduct was not raised below, we affirm.

Because Lewis does not challenge the sufficiency of the evidence supporting his convictions, a detailed recitation of the facts underlying those convictions is not necessary. During voir dire, the State used peremptory challenges to strike six black venirepersons from the jury panel. Lewis objected and argued that the State's use of its peremptory challenges to strike all the remaining black venirepersons from the jury panel was in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). After the trial court ruled that Lewis had made a prima facie showing of racial discrimination, the State proceeded to give its racially neutral reasons for exercising each strike. With respect to venirepersons Wright and Harding, the following colloquy occurred:

> STATE: Ms. Wright yesterday at the end of the trial, her and the Defendant . . .
>
> DEFENSE COUNSEL: The other defendant . . .
>
> STATE: The other defendant who, and that causes me to . . .
>
> COURT: That's good enough. It's racial neutral.
>
> STATE: Okay. Mr. Harding was related to the Defendant yesterday.
>
> DEFENSE COUNSEL: That's yesterday's defendant. It's not anything to do with this case.

STATE: It has to do with the same officers and all that.

DEFENSE COUNSEL: No.

STATE: I believe that he'll have a bias . . .

DEFENSE COUNSEL: Doesn't make any difference.

STATE: . . . against him.

COURT: His brother had a relative arrested on a drug related offense.

STATE: Okay.

COURT: That's enough. Racial neutral.

The trial court ruled that all of the reasons given by the State for striking each venireperson were racially neutral and overruled Lewis's *Batson* challenge.

Lewis argues on appeal that the trial judge erred in overruling his *Batson* challenge to the State's peremptory removal of blacks from the jury panel. However, before addressing the merits of Lewis's argument, the sufficiency of his abstract must be discussed. Lewis has failed to abstract any portion of the jury trial. Instead, he has photocopied and placed in his addendum four pages from the transcript, which contain his *Batson* objection and the State's race-neutral explanations for the removal of the two black venirepersons that he argues on appeal were improperly struck from the panel. In addition, Lewis has failed to include in his addendum both the judgment and commitment order and his notice of appeal.

According to Ark. Sup. Ct. R. 4-2(a)(5) (2003), an appellant shall include in his brief an abstract or abridgment of the transcript, consisting of such material parts of the testimony of witnesses and colloquies between the court and counsel as are necessary to an understanding of all questions presented to the appellate court for decision. Also, under Rule 4-2(a)(8), the appellant's brief must include an addendum that contains photocopies of the order or judgment appealed from, as well as the notice of appeal. While the failure to abstract or include 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, under the revised rule, this court must now allow rebriefing to cure deficiencies in the abstract or addendum. *Spears v. State*, 82 Ark. App. 376, 109 S.W.3d 139 (2003). Although this court could order rebriefing in this case due the deficiencies in Lewis's abstract and addendum, because he has included in his addendum the material portions of the colloquy between counsel and the trial court discussing his *Batson* challenge, we instead address the merits of his argument. We also note that the record reflects that Lewis's judgment and commitment order was filed on June 29, 2001, and that the notice of appeal was timely filed on July 12, 2001.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the State from striking a venireperson as a result of racially discriminatory intent. The Court left it up to the states to develop specific procedures to follow in implementing *Batson*. *Id.* Our supreme court has established a three-step process to be used in evaluating *Batson* claims. *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998). First, the opponent of the peremptory strike must present facts that show a prima facie case of purposeful discrimination. *Id.* This can be done by showing (1) that the strike's opponent is a member of an identifiable racial group, (2) that the strike is part of a jury-selection process or pattern designed to discriminate, and (3) that the strike was used to exclude jurors because of their race. *Id.*

Second, if the opponent has established a prima facie case, the burden of producing a racially neutral explanation then shifts to the proponent of the strike. *Id.* While this explanation must be more than a mere denial of discrimination, the explanation need not be persuasive or even plausible; indeed, it may be silly or superstitious. *Id.* The reason will be deemed race neutral unless discriminatory intent is inherent in the proponent's explanation. *Id.* However, the trial court must not end the *Batson* inquiry at this stage. *Id.*

In step three, if a race-neutral explanation is given, the trial court must then decide whether the strike's opponent has proven purposeful discrimination. *Id.* During this stage, the strike's

opponent must persuade the trial court that the expressed motive of the striking party is not genuine, but rather is the product of discriminatory intent. *Id.* The opponent may do this by presenting further argument or other proof relevant to the inquiry. *Id.* If the strike's opponent chooses not to present additional argument or proof but simply relies on the prima facie case presented, then the trial court has no alternative but to make its decision based on what has been presented to it, including an assessment of credibility. *Id.* The court in *MacKintrush* emphasized that "it is incumbent upon the strike's opponent to present additional evidence or argument, if the matter is to proceed further." *Id.* at 399, 978 S.W.2d at 297. It is the opponent's responsibility to "move the matter forward at this stage to meet the burden of persuasion, not the trial court." *Id.* If the strike's opponent does not present further evidence, no additional inquiry by the trial court is required. *Id.* However, if the "opponent presents additional relevant evidence and circumstances to the trial court for its consideration, then the trial court must consider what has been presented, make whatever inquiry is warranted, and reach a conclusion." *Id.* at 400, 978 S.W.2d at 297.

Once the party striking jurors offers a race-neutral explanation, and the trial court rules on the ultimate issue of intentional discrimination, the preliminary issue of whether a prima facie case was shown then becomes moot. *Holder v. State*, 354 Ark. 364, 124 S.W.3d 439 (2003). Appellate courts will reverse a trial court's ruling on a *Batson* challenge only when its findings are clearly against the preponderance of the evidence. *Id.* The trial court is accorded some deference in making *Batson* rulings because it is in a superior position to observe the parties and to determine their credibility. *Id.*

The issue in this case involves the second step of the *Batson* procedure. Lewis argues that the State failed in its burden of offering a race-neutral explanation with respect to two of the venirepersons, Wright and Harding. Lewis asserts that it was error and improper for the trial court to "cut off" the State's race-neutral explanation as to venireperson Wright and that it was also error for the trial court to assist the State in supplying a race-neutral explanation for its removal of venireperson Harding.

We find that Lewis's arguments are not preserved for appellate review. While we cannot discern what the State was attempting to assert with respect to venireperson Wright, and

while the trial court on its own provided an additional reason for striking venireperson Harding, Lewis did not object when the trial court interrupted the State's race-neutral explanation as to Wright, nor did he object when the trial court itself supplied a race-neutral reason as to Harding. In fact, Lewis failed to offer any additional argument or other proof to rebut the State's and the trial court's race-neutral explanations and to show that the State's motives were not genuine, but were rather the product of discriminatory intent, as is required during the third stage of the *Batson* process. *MacKintrush, supra.* The burden of persuasion that there is purposeful discriminatory intent rests with and never shifts from the party opposing the strikes. *Holder, supra.*

It is well-settled that issues raised for the first time on appeal will not be considered. *London v. State* 354 Ark. 313, 125 S.W.3d 813 (2003). Because Lewis failed to raise to the trial court the arguments concerning the trial court's conduct that he now makes on appeal, his arguments are not preserved for review. *See id.* (holding that defendant's argument that it was error for the trial court to allow the State to proffer only two race-neutral explanations when three African-Americans were struck from the jury panel was not preserved for review where defendant failed to raise the argument to the trial court); *Wooten v. State*, 325 Ark. 510, 931 S.W.2d 408 (1996) (holding that defendant's argument that the State failed to provide a racially neutral reason for the removal of a venireperson was not preserved for appeal where it was not presented to the trial court). Thus, we affirm.

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.

Raymond M. BERTA and James W. Berta *v.* STATE of Arkansas

CA CR 02-1027 140 S.W.3d 487

Court of Appeals of Arkansas
Division IV
Opinion delivered November 19, 2003
Opinion published January 14, 2004

Molock Law Firm, P.A., by: *Dennis R. Molock*, for appellant Raymond M. Berta.

Patrick J. Bench, for appellant James Berta.

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

JOSEPHINE LINKER HART, Judge. Appellants, Raymond M. Berta and James W. Berta, who were tried together by a jury, were both convicted of the crimes of manufacturing methamphetamine, possession of drug paraphernalia with the intent to manufacture methamphetamine, and misdemeanor endangering the welfare of a minor. Raymond Berta was also convicted of second-offense possession of marijuana, and James Berta was convicted of simultaneous possession of drugs and firearms. Raymond Berta was sentenced to a total of 144 months' imprisonment and a fine of $1,000, and James Berta was sentenced to 300 months' imprisonment and a fine of $1,000.

On appeal, both appellants argue that the circuit court erred in denying their motions to suppress items seized during a search of their residence, contending that the affidavit supporting the search warrant failed to establish a time frame for the events described in the affidavit. Raymond Berta further argues that the circuit court

erred in denying his motion to sever his trial from James Berta's trial. We find both issues meritorious and reverse and remand.

On May 31, 2001, Steve Rich, then of the Lonoke County Sheriff's Department, prepared an affidavit supporting his request for a search warrant to search appellants and their Lonoke residence. His conclusion that items subject to seizure were "now being concealed" was supported by four specific facts, which were as follows:

> FACT #1: On 5-29-01 this officer was contacted by a citizen who advised that he was concerned about activity at [appellants' residence] advising that the chemical odor and heavy traffic that usually followed. Subject also advised that there was lots of late night activity and traffic to the residence. He further stated that there was a small child (6 years of age) living at the residence.
>
> FACT #2: This officer spoke to a reliable (used on several occasions that resulted in arrest) informant who advised that they had been to the residence and saw a meth lab in the bedroom of the home. They further stated that James Berta had a handgun and usually carried it on his person. They also confirmed the presence of the small child and stated that the components and paraphernalia were within reach of the child.
>
> FACT #3: This officer went to the address and did see in plain sight assorted items commonly used to manufacture meth to include cans of camp fuel, empty peroxide bottles, iodine bottles, and a funnel (chemical odor), plastic tubing, and coffee filters with residue. Most of these items were in a burn pile in the rear of the mobile home.
>
> FACT #4: An ACIC check showed Raymond and James both to have several outstanding warrants from local Law Enforcement Agencies. Both Parties also had criminal history for Controlled substance, theft of property and are convicted felons. Last February Little Rock narcotic officers served a search warrant at #30 Cofelt in Jacksonsville and Mr. James Berta fled on foot. A meth lab was recovered at this search warrant.

Based on this affidavit, a search warrant was issued for the residence, and numerous items were found at the residence, resulting in various charges being brought against appellants.

In their challenge of the search, both appellants argue that because the affidavit failed to set forth when the observations described in the affidavit were made, the search warrant was defective and the items seized should be suppressed. Raymond Berta further argues that facts one and two failed to establish the reliability of the informants, that fact three was based on the officer's unlawful entry onto the curtilage of appellants' residence, and that fact four contained erroneous and unsubstantiated information regarding Raymond Berta's criminal history. James Berta further argues that fact four cannot be relied upon to establish probable cause for the search.

In reviewing the trial court's denial of a motion to suppress evidence, 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. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). An affidavit for a search warrant must set forth facts and circumstances establishing probable cause to believe that things subject to seizure will be found in the place to be searched. *Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001). Because a magistrate must know that at the time of the issuance of the warrant there is criminal activity or contraband where the search is to be conducted, a time reference must be included in the affidavit, and the time that is critical is the time during which the criminal activity or contraband was observed. *Heaslet v. State*, 77 Ark. App. 333, 74 S.W.3d 242 (2002). However, the absence of a reference to time in the affidavit will not render the warrant defective if we can look to the four corners of the affidavit and infer the time during which the observations were made. *Smith v. State*, 79 Ark. App. 79, 84 S.W.3d 59 (2002).

Here, Rich set forth four facts to support his conclusion that certain items were "now being concealed" at appellants' residence. We conclude that the first three facts of the affidavit lack any reference to the time at which the informants and the officer made their observations, and none may be inferred. While the State argues it may reasonably be inferred that the events described were close in time to the signing of the affidavit, we conclude that there is no basis for this inference.

We are not unmindful of *Abshure v. State*, 79 Ark. App. 317, 87 S.W.3d 822 (2002), in which this court held that a time reference must be included in the affidavit for search warrant, but the time may be inferred from the information in the affidavit itself. In that case we affirmed the circuit court's denial of a motion to suppress evidence because the affidavit provided that surveillance of Abshure's residence, during which a strong chemical odor was noticed, was conducted on a specific date noted in the affidavit. In the case at bar, the affidavit states in the first fact that a private citizen contacted the officer on May 29, 2001, informing the officer that he had noticed a chemical odor, had witnessed heavy traffic and late night activity at the residence, and had seen a small child there. Although the affidavit states when the private citizen contacted the officer, it does not state when the private citizen made the observations. In the second fact, the affidavit states that a confidential informant advised the officer that he had seen a meth lab in the bedroom of the house, and that James Berta had a handgun and usually carried it on his person. The informant also confirmed the presence of the small child, further stating that the components and paraphernalia were within reach of the child. Again, unlike *Abshure*, where the date of the observations was stated in the affidavit, the affidavit does not contain a time frame as to when the observations were made. And, finally, in the third fact, the affidavit states that a police officer went to the address and did see in plain sight assorted items commonly used to manufacture methamphetamine. Again, no time is stated as to when the observations were made. Because we find that there is no time reference as to when the observations were made, we find the case at bar distinguishable from *Abshure*.

■ We note further that in determining whether the affidavit established probable cause, the circuit court specifically eliminated the third fact from the affidavit, concluding that the remainder of the affidavit established probable cause. Finally, the State argues that because the first three facts establish probable cause, any misleading allegations in the fourth fact regarding appellants' criminal history did not render the warrant invalid. In view of our previous conclusions, the State's premise is incorrect. Moreover, a known criminal averment is insufficient to support a finding of probable cause, is not entitled to any weight in a decision on a warrant, and is rejected as not giving rise to any credible inference. *Yancey, supra.* We reverse and remand on this point.

Raymond Berta further argues that the circuit court erred in denying his motion to sever appellants' cases. At trial, his defense was that even though the items were seized at his residence, the drug paraphernalia associated with the manufacture of methamphetamine belonged to James Berta, and it was James Berta who was involved in the manufacture of methamphetamine. He argued that because the circuit court granted James Berta's motion to preclude evidence of prior conduct of James Berta related to the manufacture of methamphetamine, then Raymond Berta was limited in presenting evidence that it was not him, but rather James Berta, who possessed the seized items and was manufacturing methamphetamine at the residence. On appeal, he again urges that appellants' antagonistic defenses demanded severance of their cases.

The circuit court has the discretion to grant or deny a severance of multiple defendants, and on appeal we will not disturb the ruling absent an abuse of that discretion. *Williams v. State*, 338 Ark. 178, 992 S.W.2d 89 (1999). Severance is appropriate when it is necessary for a fair determination of the guilt or innocence of a single defendant. *Id.* When making a decision on severance, the court should consider a number of factors, including whether the defenses of the defendants are antagonistic. *Id.* Antagonistic defenses arise when each defendant asserts his innocence and accuses the other of the crime, and the evidence cannot be successfully segregated. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996). However, when there is no reason the jury could not have believed both defenses, the defenses are not antagonistic. *Id.* A trial court is not required to grant a severance of multiple defendants unless their conflicting strategies go to the essence of their defenses and the conflicting strategies are such that their defenses cannot be accommodated by the jury. *Id.*

In sum, Raymond Berta attempted to introduce testimony regarding James Berta's prior conduct involving the manufacture of methamphetamine, while James Berta sought its exclusion, requiring the circuit court to make decisions on what of this evidence would be admissible in assisting Raymond Berta in his defense without prejudicing James Berta. Thus, Raymond Berta was unable to foster his defense that it was James Berta alone who was culpable, while the exclusion of this evidence assisted James Berta by excluding the same evidence of culpability. Thus, their conflicting strategies went to the essence of their defenses, and the

conflicting strategies were such that their defenses could not be accommodated by the jury. Consequently, we conclude that the circuit court abused its discretion in denying Raymond Berta's severance motion and reverse on this point as well. Reversed and remanded.

BIRD and VAUGHT, JJ., agree.

Jerry Dean COOPER *v.* STATE of Arkansas

CA CR 03-525 141 S.W.3d 7

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered January 14, 2004

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

Mike Beebe, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant Jerry Dean Cooper was convicted in a bench trial of the following four felonies: (1) manufacture of methamphetamine; (2) possession of methamphetamine with intent to deliver; (3) possession of paraphernalia with intent to manufacture methamphetamine; and (4) possession of pseudoephedrine with intent to manufacture methamphetamine. Mr. Cooper was sentenced to twelve years in prison for each felony conviction, to be served concurrently. He was also convicted of misdemeanor possession of marijuana and sentenced to one year in the county jail.

Mr. Cooper now appeals from his four felony convictions, arguing that none are supported by substantial evidence because the State failed to prove he possessed any of the items associated with the meth lab. Mr. Cooper does not appeal his marijuana conviction. We agree that there was insufficient evidence to support his felony convictions, and we reverse and remand.

When reviewing a challenge to the sufficiency of the evidence, the evidence is viewed in the light most favorable to the State, and only the evidence supporting the verdict will be considered. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). A conviction is affirmed if substantial evidence exists to support it. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion beyond suspicion or conjecture. *Id.*

Officer Anthony Moore testified that he received a tip from a confidential informant that a meth lab was being operated at 4123 South Shackleford Road in Little Rock. Based on the tip, Officer Moore proceeded to the residence and knocked on the door. As he was approaching the house, Officer Moore noticed a strong chemical odor.

Officer Moore testified that he met with the owner of the house, Donald Whitaker, and that Mr. Whitaker signed a form consenting to a search of the house. Officer Moore stated that the only other person present in the house was appellant, Mr. Cooper, and that Mr. Cooper gave verbal consent to search. Mr. Cooper had a bedroom and was living in the house.

Upon inspecting the house, Officer Moore observed some marijuana and white residue on a mirror in plain view. At that time both men were arrested, and Officer Moore did a pat-down search of Mr. Cooper. During the search, Mr. Cooper told Officer Moore that he had marijuana and methamphetamine in his pocket, but Officer Moore only found marijuana. After the search, Mr. Cooper remembered that he placed the baggie of methamphetamine on the kitchen table, and Officer Moore found it there. The methamphetamine found on the table was determined to weigh 0.15 grams.

Officer Moore testified that he continued to search the house and found a locked basement door. The police removed the lock and discovered a large meth lab in the basement. There was a cook taking place and the odor was extremely strong. There was testimony establishing that the ephedrine-reduction method was being used. The police seized all kinds of paraphernalia used to manufacture methamphetamine, along with pseudoephedrine and large quantities of finished product.

There was testimony from two police officers that, while they were not present during the search, Peter Hannah and Janet White had access to the house. They, along with two other people, had previously been seen coming and going from the house. Officer Moore testified on cross-examination that the owner of the house told him that Mr. Hannah had the keys to the lock on the basement door.

For reversal of his felony convictions, Mr. Cooper argues that there was insufficient evidence that he constructively possessed any of the items associated with the meth lab. Appellant acknowledges that circumstantial evidence can constitute substantial evidence to support a conviction when every other reasonable hypothesis consistent with innocence is excluded. *See Kirwan v. State*, 351 Ark. 603, 96 S.W.3d 724 (2003). However, he contends

that the circumstantial evidence was insufficient in this case because it was reasonable to conclude that someone else possessed the meth lab.

In *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991), our supreme court discussed constructive possession as follows:

> Neither exclusive nor physical possession is necessary to sustain a charge if the place where the offending substance is found is under the dominion and control of the accused. *Cary v. State*, 259 Ark. 510, 534 S.W.2d 230 (1976). Put in other terms, the State need not prove that the accused had actual possession of a controlled substance; constructive possession is sufficient. *Embry v. State*, 302 Ark. 608, 792 S.W.2d 318 (1990). Constructive possession can be implied where the contraband is found in a place immediately and exclusively accessible to the accused and subject to his control. *Id.*

Id. at 380, 802 S.W.2d at 460. Mr. Cooper argues that the State failed to establish constructive possession because there was no evidence that he exercised control over the contraband at issue.

Mr. Cooper contends that the State proved that he lived at the house, but nothing more. He notes that the lab was found in the basement of the house, and that he was never seen in proximity of the basement. He further notes that there was a lock on the basement and no evidence that he had a key, while there was evidence that Mr. Hannah had a key. Further, there was no evidence that Mr. Cooper's bedroom contained any contraband. Mr. Cooper submits that there was no evidence that he even knew the meth lab was there, much less exercised control over it. He further asserts that even if he knew it was there, there was no evidence that he knew what it was or knew of its incriminating nature. Mr. Cooper asserts that "the sole testimony was that [I] was literally locked out of that room." Because the State failed to prove he constructively possessed any of the contraband associated with the meth lab, appellant requests that this court reverse each of his four methamphetamine-related convictions.

We agree that there was a lack of evidence to connect Mr. Cooper to any of the contraband found in the basement. Joint occupancy is not in itself sufficient to establish possession on joint possession; there must be some additional factor linking the accused to the contraband. *Gwatney v. State*, 75

Ark. App. 331, 57 S.W.3d 247 (2001). In this case it is arguable that Mr. Cooper was not even an occupant of the area containing the meth lab because it was behind a locked door and there was no evidence that Mr. Cooper had access. Nevertheless, even if we consider him a joint occupant there were insufficient linking factors. While he admitted to possessing a small quantity of methamphetamine found on the kitchen table, there was no evidence to suggest that it was produced by the methamphetamine lab. Under the particular facts of this case, we hold that the State failed to prove constructive possession of the items associated with the meth lab.[1]

Pursuant to our holding, we reverse Mr. Cooper's convictions for manufacture of methamphetamine, possession of paraphernalia with intent to manufacture methamphetamine, and possession of pseudoephedrine with intent to manufacture methamphetamine. While there was not substantial evidence to support appellant's conviction for possession of methamphetamine with intent to deliver, there was clearly substantial evidence to support a conviction for the lesser-included offense of possession of methamphetamine, given that appellant admitted to possession of the small quantity seized from the kitchen table. Where the evidence is insufficient to sustain a conviction for a certain crime, but where there is sufficient evidence to sustain a conviction for a lesser-included offense, we may sentence the defendant or remand the case to the trial court for resentencing. *See Allen v. State*, 64 Ark. App. 49, 977 S.W.2d 230 (1998). We elect to remand the case with instructions to sentence Mr. Cooper for possession of methamphetamine, a Class C felony.

Reversed and remanded.

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

PITTMAN, J., dissents.

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[1] The dissent relies on *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003), in concluding that there was an additional factor linking Mr. Cooper to the methamphetamine lab. However, the contraband in that case was found in a residence occupied by Mr. Walley, and there was no evidence recited in the opinion that he jointly occupied the residence with another person.

JOHN MAUZY PITTMAN, Judge, dissenting. There was evidence at trial that a large, complete, and functioning methamphetamine lab was found in the basement of the house where appellant lived with the owner. When the police arrived, appellant told them that he lived there and admitted possessing a quantity of methamphetamine.

I disagree with the majority's holding that the evidence was insufficient to support a finding that appellant was in constructive possession of the methamphetamine lab, precursors, and other paraphernalia, and, in light of that conclusion, I also disagree with the decision to reduce the conviction for possession with intent to deliver. The State need not prove that the accused physically possessed the contraband in order to sustain his convictions if the location of the contraband was such that it could be said to be under the dominion and control of the accused, *i.e.*, constructively possessed. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).[1] Constructive possession can be implied when the contraband is in the joint control of the accused and another. *Id.* Joint occupancy, though, is not sufficient in itself to establish possession or joint possession. There must be some additional factor indicating the accused's knowledge and control of the contraband and linking it to the accused. *Id.*

As was the case in *Walley, supra*, the issue here is whether the State presented the jury with additional evidence linking appellant to the methamphetamine lab. In *Walley*, the supreme court held that the obvious presence of an ongoing drug manufacturing process and chemical odor detectable from outside the residence were, by themselves, facts from which

> the jury could reasonably conclude that Walley knew of the existence of the drugs and drug manufacturing paraphernalia in the kitchen of his residence. The jury did not have to believe Walley's testimony that he did not notice the smell in the house, did not notice the stains in the kitchen, did not notice the black plastic on the windows, and did not know what was in the locked cabinets.

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[1] The majority, in a footnote, attempts to distinguish *Walley* by asserting that there was no evidence of joint occupancy in that case. I suggest that it is odd to suggest that joint occupancy was not at issue in *Walley*; the supreme court devoted considerable attention to that issue, thoroughly discussed the law that is peculiarly applicable to it, and based its decision on its analysis of joint occupancy.

Id. at 597, 112 S.W.3d at 354. In the present case, we have similar evidence showing appellant's knowledge, *i.e.*, an extensive, currently operating methamphetamine lab in appellant's home, and a chemical odor that could be detected from the street.

When joint occupancy has been established, as it was here, all that is required to prove constructive possession is an additional factor linking the accused to the contraband. In the present case, we have an additional factor linking appellant to the methamphetamine lab — appellant admittedly possessed methamphetamine when the police arrived to search his residence. I cannot agree that the jury was required to believe that the lock on the laboratory door was any more than a ruse on the part of the manufacturers, or that appellant's admitted possession of methamphetamine — the end product of the manufacturing process — is not as compelling an additional factor as Walley's purchase of materials that could have been used to manufacture methamphetamine but could equally well have been used for an aquarium.

I respectfully dissent.

Sharon A. JOHNSON *v.* DIRECTOR of the Arkansas Employment Security Department and Beverly Health

E 03-48 141 S.W.3d 1

Court of Appeals of Arkansas
Divisions I, II and III
Opinion delivered January 14, 2004

Claudell Woods, for appellant.

Phyllis A. Edwards, for appellee.

TERRY CRABTREE, Judge. The appellant, Sharon Johnson, brings this appeal from a decision of the Board of Review denying her claim for unemployment benefits based on a finding that she was discharged for misconduct in connection with the work. On appeal, she contends that the Board's decision is not supported by substantial evidence. We disagree and affirm.

Arkansas Code Annotated section 11-10-514(a)(1)(Repl. 2002) provides that an individual shall be disqualified for benefits if she is discharged for misconduct in connection with the work. Subsection (b) of the statute provides that, if the claimant is discharged for misconduct in connection with the work on account of a willful violation of bona fide rules or customs of the employer pertaining to the safety of fellow employees, persons, or company property, the claimant shall be disqualified from the date of filing the claim until the claimant shall have ten weeks of employment in each of which the claimant shall have earned wages equal to at least his weekly benefit amount.

"Misconduct," for purposes of unemployment compensation, involves: (1)disregard of the employer's interest; (2) violation of the employer's rules; (3) disregard of the standards

of behavior which the employer has a right to expect; and (4) disregard of the employee's duties and obligations to his employer. *Rossini v. Director*, 81 Ark. App. 286, 101 S.W.3d 266 (2003). To constitute misconduct, however, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good-faith errors in judgment or discretion. *Id.* Instead, there is an element of intent associated with a determination of misconduct. *Blackford v. Director*, 55 Ark. App. 418, 935 S.W.2d 311 (1996). There must be an intentional and deliberate violation, a willful and wanton disregard, or carelessness or negligence of such a degree or recurrence as to manifest wrongful intent or evil design. *Rossini v. Director, supra.* Misconduct contemplates a willful or wanton disregard of an employer's interest as is manifested in the deliberate violation or disregard of those standards of behavior which the employer has a right to expect from its employees. *Blackford v. Director, supra.*

Whether an employee's actions constitute misconduct in connection with the work sufficient to deny unemployment benefits is a question of fact for the Board. *Thomas v. Director*, 55 Ark. App. 101, 931 S.W.2d 146 (1996). Our standard of review of the Board's findings of fact is well-settled:

> We do not conduct a *de novo* review in appeals from the Board of Review. In appeals of unemployment compensation cases we instead review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board of Review's findings. The findings of fact made by the Board of Review are conclusive if supported by substantial evidence; even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could have reasonably reached its decision based on the evidence before it. Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion.

Snyder v. Director, 81 Ark. App. 262, 263, 101 S.W.3d 270, 271 (2003). Additionally, the credibility of witnesses and the weight to be accorded their testimony are matters to be resolved by the Board of Review. *Williams v. Director*, 79 Ark. App. 407, 88 S.W.2d 427 (2002).

The appellant in this case had worked for appellee Beverly Health in Camden, Arkansas, as an LPN since 1986 until she was terminated on October 16, 2002. Glenn Clark, the executive director of the nursing-home facility, testified that appellant was fired for violating Rule 1.1 of Beverly's progressive disciplinary system for resident "neglect" because of her failure to intervene on behalf of a resident. Mr. Clark explained that appellant had worked the 11:00 p.m. to 7:00 a.m. shift on October 13-14 when at around 5:00 a.m. she made an entry into a resident's medical chart that she was unable to obtain bowel sounds. Clark said that, when bowel sounds are not detected, standard protocol called for an LPN to locate another nurse to listen for bowel sounds, and that if none were heard, a physician was to be alerted immediately and the resident's family and the director of nursing were to be notified. Appellant, however, took no further steps after making the entry in the resident's chart. Another nurse was not called in, and a doctor was not notified. Clark said that, when he asked appellant why she had not intervened on behalf of the resident, appellant responded that she "just didn't." Clark testified that listening for bowel sounds was a basic part of the physical assessment LPN's were required to perform and that employees were notified through in-service training of the proper procedure to follow when bowel sounds are not heard. Clark further testified that appellant had a history of not attending in-service training sessions. He said that appellant's failure to follow protocol in this instance was a category-one violation and that employees are advised that they could be discharged for a single category-one violation. Clark also testified that appellant's infraction was required by law to be reported to the Office of Long-Term Care and that the Office of Long-Term Care had reported the incident to the State Board of Nursing. Additionally, Clark testified that the absence of bowel sounds was an indication that something was wrong internally, such as renal failure, and that the resident in question was admitted into the hospital later that day with renal failure.

Appellant testified that the resident in question had been complaining for a week. She said that she heard the patient moaning that morning and that she took her vital signs which were within normal limits. She said that the resident told her that she was fine but that she also said that "I just don't feel good." Appellant denied that her training and experience required her to do anything after being unable to detect bowel sounds. She said that, based on experience, she knew when to call a doctor and that

she did not feel that the resident in question was in such distress as to be in need of a doctor. Appellant testified that her immediate supervisor had only given her verbal counseling over this incident but that her supervisor had also told her that she should have called a doctor. She admitted that she had not attended the last in-service training and that she had been written up in the past for not attending training sessions.

On this evidence, the Board determined that appellant was discharged for misconduct, finding that appellant had willfully violated the employer's rules pertaining to the safety of persons. Appellant contends on appeal that this finding is not supported by substantial evidence.

In *St. Vincent Infirmary v. Daniels*, 271 Ark. 654, 609 S.W.2d 675 (Ark. App. 1980), two employees who worked at the hospital's day-care center were discharged for leaving the workplace one afternoon to attend to personal business. We concluded that this single incident of leaving work amounted to misconduct because the employees had left without permission and without clocking out; because they were absent during a busy time of day at a time that did not correspond to their lunch hour; and, most significantly, because their absence placed the day care in violation of regulations concerning the ratio of adult employees to the number of children present. We held that the employees' acts were intentional and displayed a substantial disregard for their employer's interests and their own duties and obligations.

In *Beck v. Director*, 65 Ark. App. 8, 987 S.W.2d 733 (1999), a nurse violated the hospital's policy regarding the dispensation of narcotics. The hospital's procedure for dispensing narcotics required the nurse to sign out the medication in the narcotics book, noting both the date and the time, and then to give the medicine to the patient. The nurse admittedly violated this rule one day by not documenting the medication as it was given. Instead, she waited until the end of her shift and attempted to complete the necessary documentation from memory. Several days before, the nurse had also failed to consult a patient's chart prior to dispensing a dose of Darvocet, which resulted in the patient's receiving the medication at the wrong time. On this record, we rejected the nurse's contention that her conduct was nothing more than a good-faith error in judgment and held that her actions were not only in violation of the employer's rules, but that her conduct constituted a disregard of the employer's interests and the standard

of behavior the employer had a right to expect, and a disregard of her duties and the obligations that she owed to her employer.

In this case, the sole issue before us is whether the Board could reasonably conclude that appellant's actions rose to the level of misconduct. When the evidence is viewed in the appropriate light, we are unable to say that there is no substantial evidence to support the Board's finding. The testimony reflects that listening for bowel sounds was a basic component of the physical assessment nurses were required to perform. The nursing home had established a procedure that was to be followed in the event a nurse was unable to detect bowel sounds in order to ensure the protection of its residents' health and well-being. This procedure reflects that the absence of bowel sounds was deemed serious enough to warrant immediate attention and the notification of a physician. The procedure does not allow for the exercise of independent judgment or discretion on the part of nurses to depart from its requirements. When asked soon after the incident why she did not follow protocol, appellant offered no explanation other than to say that she "just didn't." We think the Board could reasonably conclude that appellant's failure to follow protocol was a dereliction of duty that was wanton and willful and that her inaction amounted to a violation of the employer's rules, a disregard of the employer's interest, a disregard of the standards of behavior the employer had a right to expect, as well as a disregard of the appellant's duties and obligations to her employer. Although appellant suggests that Mr. Clark's testimony was entitled to little weight and that we should accept her testimony that she did not neglect the resident, it is not our function to determine the weight and credibility of the testimony, as those matters are for the Board to assess. *See Williams v. Director, supra.* The Board chose to lend more credence to Clark's testimony than that of the appellant, which was its prerogative.

Affirmed.

STROUD, C.J., and PITTMAN, ROBBINS, and NEAL, JJ., agree.

GRIFFEN, GLADWIN, BAKER, and ROAF, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I respectfully dissent because I believe that appellant's conduct did not

rise to the level of a wrongful intent, evil design, or an intentional disregard of the employer's interest. Therefore, I would reverse and remand for the award of benefits.

The facts are as follows. Appellant had worked for the employer for approximately sixteen years. She had been an LPN for more than twenty-two years. At the time of her termination, she worked the night shift, from 11 p.m. to 7 a.m. On October 14, 2002, between 5 and 6 a.m., appellant checked on a particular patient and did not hear any bowel sounds. She made an entry into the patient's chart accordingly. She talked to the patient, and the patient told her that she was fine, even though she was moaning throughout much of the night. Appellant took the patient's other vital signs and recorded them, but she did not call anyone else. On the next shift, appellant's supervisor checked the same patient again and noted bowel sounds. However, later during that same day, the patient had to be delivered to a hospital for renal failure. The supervisor counseled appellant, and, subsequently, the executive director of Beverly Health conducted an investigation which resulted in appellant's termination.

Appellant then applied for, but was denied unemployment benefits. She appealed to the Arkansas Appeal Tribunal, which reversed the denial of unemployment benefits. During the telephone hearing, Glenn Clark, the executive director of Beverly Health, testified that appellant failed to follow company rules when she noticed that the patient in question had no bowel sounds, but did not take any further steps other than to record it in the chart. The procedures applicable when a nurse notices a lack of bowel sounds in a patient requires that the nurse call another nurse as a backup. If the second nurse also cannot hear any bowel activity, then a physician must be called immediately. The nurse must also contact the patient's family and the director of nursing services.

Clark testified that his employees are aware of these rules through in-service training and job descriptions. He stated that appellant never had a problem of this nature in the past. However, he mentioned an earlier incident in which appellant allegedly had failed to bring to her supervisor's attention a threat made by a nurse colleague toward a resident. On cross-examination, he also admitted that appellant had voiced concerns about salary in the past. Nonetheless, Clark explained that the only reason for termination was appellant's failure to follow the bowel-sound procedure in the

single event before her discharge. Beverly Health reported the incident to the Office of Long Term Care, which allegedly reported it to the State Board of Nursing.

Appellant testified that she had no previous disciplinary actions. She admitted that she did not report the lack of bowel sounds and offered her opinion that elderly people sometimes do not have bowel sounds and that there could be many reasons for that. She maintained that her actions that night were appropriate because the patient was not in distress. She emphasized that no one ever told her that nurses have no discretion in determining whether or not a patient was in distress. She also admitted that she did not attend the in-service training in August, and she added that no one ever said anything to her about it. She admitted that a few years earlier she had been written up for not attending in-service. Appellant claims that Clark treated her differently after she had discussed salary concerns with him prior to the incident that led to her termination.

After the Appeal Tribunal ruled in favor of appellant, her employer appealed to the Arkansas Board of Review, which reversed the Appeal Tribunal, with the result of denying appellant's unemployment benefits. Appellant then launched this appeal to our court.

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

> 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.

Fleming v. Director, Ark. Emp. Sec. Dep't, 73 Ark. App. 86, 88, 40 S.W.3d 820, 822 (2001); *see also* Ark. Code Ann. § 11-10-529(c)(1) (Repl. 2002) (stating that the Board's findings are conclusive, absent

of fraud, if supported by evidence). The credibility of witnesses and the weight to be accorded their testimony are matters to be resolved by the Board. *Niece v. Director, Ark. Emp. Sec. Dep't*, 67 Ark. App. 109, 992 S.W.2d 169 (1999).

Arkansas Code Annotated section 11-10-514(a)(1) (Repl.2002) provides that an individual "shall be disqualified for benefits if he is discharged from his last work for misconduct in connection with the work." The employer has the burden of proving misconduct by a preponderance of the evidence. *Grigsby v. Everett*, 8 Ark. App. 188, 649 S.W.2d 404 (1983). Misconduct is defined as: (1) disregard of the employer's interests; (2) violation of the employer's rules; (3) disregard of the standards of behavior which the employer has a right to expect of his employees; (4) disregard of the employee's duties and obligations to the employer. *Nibco, Inc. v. Metcalf*, 1 Ark. App. 114, 613 S.W.2d 612 (1981). There is an element of intent associated with a determination of misconduct on the part of the employee. *Oliver v. Director, Ark. Emp. Sec. Dep't*, 80 Ark. App. 275, 94 S.W.3d 362 (2002). Therefore, mere unsatisfactory conduct, ordinary negligence, or good faith errors in judgment or discretion are not considered misconduct unless they are of such a degree or recurrence as to manifest wrongful intent, evil design, or an intentional disregard of the employer's interests. *Niece v. Director, Ark. Emp. Sec. Dep't*, 67 Ark. App. 109, 992 S.W.2d 169 (1999). Whether an employee's acts are willful or merely the result of unsatisfactory conduct or unintentional failure of performance is a fact question to be decided by the Board. *Id.*

Before the backdrop of our law, I maintain that the Board of Review's decision to deny unemployment benefits based on a finding of appellant's misconduct in connection with the work is not supported by substantial evidence. As we held in *Niece v. Director, supra*, mere unsatisfactory conduct, ordinary negligence, or good faith errors in judgment or discretion are not misconduct sufficient to deny unemployment benefits. Here, appellant applied her long-standing experience as a nurse and decided that no further action had to be taken regarding the patient who had no bowel sounds. She talked to the patient and she was aware of the fact that elderly patients may have temporary lack of bowel sounds. The next nurse checking on the patient found bowel sounds. That same patient was delivered into the hospital for renal failure only later in the afternoon following appellant's early-morning check. Furthermore, even though the employer later testified that appellant's

failure to take further steps was against company policy, it also appears that appellant had never been found in violation of that policy before. In addition, the employer admitted that appellant had been dismissed solely for the failure to follow the "bowel-sound" policy.

As such, we are faced with a one-time error at best and I am at a loss how this should constitute conduct of such a degree or recurrence as to manifest wrongful intent, evil design, or an intentional disregard of the employer's interests. Appellant's error in judgment ostensibly may not have helped the patient in question, particularly in light of the fact that the patient later was indeed delivered to the hospital for renal failure. However, even if that was a mistake, it was one that did not happen repeatedly. Similarly, it does not appear that the mistake was borne of any wrongful intent or evil design or any disregard of the employer's interest. The mistake was based fully on appellant's nursing expertise and what amounts to a misjudged situation. Nothing in the employer's testimony appears to contradict that. The employer could not point to anything that would tend to prove that appellant acted with any intent whatsoever. Therefore, I would reverse and remand for an order to pay unemployment benefits.

I am authorized to state that Judges GLADWIN, BAKER, and ROAF join this dissent.

Joey KENT *v.* USABLE LIFE

CA 03-431 141 S.W.3d 895

Court of Appeals of Arkansas
Division II
Opinion delivered January 21, 2004

Scott Adams, for appellant.

Dover Dixon Horne PLLC, by: *Allan W. Horne* and *Nona M. Morris*, for appellee.

JOHN F. STROUD, JR., Chief Judge. This case arose as a result of a complaint in interpleader filed by appellee, USAble Life, when two persons, Joey Kent, a son, and Janie Kent Bilyeu, an ex-wife, filed claims for $35,000 in life-insurance proceeds on the life of James E. Kent. The circuit court directed that the proceeds be paid to Janie Kent Bilyeu, and Joey Kent appeals from that decision. We affirm.

James Kent was employed by ConAgra of Russellville. Through ConAgra, he was eligible for life insurance in the amount of $10,000, effective April 29, 1991. On March 1, 1994, James elected to purchase an additional $25,000 of supplemental life insurance. ConAgra's records indicated that James named Janie, his wife, as his beneficiary on April 29, 1991, and that this designation was never changed. James and Janie divorced in 1998, and the divorce decree was silent as to any insurance policies held by either party. Upon James's death in 2000, both Joey and Janie made a claim to the life-insurance proceeds. USAble interpleaded the funds into the registry of the Conway County Circuit Court, and the trial judge directed that the proceeds be paid to Janie, less $2250 to be paid out of the proceeds to USAble Life for its attorney fees and costs associated with the interpleader.

On appeal, Joey contends:

> [T]he divorce of James Kent and Janie Kent should be construed to change the beneficiary of the life insurance policy from Janie Kent to the children of James Kent. ... [T]he divorce should constitute a de facto or constructive change of beneficiary in the absence of any indication that the designation was irrevocable or any indication that the Chancery Court made any disposition of the policy or its proceeds.

Not only does appellant fail to cite any authority for his argument, but Arkansas case law is in direct contravention to his position. In *Allen v. First National Bank of Fort Smith*, 261 Ark. 230, 547 S.W.2d 118 (1977), our supreme court held that when insurance policies are not addressed in a divorce decree, the rights of the designated beneficiaries of the contracts of insurance are determined in accordance with contractual law "without regard to the effect of a divorce between the insured and the beneficiary." 261 Ark. at 235, 547 S.W.2d at 120.

In this case, the insurance policy was not addressed in James and Janie's divorce decree, and James never changed the beneficiary of that policy from Janie before he died. To adopt appellant's position that the divorce automatically terminated Janie as a beneficiary to James's insurance policy would require this court to completely ignore the law of contracts and to overrule our supreme court, which we cannot do. The circuit court correctly awarded the policy proceeds to Janie.

Affirmed.

HART and GLADWIN, JJ., agree.

Terry WHITTIER *v.* STATE of Arkansas

CA CR 03-509 141 S.W.3d 924

Court of Appeals of Arkansas
Division II
Opinion delivered January 21, 2004

Bart Ziegenhorn, for appellant.

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

JOHN F. STROUD, JR., Chief Judge. Appellant, Terry Whittier, was tried by a jury and found guilty of the offense of first-degree murder. He was sentenced to forty years in the Arkansas Department of Correction. His sole point of appeal is that the trial court erred in denying his requested manslaughter instruction. We agree and therefore reverse and remand.

Officer David Reynolds testified that around 4:00 a.m. on August 22, 2002, he was dispatched to the 500 block of South 13th Street in West Memphis to respond to a call of multiple gun shots. He stated that he located "a downed subject," Austin Kirkwood, on the front porch of 507 South 13th Street. He said that he did not find appellant at the scene.

Detective Ken Mitchell testified that he and Detective Smith arrived at the scene between 4:30 and 5:00 a.m. He said that the only persons they talked to that morning were the victim's uncle and the uncle's girlfriend, who both lived at the house and were inside the house at the time of the shooting. Neither the uncle nor the girlfriend had any information about what had happened. Mitchell said that over the next few weeks, however, appellant was developed as a suspect. He further explained that a man named Steven Briscoe came to his office and said that he could get some incriminating information for Mitchell. Mitchell said that they wired Briscoe for the purpose of recording a conversation between Briscoe and appellant. He said that after a taped conversation between Briscoe and appellant was obtained, appellant was arrested. Mitchell testified that appellant initially denied any involvement, but that after they played a portion of the taped conversation for him, he acknowledged shooting Kirkwood.

Mitchell recounted that appellant told him that he and Kirkwood approached each other on the street; that Kirkwood had a firearm and fired the gun twice; and that it then seemed as if Kirkwood's gun jammed. Appellant told Mitchell that he pulled out a gun at that point and fired a shot at Kirkwood as Kirkwood turned and was running toward his house. Mitchell said that appellant told him that he had gotten the gun from another person and did not want to involve anyone else in the situation. Mitchell further explained that he was present at the scene when Kirkwood's body was turned over; that a semi-automatic pistol was in his waistband; and that it was completely empty when they found it.

Detective Brian Shelton testified that he was involved in the investigation, that they found a sock containing live ammunition in one of the bedrooms of the residence at 507 South 13th Street, and that those bullets would have fit the gun carried by Kirkwood. He acknowledged that they did not conduct a gunshot-residue test on Kirkwood's hands.

After both sides rested, the defense made its record on the request to have the jury instructed on manslaughter. Defense counsel contended:

> The prong which I am submitting is that Terry Whittier, Jr., caused the death of Austin Kirkwood under circumstances that would be murder, except that he caused the death under the influence of extreme emotional disturbance for which there was a reasonable excuse. To determine the reasonableness of the excuse from the viewpoint of a person in Terry Whittier's situation, under the circumstances as he believed them to be. If I can incorporate that I think I won't have to submit any instruction, and I will submit the instruction based on the facts in the case.
>
> The facts in the case are that Terry Whittier, Jr., had a gunshot in his direction, the gun then clicked and he reacted. I think that there is evidence in the record that suggests that Terry Whittier, Jr., was acting in the heat of the moment, after being shot at to justify, and a reasonable juror could conclude that due to the state of mind, that his reaction to what had happened as opposed to be able to reflect and formulate the mental state, and acted in a heightened type situation after having gunshots fired toward him.

The trial court denied the request to instruct on manslaughter.

[redacted] Our supreme court has frequently stated that it is reversible error to refuse to instruct on a lesser-included offense when there is the slightest evidence to support the instruction. *Morris v. State*, 351 Ark. 426, 94 S.W.3d 913 (2003). The supreme court has further made it clear that we are to affirm a trial court's decision not to give an instruction on a lesser-included offense if there is no rational basis for giving the instruction. *Id.* In *Rainey v. State*, 310 Ark. 419, 421, 837 S.W.2d 453, 454 (1992), the supreme court recited the following pertinent facts of the case:

> Upon walking into the front room, Rainey testified he saw Kirkpatrick pointing the pistol at him. He grabbed her hand, pointed the gun toward the ceiling, and a shot fired. Police later recovered a bullet from the ceiling. Rainey then took the gun away from Kirkpatrick and shot her four times in the head as she was falling to the floor. He testified that after the first shot he was so hysterical that he kept firing. The entire incident, according to Rainey, took one or two seconds.
>
> Rainey admitted he did not shoot Kirkpatrick in self defense. He stated, "I just went hysterical," and "I was already mad and I just took the gun away from her and shot her." Rainey said he killed Kirkpatrick out of anger because she had threatened to tell his wife about their affair and had tried to shoot him.

The court further explained in its opinion that the trial court instructed the jury on first- and second-degree murder but refused to instruct on manslaughter, and that in the process of reaching the decision that a manslaughter instruction was unnecessary, the trial court stated that the killing was not motivated by self defense and that Rainey intended to kill the victim. The supreme court concluded in *Rainey* that the trial court erred in refusing to give the manslaughter instruction because there was a rational basis for giving it. The court explained:

> Rainey's proffered manslaughter instruction is based upon Ark. Code Ann. § 5-10-104(a) (1987), which 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 a 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; ....

> When there is a rational basis for a verdict acquitting a defendant of the offense charged and convicting him of an offense included in the offense charged, an instruction on the lesser included offense should be given, and it is reversible error to fail to give such an instruction when warranted. *Sanders v. State*, 305 Ark. 112, 805 S.W.2d 953 (1991); Ark. Code Ann. § 5-1-110(c) (1987). When there is the *slightest* evidence to warrant an instruction on a lesser included offense, it is error to refuse to give it. *See, e.g.*, *Henson v. State*, 296 Ark. 472, 757 S.W.2d 560 (1988); *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980) (emphasis added).
>
> In this case, there was evidence which would support a finding that, although Rainey admittedly purposely killed Kirkpatrick and thus committed what would otherwise have been murder, he did so under the influence of extreme emotional disturbance for which there was a reasonable excuse. The jury was presented with evidence that Kirkpatrick had attempted to kill Rainey just before he shot her. There was testimony that Kirkpatrick had threatened to tell Rainey's wife about his affair. Rainey testified that at the time of the shooting he was "hysterical," "upset," and "mad." There was thus some evidence to support the manslaughter instruction.
>
> In a recent case, *Frazier v. State*, 309 Ark. 228, 828 S.W.2d 838 (1992), Frazier admitted killing the victim but stated he did so because the victim teased him. The Trial Court denied Frazier's request for a manslaughter instruction, and we affirmed. There was no evidence that Frazier was acting under the influence of an extreme emotional disturbance. His irritation over being teased did not constitute evidence of an extreme emotional disturbance for which there was a reasonable excuse.
>
> The *Frazier* case is readily distinguishable from this one. *Here, evidence indicated that Rainey had been threatened with a gun before the killing occurred which, combined with the ongoing argument and the threat to ruin his family relationship, could well have been considered by the jury to have caused him to suffer extreme emotional distress, especially when viewed from his perspective as the statute requires.* There is a substantial difference between the emotional effect of being teased and being threatened with a gun.

Id. at 422-23, 837 S.W.2d at 455-56 (emphasis added).

Here, there was evidence that Kirkwood had fired at appellant twice before Kirkwood's gun jammed and appellant pulled his own gun and shot Kirkwood. We find that there was a rational basis for giving the manslaughter instruction in the instant case and that the trial court erred in refusing the instruction.

The State does not really dispute error in this regard. Rather, it relies upon the "skip rule," contending that without respect to whether the jury should have been instructed as to manslaughter, "[appellant] cannot prevail because he was convicted of first-degree murder, and not of the lesser-included offense of second-degree murder with which the jury was instructed and that it would have had to consider before considering manslaughter. Thus, . . . any error in failing to instruct the jury as to manslaughter is cured . . . ." We disagree with the State's position in this regard.

The State relies upon *Winbush v. State*, 82 Ark. App. 365, 107 S.W.3d 882 (2003). While *Winbush* states the general rule that "[w]hen 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," *id.* at 370, 107 S.W.3d at 885, it is important to note that the opinion cites *Rainey v. State*, *supra*, as support for that proposition. In *Rainey* the supreme court gives a more complete explanation of the "skip rule":

> A remaining issue is whether the Trial Court's failure to instruct on manslaughter was prejudicial. As a general rule, when the jury convicts a defendant of first degree murder, even though an instruction on the lesser included offense of second degree murder has been given, any error resulting from the failure to instruct on the still lesser included offense of manslaughter is cured. *See, e.g.*, *Easter v. State*, 306 Ark. 615, 816 S.W.2d 602 (1991); *Taylor v. State*, 303 Ark. 586, 799 S.W.2d 519 (1990). This is commonly referred to as "the skip rule." 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 argues the skip rule should only apply when the lesser included offense for which an instruction was denied refers to a mental state one step less culpable than the instructed offenses. In other words, the skip rule only applies when the instructed and

non-instructed offenses are described in degrees of culpability, and the lesser are indeed "included" in those for which the punishment is greater.

No doubt we have applied the skip rule when a trial court failed to instruct the jury on manslaughter, and the jury returned a verdict of murder in the first degree, thereby skipping the lesser included offense of murder in the second degree. We have done so without reference to the type of manslaughter instruction involved or the mental state necessary for the offense. *See, e.g., Easter v. State, supra*; *Taylor v. State, supra*. Our opinions in those cases, however, do not show that the argument being made here was raised. This is our first opportunity to consider it.

Had Rainey requested an instruction asking the jury to consider whether he was guilty of "recklessly causing the death of another person," another offense included in the manslaughter statute, we would probably hold that the skip rule applied. That is so because recklessness is a less culpable mental state than purposefulness, and it fits within the chain. It is a truly lesser included offense. *His argument is, however, that having requested an instruction based on purposely causing the death of another person "under the influence of extreme emotional disturbance," the skip rule does not apply. He confesses to having purposely killed the victim, but the manslaughter law, in one of its aspects, adds another element which does not fit in the chain — that of extreme emotional disturbance. One can kill purposely or knowingly, as in first and second degree murders, and yet be guilty only of manslaughter because of extreme emotional disturbance for which there is a reasonable excuse. We agree with his argument.*

The rationale given in the cases which developed what we now refer to as "the skip rule" was that no prejudicial error results from failing to instruct the jury on a lesser included offense if the jury found a state of facts to which the instruction would be inapplicable. *Farris v. State*, 54 Ark. 4, 14 S.W. 924 (1890); *Jones v. State*, 102 Ark. 195, 143 S.W. 907 (1912); *Newsome v. State*, 214 Ark. 48, 214 S.W.2d 778 (1948). In other words, even if the lesser included offense instruction had been given, the jury would still have convicted the defendant of the greater offense.

The fact that the jury found Rainey guilty of first degree murder and skipped the lesser included offense of second degree murder does not necessarily mean they found a state of facts to which his requested man-

> *slaughter instruction would be inapplicable. Whether we say that manslaughter as defined in 5-10-104(a)(1) is not a lesser included offense in first and second degree murder because it adds an element or conclude that there is an exception to the skip rule, the result is the same. The evidence before the court entitled Rainey to the manslaughter instruction. The jury could have found that although Rainey purposely killed Kirkpatrick, he did so under the influence of extreme emotional disturbance for which there was a reasonable excuse. The failure to give the jury the opportunity to consider the manslaughter instruction, which we conclude to have been justified by the evidence, was thus prejudicial.*

Rainey v. State, 310 Ark. at 424-26, 837 S.W.2d at 456-57 (emphasis added).

We find the situation presented in the instant case to closely resemble that in *Rainey*. Appellant requested the manslaughter instruction based upon the premise that he caused Kirkwood's death under the influence of extreme emotional disturbance for which there was a reasonable excuse. The evidence before the court entitled appellant to the manslaughter instruction, and the failure to give the jury the opportunity to consider it was prejudicial.

Reversed and remanded.

HART and GLADWIN, JJ., agree.

Glynnis HANKINS *v.* STATE of Arkansas

CA CR 03-275 141 S.W.3d 905

Court of Appeals of Arkansas
Division I
Opinion delivered January 21, 2004

James Dunham, for appellant.

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

ROBERT J. GLADWIN, Judge. On June 25, 2001, appellant pled guilty to possession of cocaine, a Class C felony, and was placed on five years' probation by the Pope County Circuit Court. On December 2, 2002, the trial court granted the State's petition to revoke appellant's probation, sentencing appellant to serve thirty-six months in the Arkansas Department of Correction, with imposition of an additional thirty-six months' suspended sentence conditioned upon appellant living a law-abiding life. Appellant con-

cedes that there was sufficient evidence to support the trial court's finding that she inexcusably failed to comply with the terms and conditions of her probation. Appellant's only argument on appeal is that the trial court erred in entering a judgment and commitment order reflecting the additional thirty-six months' suspended imposition of sentence because it differed from the sentence pronounced in open court. We affirm.

Because appellant concedes that there was sufficient evidence to support the revocation of her probation, we need not discuss the conditions that were imposed and the proof of the subsequent violation of those conditions. At the December 1, 2002, revocation hearing, the court found that the State had met its burden of proof that appellant inexcusably failed to comply with the conditions of her probation. In regard to sentencing, the State recommended thirty-six months in the Arkansas Department of Correction with an additional period of thirty-six months' suspended sentence. Following some discussion with the parties, the court stated to appellant that the prosecutor's recommendation for a thirty-six-month sentence was not at all unreasonable, and noted that the court would not have had any problem imposing more time. The court stated, "A judgment of conviction shall be entered sentencing [appellant] to thirty-six months in the Arkansas Department of Correction." The court then took up the issue of an appeal bond, and the proceedings were concluded.

On December 4, 2002, a judgment and commitment order was filed of record, stating that appellant was found guilty of possession of a controlled substance and sentenced to serve thirty-six months in the Arkansas Department of Correction with imposition of an additional thirty-six months' suspended sentence conditioned upon defendant living a law-abiding life (not committing any offense punishable by imprisonment). Appellant appeals that portion of the judgment that imposed an additional suspended sentence.

Appellant contends that the court erred in incorporating into the written judgment and commitment order the additional thirty-six months' suspended imposition of sentence because at no time in the proceedings did the trial court impose a suspended imposition of sentence. Appellant contends that she was entitled to be present for all portions of the proceedings concerning her case pursuant to Ark. Code Ann. § 5-4-310 (Repl. 1997), and that

there were no further proceedings where the trial court changed its ruling from the ruling announced at the revocation hearing.

We note that appellant was present for all portions of the proceedings concerning her case and that the trial court was not required to conduct further proceedings to implement the addition of a suspended imposition of sentence to the judgment and commitment order. The State is correct in its contention that the judgment and commitment order was effective when entered of record, not when orally pronounced in open court.

In *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003), the trial court pronounced judgment in open court, sentencing the defendant to five years each on three separate felonies, to be served concurrently. Eight days later, the court ordered the defendant to appear for resentencing, whereupon it sentenced the defendant to five years on each of the charges, to be served consecutively. The defendant argued on appeal that he was entitled to rely upon the sentence he received in open court, citing Ark. Code Ann. § 16-65-121 (Supp. 2001), which provides: "All judgments, orders, and decrees rendered in open court by any court of record in the State of Arkansas are effective as to all parties of record from the date rendered and not from the date of entry of record."

Our supreme court responded by noting that a judgment and commitment order is not effective until it is entered of record, and that while it is true that Ark. Code Ann. § 16-65-121 reads that a judgment rendered in open court is effective from the date it is rendered, it is also true that the statute has been superseded in civil matters by Ark. R. Civ. P. 58, which provides that a judgment is effective upon entry of record. The court cited its decision in *Price v. Price*, 341 Ark. 311, 315, 16 S.W.3d 248, 251 (2000), where it said that in order to "protect what we hold inviolate we now declare that we will defer to the General Assembly, when conflicts arise, only to the extent that the conflicting court rule's primary purpose and effectiveness are not compromised; otherwise, our rules remain supreme." The *Bradford* court went on to hold that judgment and commitment orders are effective upon entry of record in accordance with Administrative Order No. 2, and that § 16-65-121 was superseded because it directly conflicted with our rules, our Administrative Order, and our case law. The supreme court concluded that the trial court was well within its authority to modify the sentence pronounced in

open court prior to entry of judgment as long as it complied with other pertinent criminal rules. 351 Ark. at 401-402, 94 S.W.3d at 909.

Following the reasoning set forth in *Bradford*, we hold that the trial court had authority to modify the sentence pronounced in open court prior to entry of judgment because the oral order was not effective until set forth in writing and filed of record. Accordingly, we affirm.

Affirmed.

GRIFFEN and ROAF, JJ., agree.

Myron Clay NELSON *v.* STATE of Arkansas

CA CR 03-270 141 S.W.3d 900

Court of Appeals of Arkansas
Division IV
Opinion delivered January 21, 2004

[Petition for rehearing denied February 25, 2004.]

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

Mike Beebe, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant Myron Clay Nelson appeals his convictions for aggravated assault on a family or household member and felon in possession of a firearm after a bench trial in Pulaski County Circuit Court. The State also filed a petition to revoke appellant's probation in another case, and appellant agreed to

have this petition considered simultaneously with the bench trial. The trial judge found appellant guilty of the charges, and also found appellant to have violated the terms of his probation. The sentences given were run concurrently, effecting a six-year prison term. This appeal resulted. Appellant's counsel has filed a motion to be relieved as counsel and a no-merit brief with regard to the convictions and a merit-based brief regarding the revocation. Appellant was notified of his counsel's motion and brief but filed no pro se response. The State agrees with appellate counsel that there is no merit to any appeal of the convictions, but disagrees with appellate counsel that the revocation should be reversed. We affirm the convictions and revocation.

The basis for the assault and felon-in-possession charges was an incident that occurred in the home of appellant's parents, Simon and Delores Nelson, on December 8, 2001. Simon and appellant began arguing, appellant's three children were present, Delores believed that her son was intoxicated, a shotgun was brought out by one of the men, and Delores left the residence to call the sheriff's department.

Sheriff's deputies were dispatched. One of the deputies testified that Delores met him and his partner outside and told them that her son had a shotgun and was fighting with her husband. They talked to Simon, who stated to deputies that his son was "acting crazy," that appellant then retrieved a shotgun from a bedroom, and that then appellant pointed the shotgun at him and the children, but that he (Simon) was able to wrestle the gun away from appellant. A loaded twelve-gauge shotgun was recovered from the residence. Another deputy testified that appellant's parents were very upset.

Immediately thereafter, an incident report was prepared, commemorating their recollection of the event. Delores handwrote their statement, reiterating that appellant retrieved a shotgun from inside the house and threatened other family members with it. However, at the bench trial, their testimonies were that it was Simon, and not appellant, who had the gun at all times, and that somehow there had been a mistake in the written report following the incident. During the State's examination of Delores, the prosecutor moved to admit the written statement given to the police and asked if he could have Delores declared a hostile witness so that he could lead her during examination. The trial judge

permitted the request and admitted the report without objection from defense counsel. Appellant's prior felony record was admitted without objection.

Defense counsel moved for directed verdict on both charges based upon the parents' testimonies that appellant never had the gun. The motion was denied, the trial judge noting that the parents' statements dictated otherwise. Appellant then took the stand and testified that he and his father argued that day, that he had been drinking a little bit and was acting wild, but that he never had the gun. Renewed motions for directed verdict were denied.

The trial judge found that the parents' changed testimony was not credible, that their written statements following the incident were consistent with the deputies' testimony, and that appellant was guilty of both offenses. Given the guilty finding, the trial judge revoked appellant's probation. These appeals followed.

On the convictions, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals, appellant's counsel has filed a motion to withdraw on the ground that this appeal is wholly without merit. The motion was accompanied by a brief purportedly discussing all matters in the record that might arguably support an appeal, including the adverse rulings, and a statement as to why counsel considers each point raised as incapable of supporting a meritorious appeal.

The only adverse rulings were the denials of his motions for directed verdicts. We test the sufficiency of the evidence to determine whether the verdict is supported by substantial evidence, direct or circumstantial. *See* Ark. R. Crim. P. 33.1(b) (2003); *see also Green v. State*, 79 Ark. App. 297, 87 S.W.3d 814 (2002). We need only consider the evidence supporting the guilty verdict, and we view that evidence in the light most favorable to the State. *Id.* We examine all of the evidence, including any evidence that may have been admitted erroneously. *See Cook v. State*, 77 Ark. App. 20, 73 S.W.3d 1 (2002). 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.* Credibility determinations are left to the fact-finder. *Elders v. State,* 321 Ark. 60, 900 S.W.2d 170 (1995).

Arkansas Code Annotated section 5-26-306 (Repl. 1997) defines aggravated assault on a family or household member as one who, under circumstances manifesting extreme indifference to the value of human life, purposely engages in conduct that creates a substantial danger of death or serious physical injury to a family or household member. "Family or household member" includes parents. Ark. Code Ann. § 5-26-302(3). Given that the State established to the satisfaction of the finder of fact that appellant indeed possessed the firearm and threatened family members with it prior to having the gun wrested from his grip, this evidence supports a conviction for that crime. 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 must point out that appellant's counsel failed to object to the use of the hearsay written report as substantive evidence of guilt, which is generally impermissible under Ark. R. Evid. 801(d)(1)(i). Failure to object on the part of defense counsel waived any error that might be predicated on an erroneous use of that information. *See Kennedy v. State,* 344 Ark. 433, 42 S.W.3d 407 (2001).[1] As we consider for sufficiency purposes all the evidence that was admitted properly or erroneously, we conclude that there is substantial evidence to support the conviction and that no meritorious argument could be raised on appeal.

"Felon in possession of a firearm" as defined in Ark. Code Ann. § 5-73-103 (Supp. 1991) provides that no person shall possess or own any firearm who has been convicted of a felony. Appellant challenged the State's proof only as to actual possession of the gun. To possess means to exercise actual dominion, control, or management over a tangible object. Ark. Code Ann. § 5-1-

[1] In the *Kennedy* case, appellant argued on appeal that the trial judge erroneously permitted the State to use a prior inconsistent statement as substantive evidence of guilt and not just for impeachment, in violation of Ark. R. Evid. 801. The supreme court rejected that argument for failure to preserve the issue for appeal, though had he objected to using the statement for that purpose, "the trial court would have undoubtedly sustained the objection."

102(15) (Supp. 2001). Possession can be brief. *See Johnson v. State*, 306 Ark. 399, 814 S.W.2d 908 (1991); *Turner v. State*, 24 Ark. App. 102, 749 S.W.2d 339 (2000). Again, given the credibility determination made by the trial judge, and viewing all evidence received in the light most favorable to the State, there can be no meritorious argument on appeal that appellant did not possess the shotgun. The convictions are affirmed and counsel relieved.

We move now to the consideration of the merit-based argument presented on appeal regarding the revocation of appellant's probation. Appellant argues for the first time on appeal that the State failed to produce proof at the consolidated proceeding that a written list of probationary conditions was given to him, and that therefore no revocation could be had. Appellant argues that even though he is raising this for the first time on appeal, the sufficiency of the proof to revoke is nevertheless open for review.

Appellant cites *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001), for the proposition that defendants are not required to move for directed verdict in revocation proceedings in order to review the sufficiency of the evidence on appeal. Appellant asserts that because the State must provide defendants a written list of conditions of probation before one can be revoked for violation of a condition, *Zollicoffer v. State*, 55 Ark. App. 166, 934 S.W.2d 939 (1996), and because the State failed to put forth that proof at the revocation proceeding, there lacks sufficient evidence to support revocation. We disagree.

We acknowledge that the sufficiency of the State's proof as to violating a condition of probation may be challenged on appeal of a revocation in the absence of a directed-verdict motion. *See Barbee v. State, supra.* However, the rule requiring one to make procedural and evidentiary objections known to the trial court is still a viable rule of law. At no time did appellant raise this issue by pointing out to the trial court that he had not been furnished a written statement of his conditions or by objecting to the revocation hearing on that ground. In fact, appellant stipulated that the evidence put forth in the bench trial would serve as the State's basis to revoke his probation. This court will not consider issues raised for the first time on appeal. *Brown v. State*, 5 Ark. App. 181, 636 S.W.2d 286 (1982).

The reason for the statutory requirement in Ark. Code Ann. § 5-4-303 (Repl. 1997) that probationary conditions be given to probationers in writing is to avoid misunderstanding by the probationer. *Brewer v. State*, 274 Ark. 38, 621 S.W.2d 698 (1981). This requirement comports with due process; otherwise, the trial courts have no power to imply and then later revoke on conditions that were not expressly communicated in writing to the defendant. *Neely v. State*, 7 Ark. App. 238, 647 S.W.2d 473 (1983). This is not an issue of jurisdiction that can be raised at any time; it is instead a procedural issue that is waived by appellant's failure to raise it to the trial court. *See Banning v. State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987); *Cavin v. State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984); *Hawkins v. State*, 270 Ark. 1016, 607 S.W.2d 400 (Ark. App. 1980). In *Cavin v. State, supra*, Cavin challenged the revocation of his probation on appeal arguing (1) that there was insufficient evidence to revoke, and (2) that he was never given a written statement of conditions in compliance with the statutory mandate to do so. Our court rejected both contentions on appeal, the second because it was a procedural matter that appellant failed to object to at the proper time, waiving the issue for consideration on appeal. Failure to object at the proper time waives rights otherwise afforded to a criminal defendant. *Banning v. State, supra*; *Cavin v. State, supra*; *Hawkins v. State, supra*. Appellant has failed to provide any convincing argument or authority to support his contention that this procedural matter is equivalent to a challenge to the sufficiency of the evidence to support finding a violation of one of those written conditions, and we therefore affirm the revocation.

Appellant's convictions are affirmed and counsel relieved in the no-merit appeal. Appellant's revocation on appeal is likewise affirmed on the merits.

VAUGHT and CRABTREE, JJ., agree.

Jimmy C. LEWIS *v.* DIRECTOR, Employment Security Department

E 03-256 141 S.W.3d 896

Court of Appeals of Arkansas
Division I
Opinion delivered January 21, 2004

Appellant, pro se.

Phyllis A. Edwards, for appellee.

WENDELL L. GRIFFEN, Judge. Jimmy Lewis appeals from the order of the Arkansas Board of Review in which the Board denied him unemployment benefits, finding that he voluntarily left his job without good cause. Appellant argues that he left his job for good cause because his employer, Ace Hardware Corporation (Ace), discriminated against him in regularly reassigning him to a lesser-paying position that could be filled by other employees with equal or less seniority. We agree and reverse and remand to the Board for an award of benefits.

Appellant began working for Ace in 1984. Ace's employees are awarded incentive pay for completing orders in less time than Ace allows for the orders to be completed. For example, if Ace allows forty minutes to fill an order and the employee fills the order in twenty minutes, the employee earns twenty minutes of incentive pay. For every sixty minutes of incentive pay earned, an employee receives an extra hour's pay at the rate of his base hourly wage.

Jobs at Ace are awarded on a seniority system, which means that employees who have been employed the longest may bid first on the most desirable positions. In the warehouse operations unit where appellee worked, the jobs were generally divided between two departments: the break-order department and the full-case department. Both departments involved material handling, but the full-case department involved filling heavier orders that weigh as much as 5,000 pounds. Employees seek break-order positions at

Ace, in part, because those positions involve lifting no more than fifty pounds at one time. In addition, break-order employees who complete their work before the work-day is finished have the option to leave early, without pay. Appellant worked primarily as an order-filler in the break-order department. However, periodically, he was reassigned to work in the full-case department.

Appellant and Ace dispute whether break-order workers tend to earn more incentive pay. Ace presented testimony explaining that the time given to fill various types of orders and full-case orders is determined by engineers who time the work of both departments and set time-completion limits that take into consideration the difficulty of the order to be filled. Appellant's position is that, despite the engineers' determinations, it is well known among the employees and is true in his personal experience that an employee can fill a greater number of lighter orders during the course of a day than he can heavier orders because there is less heavy lifting in the break-order position; therefore, appellant asserts, based on his experience, a worker can earn more incentive pay in the break-order department than in the full-case department. He maintains this is another reason why employees bid for break-order positions.

Appellant left his employment in April 2003, after complaining to various levels of management for at least five years regarding the manner in which Ace reassigned him from his break-order position to the full-case department. Appellant and Ace agree that Ace had a large turnover in the full-case department and that whenever Ace needed additional staff in the full-case department, Ace reassigned only appellant and one other male break-order filler to the full-case department. Because appellant had more seniority than the other male, he was reassigned less often.

Typically, when appellant was reassigned to the full-case department, he was assigned to work a few hours, late in the day, to complete the department's work for that day, but he had been reassigned to work two to three days in a given week. When appellant was reassigned to the full-case department, Ace typically replaced him in the break-order department with a female employee who had much less seniority. Ace admitted that there were two females in the break-order department with the same seniority as appellant, but they were never assigned to the full-case department. Because Ace generally trained new employees for the

full-case department, it did not train existing employees to work in that department. However, the full-case department suffered from a high-turnover rate because employees frequently bid out of that department. Appellant offered to train other workers to perform full-case duties and to fill in for other workers while Ace trained them, but Ace declined his offer.

During the course of his last five years of employment, appellant complained regularly about his reassignments to the full-case department. He complained to his immediate supervisor and the operations manager ten to fifteen times each, and also complained to the warehouse manager and the general manager, the highest level of management. Generally, the supervisors agreed with appellant that it was not "right" to reassign him, but that no one else was immediately available to work in the full-case department, and that it would take them approximately two weeks to hire additional employees to work in that department. Then, the process would begin again, because Ace would hire other employees to work in the full-case department, who would then bid to another department.

Approximately seven to ten days before appellant left his employment, he complained to the general manager, who responded that Ace would need one or two weeks to get appellant out of the full-case department. Approximately one and one-half weeks after that, Ace assigned appellant to do full-case work for two hours at the end of a work day. At the start of the next work day, Ace assigned appellant to full-case work for the entire day. Appellant testified it was at this point that he determined, "that was enough." He testified that he finally understood that Ace was never going to correct the problem. When asked why he did not wait until the end of the two-week period mentioned by the general manager, he stated, "It was the same old story."

Appellant quit and applied for unemployment benefits on the ground that Ace's discrimination adversely affecting his mental and physical health. Ace controverted appellant's entitlement to unemployment benefits, and a hearing was held before the Appeals Tribunal. The Tribunal found that appellant had legitimate complaints that Ace refused to address. It observed that a position in the break-order department is a more coveted position than a position in the full-case department. The Tribunal further noted that appellant's direct supervisor, Gary Kilby, stated that appellant's concerns were not addressed because other employees would have

to be trained and that it was easier to have appellant do the work. The Tribunal also noted that Kilby admitted that appellant could have easily trained his fellow employees. Although appellant was required by Ace's personnel handbook to file a grievance with human resources but did not, the Tribunal found that appellant made a reasonable effort to resolve his disputes because he complained to every level of management.

Ace appealed to the Arkansas Board of Review. The Board reversed the Tribunal, essentially finding that Ace was allowed to use its discretion in the reassignment of its employees. The Board found that although the break-order work was less strenuous, the work of both departments was similar and appellant was well-trained to work in the full-case department. The Board noted that the evidence was in dispute regarding the extent to which the reassignments adversely affected appellant's incentive-pay earnings.

The Board was not persuaded by appellant's argument that Ace's reassignment procedure was discriminatory. It noted that Ace had managerial discretion to reassign employees on a temporary basis to meet staffing needs. Further, the Board noted that appellant did not allege a contractual term under which an employee's seniority would limit managerial discretion. Because the evidence was that women would have to call for assistance in lifting heavy items, the Board found that to assign women in the full-case department would have compounded Ace's staffing problems in that department. Therefore, the Board found that this was a legitimate, nondiscriminatory business reason not to assign women to the full-case department. Finally, the Board found that appellant's claims that his problems at work were affecting his health were unconvincing. This appeal followed.

■ We will affirm the Board's decision on a question of fact if it is supported by substantial evidence. *Magee v. Director*, 80 Ark. App. 162, 92 S.W.3d 703 (2002). Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Gunter v. Director*, 82 Ark. App. 346, 107 S.W.3d 902 (2003).

An individual shall be disqualified for unemployment benefits if he or she left his or her last work voluntarily and without good cause connected with the work. Ark. Code Ann. § 11-10-513(a)(1) (Supp. 2003). Good cause is a cause that would reasonably impel an average, able-bodied, qualified worker to give up his or her employment. *Garrett v. Director*, 58 Ark. App. 7, 944 S.W.2d 865 (1997). Good cause 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. *Gunter v. Director*, 82 Ark. App. 346, 107 S.W.3d 902 (2003). In addition, in order to receive unemployment benefits, an employee must make reasonable efforts to preserve his or her job rights. Ark. Code Ann. § 11-10-513(b).

We hold that the Board erred in finding that appellant did not leave his work for good cause. The Board concluded that Ace had a legitimate, business-related reason for not training women to work in the full-case department, in that if women were required to call for assistance to lift the heavier objects, that would compound Ace's staffing problems. However, Ace made no such assertion. By Ace's own admission, the only reason that it failed to train other workers was because appellant was already trained and it was easier to reassign him. Appellant testified that some orders in the full-case department weighed as much as 5,000 pounds. Thus, presumably even men who are reassigned to the full-case department will be required to call for the assistance of a forklift to handle such heavy material.

While an employer has managerial discretion, it may not use that discretion in a discriminatory manner. Even if we agree that Ace had a legitimate, business-related reason for not training *women* to work in the full-case department, it advanced no such reason for not training other *men* to work in that department. We cannot ignore that Ace's staffing problems were self-created and that its reassignment policy seems to violate its own rules regarding seniority upon which its employees rely.

Appellant left his job when he realized that Ace was never going to permanently address the underlying situation that caused his reassignment to the full-case department: in spite of the fact that employees regularly bid out of the full-case department, causing staffing shortages in that department, Ace refused to train other existing workers to fill those shortages. An element in

determining good cause is whether the employee took appropriate steps to prevent mistreatment from continuing. *Teel v. Daniels*, 270 Ark. 766, 606 S.W.2d 151 (Ark. App.1980). Appellant had worked for Ace for nearly twenty years. After five years of complaining to all levels of management about being reassigned to a position that, in his experience, caused him to lose pay, after offering to assist with training other employees, and after having management violate its own seniority rules and take virtually no action to provide a permanent remedy, appellant quit. We agree with appellant that his circumstances would reasonably impel an average, able-bodied, qualified worker to give up his or her employment.

Reversed and remanded for an order to award benefits.

GLADWIN and ROAF, JJ., agree.

Donald GHOSTON *v.* STATE of Arkansas

CA CR 03-32 141 S.W.3d 907

Court of Appeals of Arkansas
Division IV
Opinion delivered January 21, 2004

John W. Cone, for appellant.

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

TERRY CRABTREE, Judge. In a jury trial, Donald Ghoston was found guilty of first-degree murder, attempted first-degree murder, and committing a terroristic act for which he was sentenced to a total of fifty years in prison. For reversal, appellant contends that the trial court erred in refusing his instruction on self-defense, in refusing his instruction on manslaughter, and in refusing to allow cross-examination of a witness in order to show bias. We find merit in the third issue raised and reverse and remand for a new trial.

This case involves a shoot-out that occurred at around 3:00 a.m. on Sunday June 24, 2001, on West 24th Avenue in Pine Bluff. The shooting occurred between persons positioned in front of the residence of Jamaul Savage and the occupants of an El Camino truck. No one at the house was injured. However, the driver of the truck, James Scott, was killed, and his brother, Michael Scott, who was riding in the back of the truck, was injured. William Taylor was a passenger in the truck, and he received an injury to his thumb.

According to William Taylor, he had been riding around with Michael Scott that evening when a tan Crown Victoria had fired shots at their vehicle. He and Michael then drove to the home of James Scott and told him of that occurrence. James Scott left for a short time, and when he came back, he had a shotgun and an SKS rifle. The three got into the truck and drove around looking for the Crown Victoria. James Scott and Taylor had the shotgun in the cab of the truck, while Michael Scott was in the back armed with the SKS rifle. Taylor said that they were headed for Jamaul Savage's house looking for the Crown Victoria and that they drove past the house and saw people in the yard and then they went to his cousin's house for a brief time. He said that they drove past Savage's house again and that this was when the shooting erupted. He said that the shooting began before they reached the house while they were at the corner of 24th and Elm Streets and that no shots had been fired from the truck at that point. The truck was being fired upon on the driver's side, and he tried to pull James Scott out of the truck. Taylor saw Michael lying down in the bed of the truck with his eyes closed. Taylor said that he fired once toward the house with the shotgun and that he grabbed the SKS rifle and ran. He got rid of the rifle during his escape, but he later led the police to where it could be found. On cross-examination, he admitted that he had told the officers that "I guess a shooting was going down" and that he had also told the police that some of the shots could have come from the back of the truck.

Roy Thompson testified that he arrived at the Savage's house at around 2:30 a.m. and that he smoked marijuana with persons inside the house. He had seen that O.T. Watson was wearing surgical gloves so he went outside to see "what was happening." Appellant told him that the occupants of the El Camino truck had jumped Savage's brother the night before and said that "we're going to get them." Thompson said that appellant retrieved a gun and also gave one to O.T. Watson and said "we're

gonna wait on them." Thompson then saw the truck coming back down the street with its lights out, and he saw someone in the back of the truck. He related that shots were fired from the house before the truck got there. Thompson testified that appellant was on one knee firing at the truck and that appellant then ran toward the truck while firing the weapon. Thompson, appellant, and others went to Little Rock that night and stayed in a motel. He said that he had stayed with a woman at the motel. He went to the police station in Pine Bluff the next day and gave a statement. On cross-examination, Thompson said that there were so many gunshots that he couldn't tell "who had shot at what." He denied that he had participated in the shooting or that he was casting blame on the appellant to mask his own guilt.

Takeiya Hudson, Savage's girlfriend at the time, testified that she had driven by the house and had seen the police and an ambulance there. She and her friend continued driving and saw appellant at a gas station wearing no shirt. Appellant flagged them down and got in the car. Appellant told Hudson that "they came by to do a drive-by on them, but instead we got them." They drove to a friend's house where appellant washed his face and hands with bleach to get rid of gunpowder. Ms. Hudson said that she, appellant, Savage, Roy Thompson, "Ked" and "Mun" drove to Little Rock that night to stay in a motel. According to her, she was the only female on the trip. She said that, when they heard the next day that Michael Scott had survived, appellant stated that there was no way that Michael Scott could have lived because he had shot him in the face. She further testified that appellant had threatened her and her children in an effort to get her to change her story.

Kashanda Gurley testified that she and appellant had a child together and that appellant had called her on either the 23rd or 24th of June. In this conversation, appellant told her that he had hidden some guns in her shed, and he asked her to get rid of them. Instead, she called the police who retrieved a .22 rifle and a .380 pistol. She also said that appellant asked her to give an alibi for him.

In addition to the SKS rifle Taylor retrieved for the police, officers recovered another SKS rifle from the home of the Kresses who lived next door to the Savages. Officers found a large quantity of shell casings at the scene of the shooting. The shotgun fired by Taylor was found under James Scott's body. One shotgun shell casing was found, and ballistics showed that it was fired from the

shotgun. Nine millimeter shell casings were found, but no weapon was recovered that matched any of the shell casings. Thirty-two 7.62 millimeter shell casings were submitted for testing. Fifteen of the shell casings were fired from the rifle that was recovered from the El Camino. Seventeen were fired from the one obtained from the Kress's home. Ballistics did not match any of the shell casings recovered to the .22 rifle or .380 handgun turned over to the police by Ms. Gurley. Michael Scott's hands were tested for gunshot residue and the test came back positive.

Dr. John Cone testified for the defense. He said that Michael Scott had an entry wound at the front of the mouth and an exit wound on his neck behind the ear. He had surgery to repair a broken jaw. Another witness, Edward Smith, testified that he lived on 24th Avenue and that he had heard the gunshots. He said that shots were being fired from both angles, meaning from the vehicle, as well as the street. He said that he also saw a red-and-white truck come to the scene and fire on the truck. Steve Kress, who lived next door to the Savages, testified that he saw the truck drive by and that there was an armed man in the back wearing something covering his face. He saw the truck drive by the first time and then went inside because he thought a shooting was about to occur.

Appellant first argues that the trial court erred in refusing to give an instruction on self-defense. We find no error. One who asserts the defense of justification for a homicide must show not only that the person killed was using deadly force, but that he responded with only such force as was necessary and that he could not have avoided the killing. *Smith v. State*, 337 Ark. 239, 988 S.W.2d 492 (1999). Deadly force is justified as self-defense only if the use of such force cannot be avoided, as by retreating. *Heinze v. State*, 309 Ark. 162, 827 S.W.2d 658 (1992). Likewise, Arkansas Code Annotated section 5-2-607(a) (Repl. 1997) provides that a person may not use deadly force in self-defense if he knows that he can avoid the necessity of using that force with complete safety by retreating, unless that person is in his dwelling and was not the original aggressor. Although the applicable instruction, AMCI 2d 705, makes provision for the requirement of retreating, the instruction appellant proffered did not include it.

Under the facts of this case, it should have been included since appellant was not at his own home and was by all accounts standing outside when the shooting took place. Where a defendant has offered sufficient evidence to raise a question of fact concern-

ing a defense, the instruction must fully and fairly declare the law applicable to the defense. *Walton v. State,* 53 Ark. App. 18, 918 S.W.2d 192 (1996). An appellant may not complain of the refusal of the trial court to give an instruction that is only partially correct, as it is his duty to submit a wholly correct instruction. *Merritt v. State,* 82 Ark. App. 351, 107 S.W.3d 894 (2003). Since appellant's instruction did not contain a complete statement of the law, it was not error to refuse it.

Secondly, appellant contends that the trial court erred in refusing to give a lesser-included offense instruction on manslaughter that he recklessly caused Mr. Scott's death. The jury, however, was instructed on capital murder, first-degree murder, and second-degree murder, and the jury returned a verdict for first-degree murder. Appellant thus suffered no prejudice. When a lesser-included offense has been the subject of an instruction, and the jury convicts of the greater offense, any error resulting from the failure to give an instruction on still another lesser included offense is cured. This is known as the skip rule. *Cooper v. State,* 324 Ark. 135, 919 S.W.2d 205 (1996).

Appellant's final argument is that the trial court erred in restricting his cross-examination of witness Roy Thompson by not allowing him to question the witness about an incident where he threatened and beat up Loleita "Nicki" Morris. Appellant's proffer showed that Ms. Morris left the police station with Thompson after she had given a statement to the police about the shooting. Just after they left the police station, Thompson was seen by numerous persons dragging Ms. Morris out of a car and beating her, such that her shirt was torn off. Several of the witnesses came to Ms. Morris's aid, and she was rescued. Ms. Morris told the police that Thompson was upset with her because he believed that she had not provided him with an alibi for the shooting as he had instructed her to do. Although the police interviewed the witnesses and Ms. Morris and made a report, Mr. Thompson was not charged with any crime as a result of the incident. Appellant argued that the matter was relevant on the issue of bias, but the trial court did not allow him to pursue the subject.

A trial court is accorded wide discretion in evidentiary rulings, and will not be reversed on such rulings absent a manifest abuse of discretion. *Pryor v. State,* 71 Ark. App. 87, 27 S.W.3d 440 (2000). As was observed by the court in *Fowler v. State,* 339 Ark. 207, 5 S.W.3d 10 (1999):

> As a general rule, all relevant evidence is admissible. Relevant evidence is any evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. A witness's credibility is always an issue, subject to attack by any party. The scope of cross-examination extends to matters of credibility. A matter is not collateral if the evidence is relevant to show bias, knowledge, intent, or interest. Proof of bias is 'almost always relevant because the jury, as the finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness's testimony.' In other words, matters affecting the credibility of a witness are always relevant.

Id. at 219, 5 S.W.3d at 16-17 (citations omitted).

In this case, Roy Thompson was admittedly outside the home of Jamaul Savage when the shooting occurred. He denied firing a weapon and testified favorably for the State by implicating appellant and O.T. Watson as the ones who had shot at the truck. In the proffer, Thompson allegedly threatened and battered a woman in retaliation against her for not relaying the information he wanted her to impart to the police. Although the beating of this woman was quite brutal and witnessed by many persons, he was not charged with any offense.

We think these matters reflected upon the witness's interest, his motives in testifying, and his bias and that cross-examination on this subject should have been allowed. *See Henderson v State,* 322 Ark. 402, 910 S.W.2d 656 (1995) (evidence of witness tampering is evidence of bias and consciousness of guilt and is thus admissible); *Wood v. White,* 311 Ark. 168, 842 S.W.2d 24 (1992) (hostility of a witness against a party admissible to show bias); *Goodwin v. State,* 263 Ark. 856, 568 S.W.2d 3 (1978) (officer's threat to make sure that the defendant went to prison if he did not become an informant relevant to the issue of bias and thus admissible); *Morris v. State,* 21 Ark. App. 228, 731 S.W.2d 230 (1987) (defendant's attempt to have a witness change her testimony admissible under rule 404(b)); *Tubbs v. State,* 19 Ark. App. 306, 720 S.W.2d 331 (1986) (witness's offer of money to another witness to get the witness to change testimony admissible as evidence of bias); *Hackett v. State,* 2 Ark. App. 228, 619 S.W.2d 687 (1981) (threatening a witness in an effort to keep the witness from

testifying against the defendant admissible on the issue of bias). We thus hold that the trial court abused its discretion. Because Thompson was a vital witness for the State, since he was the only eyewitness who actually placed a weapon in appellant's hands, we cannot conclude that the trial court's error was harmless. Therefore, we reverse and remand for a new trial.

Reversed and remanded.

ROBBINS and VAUGHT, JJ., agree.

Roy Ewing SHIRLEY, Jr. *v.* STATE of Arkansas

CA CR 03-610 141 S.W.3d 921

Court of Appeals of Arkansas
Division IV
Opinion delivered January 21, 2004

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

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

TERRY CRABTREE, Judge. The appellant, Roy Ewing Shirley, Jr., was placed on probation for committing the offense of first-degree sexual abuse. On February 6, 2003, appellant appeared before the court and pled guilty to violating the conditions of his probation. By a judgment and commitment order dated February 11, 2003, the trial court imposed a five-year sentence upon the probation revocation. Later on that same date, the court requested appellant's appearance in court. In an effort to ensure appellant's payment of the cost of treatment that had been required as a condition of appellant's probation, the trial court increased appellant's sentence upon revocation to ten years in prison, of which five years were suspended. An amended judgment to that effect was entered that same day. The appellant now appeals arguing that the trial court did not have jurisdiction to alter the first sentence that had been imposed

upon revocation. The State concedes error, and we agree that the trial court did not have the authority to amend the initial judgment.

Technically, this appeal arises from a guilty plea. The general rule is that there is no right to appeal from a plea of guilt. *Hampton v. State*, 48 Ark. App. 93, 890 S.W.2d 279 (1995). However, this rule is not without exceptions. *Id.* The denial of a motion to suppress can be appealed under a conditional plea of guilt made pursuant to Ark. R. Crim. P. 24.3. There can also be an appeal after a guilty plea when the appeal is from the denial of a postjudgment motion. *See Hodge v. State*, 320 Ark. 31, 984 S.W.2d 927 (1995); *Jones v. State*, 301 Ark. 510, 785 S.W.2d 217 (1990). Also, when the issues of guilt and sentencing have been bifurcated, an appeal is permitted for the review of errors alleged to have occurred at the sentencing hearing. *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994). There can be no appeal, however, where the appeal is from a sentencing procedure that was an "integral part of the acceptance of the plea of guilty." *State v. Sherman*, 303 Ark. 284, 285, 796 S.W.2d 339 (1990). *See also Hampton v. State, supra; Henagen v. State*, 302 Ark. 599, 791 S.W.2d 371 (1990). *Cf. Reeves v. State*, 339 Ark. 304, 5 S.W.3d 41 (1999).

In the recent decision of *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003), the court applied the reasoning of *Hill v. State, supra,* to permit an appeal after a guilty plea had been entered. There, the appellant pled guilty to three felony offenses, and the court pronounced sentence in open court of five years in prison for each offense to be served concurrently. Eight days later, the trial court issued an order *sua sponte* directing the appellant to appear in court for resentencing. At the resentencing hearing, the court ordered the five-year terms to be served consecutively. Despite the guilty plea, the appeal was allowed on the ground that the sentencing hearing took place "separate and apart from the guilty plea." *Bradford* at 401, 94 S.W.3d at 908. Like *Bradford,* the appellant in the instant case was sentenced at a proceeding separate and apart from the guilty plea. Therefore, we conclude that an appeal is proper.

As a general rule, a trial court may not revise a valid sentence after execution of the sentence has begun. *Hodge v. State*, 320 Ark. 31, 894 S.W.2d 927 (1995). A sentence is put into execution when the trial court issues a judgment of conviction or

a commitment order. *Gates v. State*, 353 Ark. 333, 107 S.W.3d 868 (2003). In this case, the trial court entered a judgment and commitment order sentencing the appellant to five years in prison. Having done so, the trial court lacked the authority to modify the judgment. *See Hodge v. State, supra.* Therefore, we affirm as modified to reinstate the five-year sentence imposed in the judgment entered on February 11, 2003. *Id.*

Appellant has also posed the question of whether this case runs afoul of the prohibition against being twice placed in jeopardy. We do not address this argument because it was not raised below. *Id.* Even so, we note that such an argument was rejected in *United States v. DiFrancesco,* 449 U.S. 117 (1980). There, the Court remarked that the prohibition against multiple trials is the controlling constitutional principle of double jeopardy and that sentencing does not carry the finality that attaches to an acquittal, which prohibits retrial:

> ... our task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, not the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation.

Id. at 132. The Court further observed that "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Id.* at 135.

Affirmed as modified.

BIRD and GRIFFEN, JJ., agree.

Charles C. WHITLATCH *v.* SOUTHLAND LAND & DEVELOPMENT; The Travelers Insurance Company

CA 03-736 141 S.W.3d 916

Court of Appeals of Arkansas
Division IV
Opinion delivered January 21, 2004

Harrelson, Moore & Giles, by: *Greg Giles*, for appellant.

Robert H. Montgomery, for appellee.

TERRY CRABTREE, Judge. The Workers' Compensation Commission affirmed and adopted the opinion of an Administrative Law Judge, who found that the appellant, Charles Whitlatch, failed to prove that he was permanently and totally disabled. The ALJ found that appellant was entitled to only 50% wage-loss disability benefits beyond the 9% anatomical rating assigned by appellant's physician. On appeal, appellant claims that substantial evidence does not support the Commission's decision; we agree. Therefore, we reverse and hold that appellant is entitled to permanent total disability benefits.

In reviewing decisions from the Workers' Compensation Commission, the appellate court views 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. *Carman v. Haworth, Inc.*, 74 Ark. App. 55, 45 S.W.3d 408 (2001). Substantial evidence exists if reasonable minds could reach the same conclusion. *Daniels v. Arkansas Dep't Human Servs.*, 77 Ark. App. 99, 72 S.W.3d 128 (2002); *Lee v. Dr. Pepper Bottling Co.*, 74 Ark. App. 43, 47 S.W.3d 263 (2001). When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the

evidence, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Clardy v. Medi-Homes LTC Serv. LLC*, 75 Ark. App. 156, 55 S.W.3d 791 (2001).

On February 2, 1998, appellant sustained a compensable injury to his low back when he was involved in a head-on motor vehicle accident while returning with supplies to his workplace, Southland Land & Development. At the time of appellant's injury, Southland Land & Development, the appellee, had employed appellant for seven years as a maintenance man. Appellant described his job duties as requiring him to refurbish mobile homes when a tenant moved, maintain the grounds, and perform minor plumbing and electrical jobs. Prior to working for appellee, Coker Building employed appellant in construction work, and International Paper employed him as a forklift driver. Appellant described all of his past work experience as manual labor.

In an effort to overcome his injuries and return himself to work, appellant underwent numerous procedures, tests, and treatments over a four-year period. Appellant initially came under the care of Dr. Richard McCarthy, with the Arkansas Spine Center. On April 22, 1998, Dr. McCarthy conducted an evaluation of appellant, and based upon the severity of appellant's injuries, the doctor reported:

> He has been in a good state of health until February 2, 1998, at which point he was involved in a motor vehicle accident. . . Mr. Whitlatch wound up underneath his steering wheel with the steering wheel up against his chest. Since then the pain has gotten worse. . . The pain is felt in his back and hip on the left. His leg pain is significantly worse than the back pain. The primary pain has been felt around the anterior aspect of his left hip into the left testicle along the medial side of his left thigh and has now settled at it's worst point pressed again the medial side of his left knee. There is some component of pain and numbness along the posterior aspect of the leg but this is much less than the thigh pain. There is some pain that extends along the medial side of the left calf as well. The pain is present throughout all of the day, and it is constant. He sleeps very poorly at night, often having to get up for pain relief. . . Walking or bending makes his pain worse. He really has a lot of difficulty even standing in one place. . . Although he desires going back to work, there is some question as to whether or not he will be able to go back to physical labor.

Dr. McCarthy performed surgery on appellant's back in June of 1998. Dr. McCarthy found the nerve root to be, "quite taut" and it appeared to be "under pressure from beneath." The postoperative diagnosis was, "herniated nucleus pulposus, L3-4, with extra tyramidal nerve root compression." The surgery relieved some of appellant's lower leg pain, but appellant's lower back, hip, and upper back pain remained. As a result of appellant's continuing pain, Dr. McCarthy ordered a follow-up MRI on August 27, 1998, which revealed significant scarring around the L3 nerve root. The report following the MRI states:

> No significant disc bulge or herniating is identified. Enhancing epidermal scar is identified in the left L3-4 foramen and extends back posteriorly and laterally from prior surgery. This may partially surround the L3 root within the foramen.

By September 9, 1998, appellant reported "intolerable" pain, and Dr. McCarthy referred appellant to Dr. Carl Covey for pain management. At that time, Dr. McCarthy wrote in his progress note:

> I will ask for him to be evaluated by the pain service and allow them to see what can be done for his problem. At this point he is unable to return to work, its too early to rate him and I would say that at this point he has a poor prognosis for being able to return to work. At this point, I don't have much else to offer him to be able to help him with his problem.

Dr. Covey implanted, first a trial and then a permanent, spinal cord stimulator to alleviate appellant's pain. Appellant testified that the stimulator made the pain bearable; however, it did not eliminate it. In addition, appellant was prescribed narcotic medication, OxyContin, twice daily and a Duragesic patch that he changes every forty-eight hours. In his medical reports, Dr. Covey indicated that the OxyContin was prescribed for appellant's "break through pain."

By December of 2000, appellant reported increasing pain, complaints of his legs falling asleep, and loss of bladder control. Dr. Covey wrote in a progress note on December 8, 2000:

> [Appellant] says that when he sits for a period of time or when he is sleeping many times at night, he legs will fall asleep so much that he can't get up or stand and loses control of his bladder at that time. It

> is positional related. . . Assessment: patient with contractible back and left lower extremity pain, now with complaints of some numbness and incontinence, intermittent related to position, specifically sitting or laying for long periods of time. . .

Ultimately, appellant was referred for a functional capacity evaluation with Dr. Kevin Collins. On August 3, 2001, appellant underwent the testing, and the report confirmed that he was unable to complete many of the tests and exercises normally performed and that he was "crying" in pain while lifting only eight pounds. In spite of appellant's "crying" pain, the report concluded that appellant "displayed the functional abilities of working in the sedentary category for an eight-hour day. Frequent position changes should be afforded as needed."

Following the functional capacity evaluation, Dr. Collins issued a letter report dated September 19, 2001, and concluded that appellant was totally and permanently disabled, and unable to perform any work-related activities on a sustained basis. Dr. Collins specifically noted appellant's "good effort" during the course of the evaluation and diagnosed him with "failed back syndrome." Dr. Collins opined that appellant was totally and permanently disabled as a result of a combination of his "physical findings" and appellant's "narcotic usage." He also assigned appellant a 9% permanent impairment rating to the body as a whole.

On March 11, 2002, in a follow-up report, Dr. Collins wrote that appellant continued to suffer with severe pain in his left leg and low back. Appellant described his pain to Dr. Collins as "sharp and burning," as if he is on "fire," and as if "a piece of burning charcoal is inside his back." Appellant also reported to Dr. Collins that the leg and back pain were constant and that the narcotic medications only make the pain "bearable," at least to the point where he was not crying all of the time.

As a result of his severe pain, appellant is not able to sleep at night. During the day, he tries to lay down and rest. Due to his lack of sleep, he reports that he stays "irritable, jittery, and angry." According to appellant, he suffers side effects from the medications, which make him "feel groggy, down, and not there all the time." Appellant stated that he spends his days getting "up and down" to get comfortable. He testified that the most comfortable position for him is lying on his left side with his left leg pulled up towards his body with his right leg straightened. He said that

during the day he watches television, reads, and lies on his bed playing with his dog, a small toy fox terrier. Between the working hours of 8 a.m. and 5 p.m., he estimates that he spends four to five hours lying down and trying to cope with his pain. As a result of his pain, he is no longer able to take care of his household responsibilities, and a neighbor helps with his housework. He is unable to vacuum, cook, or wash dishes.

Before his compensable injury, appellant worked full time and reported that he liked his job. Now, however, as a result of his severe pain and the side effects he suffers from his medications, he does not believe that he would be able to concentrate or focus on a job. Appellant also suffers from memory loss associated with the medications. Yet, in an effort to address his ability to return to work, appellant underwent a vocational assessment on February 23, 2002, with Bob White, a vocational expert. White stated in his report:

> [Appellant] appears much older than his stated 44 years of age. He is very deconditioned, has wide circles under his eyes, and has a limp of the left leg. He stated that he had not slept in five days prior to this interview. He had to hold his left leg out in an extended position while sitting, leans forward in his chair propping himself up with his hands. He verbally expressed a need for help. . . I know of no unskilled jobs that offer the ability to alternately sit and stand. . . The effects of pain, medication, and depression and anxiety all can impact judgment, attention and concentration, persistence and pace which are required to complete the eight hour work day and the forty-hour work week. . . It is the opinion of this specialist that [appellant] is not a candidate for any type of employment and is unable to physically and mentally meet the demands of sedentary work. . .

At the time of the hearing, appellant was forty-four years old. Appellant completed the eleventh grade, but he had not obtained his GED. Appellant sustained an injury to a portion of his body that is not scheduled under workers' compensation laws. Therefore, appellant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522 (Repl. 2002), which states in pertinent part:

> (b)(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical

> impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

Pursuant to this statute, when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the anatomical rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Cross v. Crawford County Memorial Hospital*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Eckhardt v. Wills Shaw Express, Inc.*, 62 Ark. App. 224, 970 S.W.2d 316 (1998). In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

In spite of the opinions of Dr. McCarthy, Dr. Collins, and Bob White, the Commission concluded that appellant was not totally and permanently disabled, and found that he had only established by a preponderance of the evidence that "he sustained a decrease in his wage earning ability equal to 50% to the body as a whole, for a total permanent partial disability rating of 59% to the body as a whole." The Commission was persuaded by the fact that:

> [Appellant] is relatively young and has sustained a physical impairment rating of only 9% to the body as a whole. [Appellant] contends that his pain prevents him from returning to the work force, but he has not even attempted to seek any type of employment to determine the true extend of his wage loss disability.

The Commission also noted that appellant underwent a functional capacity evaluation, which determined that he "displayed the func-

tional abilities of working in the sedentary category for an eight-hour day. Frequent position changes should be afforded as needed."

Appellant argues that the Commission's analysis was flawed and that reasonable minds could not reach the decision that the Commission reached. Appellant's argument is well taken. Appellant maintains that he is totally and permanently disabled as the result of the combination of the severe pain he suffers from in his back and legs along with the severe side effects he suffers associated with the narcotic medication he takes daily.

In short, when taking into consideration appellant's limited education, manual-labor employment skills, severe pain in his back and legs, coupled with the side effects of necessary prescription pain medication, in addition to the testimony of his doctors and vocational expert, we are convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission, finding that appellant was anything less than permanently and totally disabled. *See Maxey v. Tyson Foods, Inc.*, 341 Ark. 306, 18 S.W.3d 328 (2000). For these reasons, we are compelled to reverse the Commission's decision.

BIRD and GRIFFEN, JJ., agree.

BYME, INC. *v.* Jackie IVY and Connie Ivy

CA 03-716 141 S.W.3d 913

Court of Appeals of Arkansas
Division III
Opinion delivered January 21, 2004

Wright, Lindsey & Jennings LLP, by: *Troy A. Price*, for appellant.

Friday, Eldredge & Clark LLP, by: *Marvin L. Childers* and *Bruce B. Tidwell*, for appellees.

KAREN R. BAKER, Judge. Appellant Byme, Inc., which operates under the name RE/MAX International Relocation Services, Inc. (hereafter RE/MAX), appeals from a summary judgment ordering it to specifically perform a contract to buy property from appellees. We reverse and remand.

On May 21, 1997, RE/MAX entered into a contract with Huntco Steel, Inc., to provide relocation services for Huntco's employees. Under the terms of the contract, when so authorized by Huntco, RE/MAX would obtain an appraisal value of the employee's home and prepare a marketing-strategy report, recommending to the employee the list price of the home and strategies for obtaining a fair market value for the home. Then, RE/MAX would send the employee a contract of sale and other documents, offering to purchase at the appraised value. Upon receipt of the executed documents from the employee, RE/MAX would take the home into its "inventory" and list it for sale on the open real-estate market. At that point, RE/MAX would submit to Huntco an invoice equal to 7% of the home's appraised value. An additional invoice for 4.5% of the appraised value would be sent to Huntco at the end of each quarter that the home remained in inventory. If the home was sold, RE/MAX would receive from Huntco reimbursement of certain costs, plus various fees.

Appellee Jackie Ivy was an employee of Huntco. On September 10, 2001, RE/MAX sent Ivy and his wife Connie a letter "offering to purchase" their home at its appraised value of $612,500. Attached to the letter was a warranty deed showing the Ivys as grantors and a blank line for the grantee; an irrevocable limited power of attorney and affidavit of delivery and acceptance of warranty deed, which basically stated that the deed to the Ivy property had been delivered to RE/MAX and that RE/MAX had the power to negotiate and deliver sales contracts and all other documents needed to close the sale of the property; and a contract of sale for the property.

The contract of sale provided that RE/MAX agreed "to purchase" and the Ivys agreed "to sell and convey to RE/MAX or its nominee" the Ivy home for $612,500. The Ivys' equity would

be paid to them based on a contract formula and based on "your company's relocation policy" after receipt by RE/MAX of all executed documents.

Paragraph 6(f) of the contract of sale is the clause at issue in this case. It reads:

> 6. EXPRESS CONDITIONS: As express conditions of this Contract, it is specifically understood and agreed that:
>
> . . . .
>
> f. RE/MAX is relying upon the Sellers' [Ivys']employer to make certain payments to it and, therefore, each and every obligation of RE/MAX under this contract is expressly contingent upon the Sellers' employer fulfilling all of its obligations to RE/MAX. Sellers agree that RE/MAX is released from any and all obligations of this Contract should the Sellers' employer fail to perform any of its duties with RE/MAX.

On September 12, 2001, the Ivys executed the deed, the power of attorney and affidavit of delivery, and the contract of sale. Thereafter, RE/MAX paid the Ivys $24,066.11 for their equity in the property and began making monthly mortgage payments on the home in the amount of $4,700.

On February 12, 2002, the Ivys received a letter from RE/MAX, stating that, as of February 6, 2002, "your employer is indebted to RE/MAX on your property in the amount of $70,437.50 in acquisition and quarterly deposits." The letter reminded the Ivys that the contract of sale was "expressly contingent upon your employer making certain payments to RE/MAX and fulfilling all of its obligations to RE/MAX." In light of Huntco's failure to pay, RE/MAX advised the Ivys that it would make no further payments on the property and demanded reimbursement of the equity and mortgage payments already made, a total of $55,858.81.

The Ivys filed suit on June 7, 2002, and alleged that they understood that the sale of their property to RE/MAX was complete. They demanded specific performance of the contract of sale. RE/MAX, relying on paragraph 6(f) of the contract, answered that, because Huntco did not make certain payments under

its contract with RE/MAX, RE/MAX was released from any and all obligations under its contract with the Ivys.

On October 25, 2002, the Ivys filed a motion for summary judgment, arguing that paragraph 6(f) of the contract was unenforceable due to vagueness. The trial court granted the motion for summary judgment, ruling that paragraph 6(f) was unenforceably vague and that, therefore, RE/MAX was not released from its obligation to purchase the Ivys' home. The court ordered RE/MAX to specifically perform the contract of sale to purchase the property, to pay the Ivys $58,694.62 to compensate them for the amounts they had paid on the house since February of 2002, and to pay the Ivys $7,206.25 in attorney fees. Following entry of a final order, RE/MAX filed a timely notice of appeal.

The issue to be determined is whether paragraph 6(f) of the contract is so vague as to be unenforceable. The terms of a contract must be reasonably certain. *ERC Mortgage Group, Inc. v. Luper*, 32 Ark. App. 19, 795 S.W.2d 362 (1990). A contract is sufficiently certain if it provides a basis for determining the existence of a breach and for giving an appropriate remedy. *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992). The law does not favor destruction of contracts because of uncertainty. *Id.* However, a court cannot enforce a contract that it cannot understand. *Barnes v. Barnes*, 275 Ark. 117, 627 S.W.2d 552 (1982).

We do not believe paragraph 6(f) is incapable of being understood. It states clearly that RE/MAX is relying on Ivy's employer to make certain payments and that the contract is contingent on the employer fulfilling its obligations to RE/MAX. The clause also clearly states that RE/MAX will be released from its obligations under the contract of sale should the employer fail to perform its duties. Thus, although the clause does not state what particular duties are owed by Huntco to RE/MAX, it is clear enough to provide a basis for determining whether a breach occurred. As for the specific duties owed by the employer to RE/MAX, these are matters that may be ascertained by viewing the Huntco contract, *i.e.*, resorting to extrinsic evidence as is done in the case of ambiguous contracts. *See Stacy v. Williams*, 38 Ark. App. 192, 834 S.W.2d 156 (1992). Further, the supreme court stated in *Shibley v. White*, 193 Ark. 1048, 1052-53, 104 S.W.2d 461, 464 (1937):

> If, with the aid of the usual tests and principles of construction, the court is able to ascertain and to enforce the intention of the parties, their agreement will not be held uncertain.

See also Dziga v. Muradian Bus. Brokers, Inc., 28 Ark. App. 241, 773 S.W.2d 106 (1989) (holding that absolute certainty is not required, and that that is certain which may be rendered certain); 1 Arthur Linton Corbin, CORBIN ON CONTRACTS § 4.1 at 543-44 (Rev. ed. 1993) (stating that extrinsic evidence may be sufficient to fill the gaps and to remove doubts in a contract).

Paragraph 6(f) of the contract of sale in this case is in the nature of a condition subsequent. Such a condition, which follows liability on a contract but provides for a contingency which, if it occurs, will defeat a contract already in effect, is a condition subsequent. *See Nichols Bros. Investments v. Rector-Phillips-Morse, Inc. and Bill Haupt*, 33 Ark. App. 47, 801 S.W.2d 308 (1990) (citing 17 Am. Jur. 2d *Contracts* § 323 (1964)). Here, the intention of the parties to this contract was clearly expressed. Appellees agreed to release appellant from all obligations of the contract should appellee's employer fail to perform its duties to appellant. The condition made is aleatory, but that does not affect its validity or enforceability. An aleatory contract is defined as "a mutual agreement, of which the effects, with respect both to the advantages and losses, whether to all the parties or to some of them, depend on an uncertain event." Black's Law Dictionary 70 (6th ed. 1990). The trial court found the paragraph to be "unenforceably vague"; however, the paragraph imposes no obligations or duties upon the parties to be enforced or that either of the parties could breach. It merely identifies the condition subsequent that relieves RE/MAX of further obligations under the contract. Whether or not the condition subsequent occurred was a question of fact; thus, summary judgment was inappropriate in this case.

Reversed and remanded.

HART and NEAL, JJ., agree.

Calvin D. DOOLEY *v.* AUTOMATED CONVEYOR SYSTEMS, INC., and Fremont Compensation

CA 03-459 143 S.W.3d 585

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered January 28, 2004

Fogleman & Rogers, by: *Joe M. Rogers*, for appellant.

Roberts Law Firm, P.A., by: *Bruce D. Anible* and *John D. Webster*, for appellees.

JOHN F. STROUD, JR., Chief Judge. This is a workers' compensation case in which appellant, Calvin Dooley, sustained a back injury while working for appellee, Automated Conveyor Systems, Inc. Appellee and its workers' compensation carrier, appellee Fremont Compensation, refused to pay appellant's medical expenses. Consequently, those expenses were partially paid by appellant's health-care-plan provider. Following a hearing on his workers' compensation claim, the ALJ determined that appellant's injury was compensable and awarded benefits. Appellant subsequently sought a clarification of the ALJ's ruling concerning the issue of whether appellees were entitled to an offset for the medical expenses that were paid by the health-care-plan provider. The record was supplemented to show that the employer was self-insured with respect to the employees' health-care plan and that both the employer and the employees contributed to the cost of the plan. The ALJ then ruled that appellees were entitled to an offset for the benefits paid by the health-care plan, pursuant to Arkansas Code Annotated section 11-9-411 (Repl. 2002), and that the constitutional argument raised by appellant was not timely made. The Commission affirmed the ALJ

with respect to the offset, but determined that the constitutional issue had been timely made. Even so, the Commission found that the constitutional challenge was without merit. This appeal followed. We affirm.

For his first point of appeal, appellant contends that the Commission "erred in concluding that the offset provisions of Arkansas Code Annotated section 11-9-411 apply to group health plan benefits regardless of whether the premiums therefor are paid by the employer or the employee."[1] We find no error.

Our review is *de novo* because it is for our appellate courts to decide what a statute means. *South Central Arkansas Elec. Coop. v. Buck*, 354 Ark. 11, 117 S.W.3d 591 (2003). Arkansas Code Annotated section 11-9-411 (Repl. 2002) provides:

> 11-9-411. Effect of payment by other insurers.
>
> (a) *Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.*
>
> (b) The claimant shall be required to disclose in a manner to be determined by the Workers' Compensation Commission the identity, address, or phone number of any person or entity which has paid benefits described in this section in connection with any claim under this chapter.
>
> (c)(1) Prior to any final award or approval of a joint petition, the claimant shall be required to furnish the respondent with releases of all subrogation claims for the benefits described in this section.

[1] As noted by the Commission in its opinion, the ALJ did not award any temporary disability benefits, and appellant did not appeal the ALJ's decision in that regard to the Commission. Consequently, as found by the Commission, appellant failed to establish that he was harmed by section 11-9-411 as it may apply to disability benefits, and his constitutional challenge in that regard has been rendered moot by the lack of any award of disability benefits. Therefore, to the extent that appellant may include disability benefits in his arguments on appeal to this court, they are not preserved and we do not address them.

> (2)(A) In the event that the claimant is unable to produce releases required by this section, then the commission shall determine the amount of such potential subrogation claims and shall direct the carrier or self-insured employer to hold in reserve only said sums for a period of five (5) years.
>
> (B) If, after the expiration of five (5) years, no release or final court order is presented otherwise directing the payment of said sums, then the carrier or self-insured employer shall tender said sums to the Death and Permanent Total Disability Trust Fund.

(Emphasis added.) In developing his argument, appellant acknowledges that subsection (a) does not specify that any such policy or plan must be funded solely by the employer before an offset can occur. He argues, however, that it is the only reasonable construction of the statute. We do not agree.

In *American Standard Travelers v. Post*, 78 Ark. App. 79, 82, 77 S.W.3d 554, 555 (2002), we explained the basic rules of statutory construction:

> [W]e recognize that the basic rule of statutory construction to which all other interpretive guides must yield is to give effect to the intent of the legislature. *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998). Arkansas Code Annotated section 11-9-704(c)(3) (Repl. 1996) states that we are to construe the workers' compensation statutes strictly. Strict construction requires that nothing be taken as intended that is not clearly expressed. *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001). The doctrine of strict construction is to use the plain meaning of the language employed. *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Where the language of a statute is unambiguous, we determine legislative intent from the ordinary meaning of the language used. *Leathers v. Cotton*, 332 Ark. 49, 52, 961 S.W.2d 32, 34 (1998). In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* The statute should be construed so that no word is left void, superfluous, or insignificant; and meaning and effect must be given to every word in the statute if possible. *Locke v. Cook*, 245 Ark. 787, 434 S.W.2d 598 (1968).

The language of section 11-9-411(a) is clear. It is evident that the legislature intended for the amount of workers'

compensation benefits payable to an injured worker to be reduced "dollar-for-dollar" by the amount of benefits that the worker has previously received for the same medical services under any of the listed group plans. Appellant's construction of this section would require that we find an intention to allow offsets only in cases where the employer alone funded the plan — something that is not clearly expressed in the statutory language. Moreover, appellant notes that the initial clause in section 11-9-411(a) provides, "benefits payable to an injured employee . . . ." He contends that a strict construction of this language precludes an offset for medical expenses that were paid directly to a medical provider instead of to the injured employee. Again, we do not agree. Using the plain meaning of the language employed in this clause, it is clear that medical expenses that are paid directly to a medical provider are paid on behalf of the injured employee and are thus "payable" to the employee.

The case law relied upon by appellant in support of his position preceded the 1993 amendment of our workers' compensation laws, and, in particular, preceded the enactment of section 11-9-411(a). He relies upon pre-1993 cases, *i.e.*, those decided prior to the enactment of section 11-9-411 as part of a comprehensive revision of the Arkansas workers' compensation laws. In the pre-1993 cases, no offset was allowed for payments made from private insurance or plans unless the employer could establish clearly that the claimant had received payments from insurance provided by the employer and that sums paid to the injured employee were intended as advance payments of compensation. *See, e.g.*, *Riverside Furn. Co. v. Loyd*, 42 Ark. App. 1, 852 S.W.2d 147 (1993); *Southwestern Bell Tel. Co. v. Siegler*, 240 Ark. 132, 398 S.W.2d 531 (1966). A critical factor in these cases was whether the premiums were paid by the employees or the employer. Here, the health plan was funded by contributions from both the employer and the employee. Appellant contends that the Commission's decision is therefore clearly contrary to the cited case law. Appellant's reliance upon these pre-1993 cases is misplaced because they are simply no longer controlling.

Appellant next argues under this point that construing section 11-9-411(a) to allow an offset for group health or disability benefits contributed to by the employee is, in effect, contributing to the cost of his workers' compensation benefits in violation of

Arkansas Code Annotated section 11-9-109 (Repl. 2002). However, appellant's reliance upon section 11-9-109 is misplaced. Section 11-9-109 provides:

> *Agreement to pay premium void.*
>
> (a) No agreement by an employee to pay any portion of the premium paid by his or her employer to a carrier or to contribute to a safety program as provided under § 11-9-409 or a benefit fund or department maintained by the employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid.
>
> (b) Any employer who makes a deduction for those purposes from the pay of any employee entitled to the benefits of this chapter shall be guilty of a Class D felony.

The short answer to appellant's argument in this regard is that there was neither an agreement by appellant to pay a portion of the workers' compensation premium nor a deduction for that purpose from his paycheck. Moreover, we do not agree that allowing offsets pursuant to the clear language of section 11-9-411(a), in effect, violates section 11-9-109.

For his last subpoint under this point of appeal, appellant contends that section 11-9-411 "contains inconsistencies that prohibit an offset." The alleged inconsistency lies in 11-9-411(c)(1), which requires the claimant to furnish the respondent with a release of all subrogation claims for the benefits described in this section. Appellant argues that the only way the claimant can provide for such a release is for the respondents to pay the group-medical-expense provider all sums it may have paid, which precludes it from being granted an offset. We disagree.

In its opinion in this case, the Commission addressed this portion of appellant's argument as follows:

> As we understand operation of the statute . . . a workers' compensation carrier will hold in reserve and ultimately reimburse a group carrier for those medical benefits paid for by the group carrier. The workers' compensation carrier will also take a dollar-for-dollar offset (i.e., not pay the claimant or the medical provider) for benefits described in Section 411(a), and the group carrier will provide a release of any potential subrogation claims once it has been

> reimbursed by the workers' compensation carrier for those medical benefits already paid for by the group carrier. Consequently, we see no merit in the claimant's argument on appeal that the requirements of Ark. Code Ann. § 11-9-411(c)(1) render impossible the dollar-for-dollar offset provided to the workers' compensation carrier under Ark. Code Ann. § 11-9-411(a).

The interpretation given a statute by the agency charged with its administration is highly persuasive, and while not conclusive, it should not be overturned unless it is clearly wrong. *Death & Perm. Dis. Trust v. Anderson*, 83 Ark. App. 230, 125 S.W.3d 819 (2003). We find nothing clearly wrong with the Commission's interpretation of section 11-9-411(c).

For his second point of appeal, appellant contends that the Commission "erred in concluding that Arkansas Code Annotated section 11-9-411 is constitutional as applied in allowing an employer and its workers' compensation carrier to claim an offset for group health plan benefits contributed to by the claimant employee." Again, we find no error.

As explained in *Ester v. National Home Centers, Inc.*, 335 Ark. 356, 364, 981 S.W.2d 91, 96 (1998):

> All statutes are presumed constitutional and we resolve all doubts in favor of constitutionality. *Golden v. Westark Community College*, 333 Ark. 41,969 S.W.2d 154 (1998); *ACW, Inc. v. Weiss*, 329 Ark. 302, 947 S.W.2d 770 (1997); *McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997). The party challenging a statute's constitutionality has the burden of proving that the act lacks a rational relationship to a legitimate objective of the legislature under any reasonably conceivable set of facts. *Arkansas Hosp. Ass'n v. Arkansas St. Bd. of Pharmacy*, 297 Ark. 454, 763 S.W.2d 73 (1989); *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). *See also Smith v. Denton*, 320 Ark. 253, 895 S.W.2d 550 (1995); *Winters v. State*, 301 Ark. 127, 782 S.W.2d 566 (1990). It is not our role to discover the actual basis for the legislation. *Arkansas Hosp. Ass'n, supra; Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). We merely consider whether there is any rational basis which demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of arbitrary and capricious government purposes. If we determine that any rational basis exists, the statute will withstand constitutional challenge. *See Arkansas Hosp. Ass'n., supra.*

Appellant's constitutional challenge lies in the Commission's interpretation of section 11-9-411 to allow employers an offset for medical benefits partially paid by group plans, which have been funded in part by employee contributions. He contends that if the Commission correctly interpreted the statute in that manner, then it is unconstitutional. He argues that workers' compensation benefits are provided by employers in exchange for employees' forbearance from suing the employer in tort; that as such they are valuable benefits; that those benefits cannot be denied or taken away for constitutionally impermissible reasons; that property interests are constitutionally protected and no state can deprive one of his property without due process of law; and that if those rights are so denied, Article 2, Section 13, of the Constitution of Arkansas entitles the aggrieved party to a remedy in the law.

In addressing appellant's constitutional challenge, the Commission explained:

> [W]e understand the provisions of Section 411 to protect third-party payors of medical benefits, and to provide a means for those third-party payors to recover their payments *from* the workers' compensation carrier who is ultimately liable for payment of those medical benefits under the statutory provisions cited by the claimant's brief. We find that Ark. Code Ann. § 11-9-411 is rationally related to a legitimate governmental interest in providing a means for third-party payors of medical benefits to recover their payments from the workers' compensation carrier who is obligated under the workers' compensation law to pay for those medical benefits, as well as a legitimate governmental interest in controlling insurance costs by eliminating the double recovery of medical costs that the claimant apparently seeks in the present case. We point out that, by explicitly providing a means for reimbursement to group carriers from workers' compensation carriers for injuries ultimately determined to be work related, Section 411 also appears to, at least in part, remove a disincentive group carriers might otherwise have had under prior law to avoid making any medical payments until after an injury has been adjudicated either work related or nonwork related.

Appellant simply did not meet his burden of proving that the act lacks a rational relationship to a legitimate objective of the legislature, and the Commission's explanation of the statute's purpose demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of arbitrary and capricious government

purposes. We find that a rational basis exists for the statute, and that it therefore withstands appellant's constitutional challenge.

Affirmed.

PITTMAN, GLADWIN, and ROBBINS, JJ., agree.

BAKER and ROAF, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. Appellant, Calvin Dooley, was awarded benefits for injuries he sustained to his back while working for appellee, Automated Conveyor Systems, Inc. He challenges the Arkansas Workers' Compensation Commission's conclusion that the offset provisions of Arkansas Code Annotated section 11-9-411 (Repl. 2002) apply to group health plan benefits regardless of whether the premiums are paid by the employer or the employee. I agree that to allow an offset for group health or disability benefits contributed to by the employee is, in effect, contributing to the cost of workers' compensation benefits in violation of section 11-9-109. Appellant also asserts that the Commission erred in concluding that the statute is constitutional as applied in allowing an employer and its workers' compensation carrier to claim an offset for group health plan benefits contributed to by the claimant employee. I agree and would reverse.

Arkansas Code Annotated section 11-9-411 (Repl. 2002) was amended in 1993. Prior to the amendment:

> As a general rule, there is ordinarily no reduction of compensation benefits because of payments made from private pensions or health and accident insurance, whether provided by the employer, union, or the claimant himself. However, the employer may be entitled to a setoff where the employer clearly establishes that (1) the claimant has received payments from insurance provided by the employer, and (2) sums paid to the injured employee were intended as advance payments of compensation. *See Varnell v. Union Carbide*, 29 Ark.App. 185, 779 S.W.2d 543 (1989). Only where the employer clearly establishes that sums paid to an injured employee are advance payments of compensation is the employer entitled to any setoff; in all other situations, the employee recovers the full amount of his disability benefits provided under the Workers' Compensation Act. *Varnell v. Union Carbide, supra.*
>
> In *Emerson Electric v. Cargile*, 5 Ark. App. 123, 633 S.W.2d 389 (1982), we concluded that: [W]here the insurance, whether private

> or company administered, is provided and funded by the employer the rule announced in *Southwestern Bell Telephone Company* [*v. Siegler*, 240 Ark. 132, 398 S.W.2d 531 (1966)] should be followed and the employer afforded the right to show, if he can, that the payments were 'payments of compensation in advance.'

Riverside Furniture Co. v. Loyd, 42 Ark. App. 1, 4-5, 852 S.W.2d 147, 149-50 (1993).

The majority dismisses the entire reasoning of these cases because they predate the 1993 amendment. The cases, however, analyzed the availability of setoff in the context of what is now section 11-9-807. The legislature did not change the provisions of that statute in the 1993 comprehensive revision of the workers' compensation laws. With the exception of pronoun usage, at the time of those cases through today, the section provides:

> (a) If the employer has made advance payments for compensation, the employer shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.
>
> (b) If the injured employee receives full wages during disability, he or she shall not be entitled to compensation during the period.

Ark. Code Ann. § 11-9-807 (Repl. 2002).

In *Emerson, supra*, this court addressed for the first time whether benefits from private insurance could be setoff pursuant to the workers' compensation statutes. After citing the previous statutory citation of Arkansas Code Annotated section 11-9-807, Ark. Stat. Ann. § 81-1319(m) (Repl. 1976), the court reasoned:

> No cases have been cited to us in which our court has addressed the question of whether or not benefits paid under private insurance may be considered advance payments for compensation. We conclude that the sounder rules to apply are that where the insurance, whether private or company administered, is provided and funded by the employer the rule announced in *Southwestern Bell Telephone Company, supra*, should be followed and the employer afforded the right to show, if he can, that the payments were "payments of compensation in advance." But where, as here, the employer does no more than to make the group coverage available at the employee's sole expense, no setoff should be allowed. Since the policy of insurance issued to the employee at his sole expense is a matter of

> private contract it could not affect the rights of the injured employee to recover under the compensation law or be considered as payments of compensation in advance. Under our statute only compensation paid in advance may be setoff against an award. *Southwestern Bell Telephone Co. v. Siegler, supra.* We conclude that private insurance procured by the employee does not come within that provision of our statute.

Emerson Elec. v. Cargile, 5 Ark. App. at 126, 633 S.W.2d at 390. The focus of the court's analysis was whether the employer intended the private insurance to be advanced payments for compensation. If the employer did not intend for the benefits paid under private insurance to be advanced payments for compensation, then our statute does not allow setoff. The court in *Emerson* specifically concluded that private insurance procured by the employee does not come within that provision of our workers' compensation statutes. Although the employee in *Emerson* paid the entire premium rather than a portion of the premium, the statutory prohibition against an employee providing funds "to pay any portion of the premium" for insurance required by our workers' compensation law still applies.

Arkansas Code Annotated section 11-9-109 (Repl. 2002) provides that employers, not employees, are responsible for providing workers' compensation coverage and that employers attempting to shift this burden to employees shall be guilty of a Class D felony. The majority concludes that there was neither an agreement by appellant to pay a portion of the workers' compensation premium nor a deduction for that purpose from his paycheck. However, the effect of the majority's decision is to reimburse the worker's compensation carrier with money from private insurance obtained with premiums paid by the employee. The statute specifically prohibits *any portion of the premium* being paid by the employee.

If the majority's position is that the employer intended for the employee to pay premiums for health care intended to advance payment for medical services required to be paid pursuant to the workers' compensation statutes, then the employer is guilty of a Class D felony. If not, section 11-9-411 unconstitutionally limits the worker's rights in law through contract. As the appellant points out, the workers' compensation carrier has no rights to that third-party contractual obligation. *Emerson, supra,* and *Moore v.*

Pulaski County Special Sch. Dist., 73 Ark. App. 366, 43 S.W.3d 204 (2001). Therefore, we should reverse.

ROAF, J., joins.

James McKINNEY *v.*
TRANE COMPANY & Travelers Indemnity Company

CA 03-742 143 S.W.3d 581

Court of Appeals of Arkansas
Division IV
Opinion delivered January 28, 2004

Walker, Shock & Cox, PLLC, by: *J. Randolph Shock*, for appellant.

Hardin, Jesson & Terry, PLC, by: *J. Rodney Mills*, for appellees.

SAM BIRD, Judge. James McKinney appeals the denial of his workers' compensation claim for an injury to his left knee. The injury, sustained in the workplace on December 14, 2001, required medical treatment and ultimately resulted in surgery. The Workers' Compensation Commission affirmed and adopted the decision of the administrative law judge, which denied his claim on the following basis:

> [T]he claimant was not performing employment services at the time he chose to jump over the tube sheeting to retrieve his soda so that he could go on his smoke break. This jump and landing which injured the claimant's left knee did not occur at a time when the claimant was advancing the respondent's interests or performing employment activities.

McKinney contends that the Commission erred in determining that he was not performing employment services at the time of his injury. We affirm the decision of the Commission.

McKinney testified that he was a union employee working as a sheet-metal fabricator under a full-time contract of hire pursuant to a union contract with appellee Trane Company. He testified that on the date of the injury he was working in the coil shop, and that a co-worker came to get him to go on his last break about five or six minutes before the break. He walked to the break table to get his cigarettes and turned around to go outside, but he

decided instead to go back to get a soda he had left on the break table. He took the most direct route by leaping over tube sheet buckets instead of going all the way around, and he landed on the floor on a pile of aluminum fins that he had not seen before leaping. His leg slipped, and his knee was injured. He testified that the setup of the department where the buckets were located had been changed from the time that he had been there previously, which was probably more than a month earlier. On the day after his injury, the company posted a "lost-time injury notice" stating that there should be no jumping or running in the facility.

McKinney testified that he was pinning coils until his co-worker came to get him for break, at which time he removed his apron, gloves, and safety glasses, putting his equipment on the table. He said that if he had gotten his soda and had not fallen, he would have gone outside to smoke on his break. He said that although he would not have been pinning coils on break, he would have been under a duty to report anything askew in the workplace had he observed it during that time. He said that the break gave employees an opportunity to go to the restroom, to smoke, or to refresh themselves with a drink. He explained that this was a scheduled ten-minute break under the union contract of employment, and that almost everyone in the plant was on break at the same time.

A compensable injury is defined, in part, as an accidental injury "arising out of and in the course of employment." Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2003). A compensable injury does not include an injury "inflicted upon the employee at a time when employment services were not being performed." Ark. Code Ann. § 11-9-102(4)(B)(iii). In *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998), we held that the claim was not compensable because employment services were not being performed when Harding tripped over a rolled-up carpet on her way to a designated smoking area in the workplace. We rejected her argument that the break advanced her employer's interest by allowing her to relax and to work more efficiently. We observed that an employee's injury sustained en route to a break area would have been in the course of employment under prior law and the personal-comfort doctrine, but that Act 796 of 1993 excluded from the definition of "compensable injury" any injury inflicted upon an employee while the worker was not performing employment services.

In *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002), a truck driver was injured while returning to his truck after using the restroom during a break. The supreme court, stating that it had not directly addressed the personal-comfort doctrine since the enactment of Act 796, refused to automatically accept or reject the doctrine. Instead, the court said that the critical issue was whether the employer's interests were being advanced directly or indirectly by the claimant at the time of the injury. The *Pifer* court wrote the following:

> Since 1993, we have twice been called upon to construe the statutory language found in sections 11-9-102(4)(A)(i) and 11-9-102(4)(B)(iii). *See White v. Geogia-Pacific Corp., supra,* and *Olsten Kimberly Quality Care, supra.* We have held that an employee is performing "employment services" when he or she "is doing something that is generally required by his or her employer. . . ." *White v. Georgia-Pacific Corp.,* 339 Ark. at 478, 6 S.W.3d at 100. We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." *White v. Georgia-Pacific Corp., supra; Olsten Kimberley, supra.* The test is whether the injury occurred "within the time and space boundaries of the employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interest directly or indirectly." *White v. Georgia-Pacific Corp.,* 339 Ark. at 478, 6 S.W.3d at 100 and *Olsten Kimberly, supra.*

347 Ark. at 856-57, 69 S.W.3d at 3-4. Pifer's claim was held to be compensable on the finding that the restroom break was a necessary function that directly or indirectly advanced the employer's interests.[1]

McKinney, arguing that a claim is not precluded merely because an employee was engaged in an act of a personal nature at the time of injury, contends that the Commission erred in analyzing his claim under *Harding v. City of Texarkana, supra.* He points instead to the "critical issue" set forth in *Pifer* as to whether the employer's interests were being advanced directly or indirectly by the employee at the time of the injury. McKinney proposes that the performance of a contract of employment is "by definition"

[1] Similarly, in *Collins v. Excel Specialty Products,* 347 Ark. 811, 69 S.W.3d 14 (2002), the supreme court held that the claimant's restroom break was a necessary function and directly or indirectly advanced the interests of her employer.

performance of employment services because the contract, including in this case the paid break as a condition of contract, directly benefits his employer. The respondents contend that adoption of McKinney's argument would extend workers' compensation coverage to other activity allowed under an employment contract, such as paid vacations. Further, respondents argue that this case is distinguishable from those in which workplace injuries were sustained while employment services were being performed. We agree with the respondents.

In *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999), which was quoted extensively and with approval by the *Pifer* court, a claimant on break was injured while on his way to smoke in an area where he could keep an eye on equipment in his work station and could immediately return if necessary. The *White* court held that the claim, although not compensable under the personal-comfort doctrine, was compensable because employment services were being performed at the time of the injury. The supreme court wrote:

> The court of appeals has held that when an employee is doing something that is generally required by his or her employer, the claimant is providing employment services. *See Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999); *Shults v. Pulaski County Special Sch. Dist.*, 63 Ark. App. 171, 976 S.W.2d 339 (1998).
>
> In the present matter, Georgia-Pacific argues that White was on a personal break and not performing any employment services; thus, his injury is not compensable. This argument ignores the fact that someone had to monitor the dryers, whether it be White or a relief worker. Because there was no relief worker provided, White was forced to remain near his immediate work area in order to monitor those machines. If one of the dryers needed to be loaded or his supervisor needed him for some reason, White would have been forced to return to his forklift immediately. Georgia-Pacific's argument also ignores the fact that White's supervisor instructed him to take a break "when he could."
>
> We believe the present situation is analogous to the facts presented in *Ray*, 66 Ark. App. 177, 990 S.W.2d 558. In *Ray*, appellant was employed by the University of Arkansas as a food-service worker in a cafeteria. She was entitled to two unpaid thirty-minute breaks and two paid fifteen-minute breaks each day. During one of her paid breaks, appellant slipped and fell as she was

> getting a snack from the cafeteria for her own personal consumption. The Commission denied appellant's claim for disability benefits after determining that she was not performing employment services at the time of her injury. The court of appeals reversed the Commission's decision, noting that [she] was paid for her fifteen-minute breaks and was required to assist student diners if the need arose. Based on those facts, the court of appeals held that the employer gleaned benefit from appellant being present and required to aid students on her break. Likewise, in this matter Georgia-Pacific also gleaned benefit from White remaining near his work station in order to monitor the progress of the dryers and immediately return to work if necessary.

339 Ark. at 478-79, 6 S.W.3d at 100-01.

McKinney argues that the activities and situation of this case are similar to those constituting "employment services" in *White v. Georgia-Pacific Corp., supra*, and *Ray v. University of Arkansas, supra.* He points to his testimony that he felt an obligation to report or take care of anything askew that he might observe during his break, and that he returned from break-time activities more refreshed and better able to complete his work. We do not find such an analogy. The claimant in *Ray* was required to aid students on her break, and the claimant in *White* was forced to remain near his immediate work area in order to monitor machines and immediately return to work if necessary: in each case the employer gleaned benefit from the worker performing, or standing ready to perform, specific activities while on break.

McKinney, on his way to his smoke break, was involved in nothing generally required by his employer and was doing nothing to carry out the employer's purpose; thus, the employer gleaned no benefit from his activities on break. *See Pifer v. Single Source Transp., supra.* We reject McKinney's argument that his left-knee injury was compensable because it occurred during a paid break taken pursuant to a union-negotiated contract. Thus, we affirm the Commission's finding that the jump and landing that caused the injury did not occur at a time when the claimant was performing employment services.

Affirmed.

GRIFFEN and CRABTREE, JJ., agree.

Charles SMITH *v.* CITY of FORT SMITH

CA 03-530 143 S.W.3d 593

Court of Appeals of Arkansas
Division IV and I
Opinion delivered January 28, 2004

[redacted]

Walker, Shock & Cox, P.L.L.C., by: *J. Randolph Shock*, for appellant.

Daily & Woods, P.L.L.C., by: *Douglas M. Carson*, for appellee.

LARRY D. VAUGHT, Judge. Appellant Charles Smith appeals the decision of the Arkansas Workers' Compensation Commission denying his claim for benefits on the ground that he was not performing employment services at the time of his injury. Appellant was employed by appellee, the City of Fort Smith, as a dump-truck driver for the street department. On May 2, 2000, appellant reported for work and spent the day transporting refuse from a temporary dump to the city landfill in a truck owned by appellee. At the time of the occurrence, appellee maintained a temporary dump in the back yard of a city shop facility that was appellant's base. The dump was a temporary location for limbs, dirt, gravel, and other debris removed from drainage ditches. The refuse was periodically moved from the temporary dump to the city landfill by street department employees on days when the weather was not conducive to them performing their regular tasks. At the time of the incident, appellee permitted its employees to remove and use the refuse for their personal use.[1]

[1] This policy was changed subsequent to appellant being injured and filing a claim

The accident that is central to this case happened near the end of appellant's work shift[2] when he was loading some old "waste" gravel into his own dump truck to take home and spread on his driveway. The accident occurred when appellant saw a concrete block that he did not want in the gravel being loaded into the truck by the driver of the front-end loader. Appellant climbed up the side of his personal truck to retrieve the concrete block when he slipped and caught himself with his left arm, injuring his shoulder. Appellant admitted that the exact task he was engaged in at the time of the accident involved throwing something he did not wish to take, specifically the concrete block, back onto the refuse pile.

Appellee initially accepted the claim as compensable and paid benefits, but later denied compensability and asked for an award against appellant for all benefits previously paid. The administrative law judge subsequently found appellant's claim to be compensable and awarded permanent partial disability at forty-four percent. Appellee appealed to the full Commission, and appellant cross-appealed seeking permanent and total disability.

The Commission issued its decision on February 21, 2003, denying compensability because at the time of the accident appellant was loading gravel into his own truck to take home to spread on his driveway, and more specifically, was attempting to throw back a concrete block he did not want for his personal use, thus he was not performing "employment services."

■ In reviewing decisions from the Workers' Compensation Commission, the appellate court views 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 Waffles, Inc.*, 83 Ark. App. 106, 117 S.W.3d 653 (2003). Substantial evidence exists if reasonable minds could reach the same conclusion. *Id.* When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence,

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against the city, and employees are no longer allowed to haul away gravel for their own personal use.

[2] Appellant's injury occurred a little more than thirty minutes before his shift was to end, and he was still "on the clock" at the time of the accident.

the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Id.*

As the claimant, appellant 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). Arkansas Code Annotated section 11-9-102(4)(A) (Repl. 2002) provides that "compensable injury" means "an accidental injury causing internal or external physical harm ... arising out of and in the course of employment .... An injury is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]" Employment services are performed when the employee does something that is generally required by his or her employer. *Collins v. Excel Spec. Prod.*, 347 Ark. 811, 69 S.W.3d 14 (2002). We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." *Daniels, supra.* The test is whether the injury occurred "within the time and space boundaries of employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interests directly or indirectly." *Id.*

Appellant argues that the test for employment services was met in this case. He states that the injury occurred during normal working hours at the appellee's shop facility, and accordingly, the temporal and spatial boundaries of the test are met. The injury occurred when appellant was loading waste gravel for transport away from the temporary location, which appellant claims was: (1) directly advancing appellee's interests; (2) generally required by appellee; (3) an inherently necessary part of his job.

Appellant claims that the Commission erred in finding that the task being performed by him at the time of the injury only benefitted appellant. He argues that appellee's waste disposal burden was lessened while he benefitted by filling potholes in his driveway. Appellant asserts that if he had not loaded the gravel to take home with him, appellee would have had to have another employee take it to the land fill.

Appellant also cites as error the finding by the Commission that the task performed was not inherently necessary for his job performance. He states that both parties had witnesses who testified that hauling waste gravel from the temporary dump to the

landfill was a normal part of the occupation to be conducted on rainy days when other activities could not be accomplished. He argues that the fact that the final destination of the waste gravel was his driveway is of no importance. Appellant also states that putting waste on the pile, specifically throwing a concrete block back onto the pile, is an inherent part of his job and is exactly what he was doing at the time of the injury. Appellant maintains that even if the Commission was correct in finding that throwing the concrete block back onto the pile was not an inherent part of his job, it was merely "incidental" to his primary activity of loading waste.

Appellee discusses several cases that state the rules for deciding when an employee is performing "employment services." In *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999), our supreme court held that when an employee is doing something that is generally required by his or her employer, the claimant is providing employment services. In *White*, the supreme court emphasized that the employer compelled the claimant to be in the circumstances in which he found himself at the time of the accident. In the instant case, although removing the refuse from the temporary dump to the landfill was at times generally part of appellant's job, appellee never compelled him to remove the waste for his own benefit, much less climb up the side of his personal vehicle to remove unwanted waste objects like the concrete block.

In *Collins v. Excel Spec. Prod., supra,* the claimant left the production line in a meat processing plant to use the restroom. On her way, she fell and broke her arm. The supreme court relied on the same principles, citing *White, supra*, to find that claimant's taking a restroom break was a necessary function and directly or indirectly advanced the interests of her employer. Likewise, in *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002), the supreme court concluded that a restroom break was both a necessary function *and* directly or indirectly advanced the interests of the employer.

Along the same line, in *Olsten Kimberly Quality Care v. Petty*, 328 Ark. 381, 944 S.W.2d 524 (1997), a nurse's assistant whose job required her to care for patients in their homes was injured in an automobile accident that occurred en route from her employer's office to a patient's home. The claim was deemed to be compensable after the supreme court determined that travel, although an incidental activity, was an inherently necessary part of her employment. To the contrary, in *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998), a claimant was denied com-

pensation when she tripped over a rolled-up carpet while walking to a designated smoking area. The court reasoned that "although appellant's break may have indirectly advanced her employer's interests, it was not *inherently necessary* for the performance of the job she was hired to do." *Id.* at 139, 970 S.W.2d at 304 (emphasis added).

While the removal of the waste by appellant may have advanced appellee's interests, at least indirectly, the removal of it for his own personal use was not inherently necessary to his job. He could have spent the time removing it in appellee's truck as he had been doing all day, and would not have been climbing up the truck to remove any specific waste he did not want. Under the ususal scope of his duties, it would all have been taken to the landfill. As appellee points out, it also was not necessary at the time and place of the occurrence for appellant to have been loading gravel at all. It was near the end of the shift and no additional loads were going to be hauled to the landfill that particular day. It certainly was not a necessary function for appellant to be loading the gravel for his personal use.

There is evidence to support appellee's argument that appellant may have realized how tenuous his claim was because of the way he filled out Form N reporting the accident. He filled it out the day following the accident and indicated that the injury occurred "while getting out of [the] *City* vehicle, caught self with arm, pulled shoulder out." (Emphasis added.) The fact that appellant's own injury report form incorrectly states that the accident involved a city vehicle rather than appellant's personal vehicle casts doubt upon his credibility. The determination of the credibility and weight to be given a witness's testimony are within the sole province of the Commission. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

Although at the time of his injury appellant was engaging in an activity that benefitted appellee to some extent, in order to be compensable the activity must also have been inherently necessary for the performance of his primary job activity. *See Harding, supra.* Whether or not an employee is performing employment services is a factual determination to be made by the Commission. Under our standard of review, we find that the Commission's decision that appellant was not performing employment services at the time of his injury is supported by substantial evidence.

Affirmed.

NEAL and CRABTREE, JJ., agree.

BIRD, J., concurs.

HART and GRIFFEN, JJ., dissent.

SAM BIRD, Judge, concurring. I agree that the Commission should be affirmed because substantial evidence exists to support its finding that appellant was not performing employment services when he was injured. I write separately because I am unable to agree with the majority opinion's assertion that "the removal of the waste by appellant may have advanced appellee's interests, at least indirectly . . . ."

I find nothing in the record that supports even the suggestion that appellee's interests were advanced by appellant's removal of the waste. For all practical purposes, appellant's workday was over because there was not sufficient time remaining to perform any significant employment tasks. Instead, appellant pulled his personal truck onto appellee's property, used appellee's equipment to load his truck with waste material that appellee gratuitously permitted appellant to remove, and was injured in the process. If anything, appellant's use of the appellee's time and equipment for personal gain was adverse to appellee's interests.

JOSEPHINE LINKER HART, Judge, dissenting. As noted in the majority opinion, under our workers' compensation law, a "compensable injury" is defined as "[a]n accidental injury ... arising out of and in the *course of employment....*" Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2003)(emphasis added). However, a compensable injury does not include an "[i]njury which was inflicted upon the employee at a time when *employment services* were not being performed...." Ark. Code Ann. § 11-9-102(4)(B)(iii) (Supp. 2003)(emphasis added). While "course of employment" and "employment services" are not defined in the statutes, the Arkansas Supreme Court recently equated the two phrases. The supreme court stated that it uses "the same test to determine whether an employee was performing 'employment services' as [it does] when determining whether an employee was acting within 'the course of employment.'" *Pifer v. Single Source Transp.*, 347 Ark. 851, 857, 69 S.W.3d 1, 4 (2002) (citing *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999); *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524

(1997)); *Collins v. Excel Specialty Prod.*, 347 Ark. 811, 817, 69 S.W.3d 14, 18 (2002) (citing the same cases). According to *Pifer* and *Collins*, "[t]he test is whether the injury occurred 'within the time and space boundaries of the employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interest directly or indirectly.'" *Id.* The supreme court overruled all prior decisions of this court to the extent that they conflicted with *Pifer* and *Collins*. *Pifer*, at 859, 69 S.W.3d at 5; *Collins*, at 819, 69 S.W.3d at 20.[1]

While the majority states that this is the test, it does not then apply the test. After applying this test, I must conclude that appellant was performing employment services. As the majority notes, on the day of his injury and as was "generally part of appellant's job," appellant reported for work and spent the day removing debris from appellee's temporary dump site on appellee's property to the city landfill. As also noted by the majority, appellee permitted employees to remove the debris and use it for their own benefit; thus, appellee did not require that the debris had to end up at the landfill. Further, as the majority notes, appellant was still "on the clock" at the time of the accident. Therefore, while operating within the time and space boundaries of his employment, appellant was injured while carrying out appellee's purpose or advancing the employer's interest directly or indirectly by removing debris from appellee's property.

While the majority states that "appellee never compelled [appellant] to remove the waste for his own benefit," I note that removal of the debris was part of his job, and appellee permitted

[1] The fulcrum on which the majority's decision totters, the case of *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998), is of doubtful precedential value. In denying benefits, the *Harding* court, rather than reckoning the phrases "course of employment" and "employment services" as equal, considered them as if they stood in opposition. Further, the *Harding* court affirmed the denial of benefits even while acknowledging that the employer's interests may have been indirectly advanced. *Harding*, at 139, 970 S.W.2d at 304. All of this conflicts with the test set out in *Pifer* and *Collins*, which, as stated above, asks whether the injury occurred when the employee was advancing the employer's interests, directly or indirectly. And as noted above, our supreme court overruled all prior decisions of this court to the extent that they conflicted with *Pifer* and *Collins*. Further, I also note that the majority cites to *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997), which the majority says stands for the proposition that a claim is compensable when the claimant's incidental activity is an inherently necessary part of her employment. That case, however, does not mandate that only inherently necessary conduct is compensable. In *Pifer* and *Collins*, the test is otherwise.

removal of the debris for personal use. The test set out in *Pifer* and *Collins* asks whether the injury occurred when the employee was advancing the employer's interests, directly or indirectly. Hence, the majority's denial of benefits is ironic in that it acknowledges that "the removal of the waste by appellant may have advanced appellee's interests, at least indirectly," and that "appellant was engaging in an activity that benefitted appellee to some extent."

The majority also states that appellee did not compel appellant to discard "unwanted waste objects" from his personal truck. I note further that the majority makes much of appellant's use of his own truck for the permitted removal of debris for his personal needs, suggesting that he could have used appellee's truck to take the debris to the landfill. This ignores the fact that appellee permitted the debris to end up somewhere other than the landfill. And I ask, rhetorically, how else could appellant have removed the debris for his permitted personal use? By hand? By using appellee's truck? Surely, permission to remove the debris implied permission to remove the debris wanted by the employee by some practicable means available to the employee.

Also, the majority states that appellant "was near the end of the shift and no additional loads were going to be hauled to the landfill on that particular day." This ignores appellee's associated benefit from appellant's continued work. The quoted language seems to suggest that denial of benefits was appropriate because appellant continued to remove the debris before his shift ended, leading one to conclude that the majority is denying benefits because appellant did not knock off early.

Based on the applicable law and relevant facts, I cannot reach any other conclusion than that appellant's removal of debris from appellee's temporary dump site during work hours constituted employment services and that the accident arose in the course of employment.

I respectfully dissent.

GRIFFEN, J., joins in this dissent.

Angela OLSEN *v.* EAST END SCHOOL DISTRICT

CA 03-559 143 S.W.3d 576

Court of Appeals of Arkansas
Division IV
Opinion delivered January 28, 2004

[Petition for rehearing denied March 10, 2004.]

Martin Law Firm, P.A., by: *Thomas A. Martin*, for appellant.

Brazil, Adlong & Winningham, PLC, by: *William C. Brazil*, for appellees.

TERRY CRABTREE, Judge. Appellant Angela Olsen's contract as the principal of appellee East End School District's high school for the 2000-2001 school year was not renewed. The Perry County Circuit Court upheld the District's decision not to renew appellant's contract. We affirm.

Appellant was the principal of East End High School during the 1999-2000 school year. Her contract for the 2000-2001 school year was not renewed based upon the recommendation of the superintendent, Douglas Adams. Adams sent appellant a letter on April 15, 2000, stating that he intended to recommend to the school board that they not renew appellant's contract because he was recommending that the school district reorganize from three schools, a high school, a middle school, and a kindergarten and elementary school, into a two-school district. This would leave the District with one extra principal, and appellant was the most recently hired. Appellant requested a hearing before the school

board. The board voted four to one to accept Adams's recommendation not to renew appellant's contract.[1]

Appellant challenged the District's action by filing a "Petition for Writ of Mandamus and Complaint" under the Teacher Fair Dismissal Act (TFDA), Ark. Code Ann. §§ 6-17-1501 through 6-17-1510 (1999). The petition alleged that the District breached its contract with appellant by violating the TFDA and that such breach entitled appellant to all of the monetary benefits that she had under the 1999-2000 contract, plus interest and attorney's fees. Appellees answered and denied the allegations in appellant's petition.

Douglas Adams, the superintendent, testified that he sent a letter to appellant on April 15, 2000, stating that appellant's contract would not be renewed for the 2000-2001 school year because he was going to recommend a reorganization of the school district and that appellant was the principal with the least amount of service. He also stated that, at that time, there was no seniority-based reduction-in-force policy and that no such proposal had been placed before the school board.

Adams admitted that appellant's performance was not a factor in his decision to recommend that appellant not be renewed. He stated that his decision was based on the fact that the other two principals had been with the District in administrative capacities for over fifteen years and that they were doing good jobs. He explained that he made notes evaluating the principals throughout the year, noting whether there had been improvement or areas that needed improvement. He also said that, in February 2000, he requested identical information from each principal in order to complete the evaluations. He also testified that he told the principals that the decision whether to renew his own contract was being tabled until after the principals had been evaluated. He stated that appellant indicated that she had completed only six or seven of the seventeen teacher evaluations in February and was in no position to be evaluated at that time.

Adams testified that he began thinking about restructuring the District in January because the District was losing students and, thus, state funding. He stated that state standards required one principal for 300 students and that the District had 305 students in

[1] The individual appellees are the members of the school board who voted in favor of appellant's nonrenewal.

grades seven through twelve. He stated that the issue was discussed with the principals in one of the weekly administrators' meetings. He also stated that he asked appellant and the other principals to be involved in scheduling for the 2000-2001 school year so that he would be prepared if the board accepted the restructuring recommendation or retained the current configuration. He said that the nonrenewal decision was not based on the grievances appellant filed. He also stated that the restructuring decision was a financial one. He also stated that the board acted on his recommendation to restructure in June 2000.

Appellant testified that she was hired in 1999 to be the high school principal. She was certified as a principal, as well as for superintendent and curriculum specialist, based upon her having a master's degree and additional hours. She stated that the April 15, 2000, letter from Adams was the first written indication that her contract would not be renewed but that there had been other indications that her employment was in jeopardy. She testified that she had a "bumpy" relationship with Adams, resulting from, among other things, disagreements over her spending authority, Adams's decision not to expel a student who had threatened appellant, and a parent whom Adams had hired to be appellant's secretary. She stated that she received many memos from Adams, some of which she considered trivial and others she considered professionally threatening. Appellant testified that another source of friction between herself and Adams was whether she was a probationary employee. She said that the other principals were evaluated and had their contracts renewed in February but that she was not evaluated and renewed at the same time. She testified that the reason given for her not being evaluated in February was that not all of the high school teachers had been evaluated but that this requirement had not been communicated to her. Appellant stated that she believed that the reorganization was a pretext for the nonrenewal of her contract.

On cross-examination, appellant testified that the April 15 letter from Adams did not mention her performance as a reason for nonrenewal. She testified that she heard rumors concerning restructuring in March and asked Adams about them, stating that, if true, one principal would be without a position. She testified that Adams told her that they were merely rumors and that he did not know what would happen.

The trial court found that the District was not required to have a reduction-in-force policy; that, because no reduction-in-

force policy exists, it could not be incorporated into appellant's contract; and that the decision not to renew appellant's contract was not arbitrary and capricious. This appeal followed.

Appellant raises three points on appeal: that the District's amendment of its personnel policies violated the TFDA, and the nonrenewal of appellant's contract was void; that the future possibility of reorganization of the school structure and future adoption of a reduction-in-force policy are not "facts" that can support a nonrenewal under the TFDA; that the District did not strictly comply with its own policies regarding the date for employing principals, and the nonrenewal of appellant's contract was void.

The standard of review in cases under the TFDA is limited to whether the trial court's decision is clearly erroneous. *Junction City Sch. Dist. v. Alphin*, 56 Ark. App. 61, 938 S.W.2d 239 (1997). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the firm conviction that a mistake has been made. *Hedger Bros. Cement & Materials, Inc. v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000). The question of whether or not a school district has strictly complied is a question of law. *Jackson v. El Dorado Sch. Dist.*, 74 Ark. App. 433, 48 S.W.3d 588 (2001). A trial court's conclusions on a question of law will be given no weight on appeal. *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000).

In her first point, appellant argues that the district illegally amended its personnel policies to adopt a seniority-based reduction-in-force policy and that this illegal procedure thereby voids the decision not to renew her contract. In Ark. Code Ann. § 6-17-1503,[2] the General Assembly laid out the construction of the statutory scheme, noting that:

> This subchapter is not a teacher tenure law in that it does not confer lifetime appointment nor prevent discharge of teachers for any cause which is not arbitrary, capricious, or discretionary. *A nonrenewal*, termination, suspension, or other disciplinary action by

[2] The Arkansas General Assembly amended Ark. Code Ann. § 6-17-1503 in Act 1739 of 2001 to require only "substantial compliance" with the TFDA. The version of the TFDA in effect at the time of the nonrenewal of appellant's contract governs the action. *Foreman Sch. Dist. No. 25 v. Steele*, 347 Ark. 193, 61 S.W.3d 801 (2001).

> 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.*

(Emphasis added.) Furthermore, section 6-17-1506 notes that a teacher's contract can be renewed automatically "unless 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...." Finally, if a teacher has been notified that his contract will not be renewed, that teacher can file a written request for a hearing with the school board. Ark. Code Ann. § 6-17-1509(a). Upon receipt of that request, the school board must grant a hearing no sooner than five days nor more than ten days after the request has been served, unless the teacher and board mutually agree in writing to postpone the hearing to a later date. Ark. Code Ann. § 6-17-1509(c)(1). Under the TFDA, nonrenewal of a contract is void unless procedures are strictly followed. Ark. Code Ann. § 6-17-1503; *Western Grove Sch. Dist. v. Terry*, 318 Ark. 316, 885 S.W.2d 300 (1994).

Appellant concedes that the District is not required to have a reduction-in-force policy in place. Further, we believe that Adams's April 15 letter was not actually a statement that appellant's contract was not being renewed based on a reduction-in-force policy. Rather, we believe that the April 15 letter was more of an explanation *why* the contract was not being renewed. Section 6-17-1506(b)(2)(B) requires that the notice of nonrenewal contain a statement of the reason so that the teacher can prepare a defense. The decision to terminate a teacher pursuant to the TFDA is a matter within the discretion of the school board, and the reviewing court cannot substitute its opinion for that of the school board in the absence of an abuse of that discretion. *Helena-West Helena Sch. Dist. v. Davis*, 40 Ark. App. 161, 843 S.W.2d 873 (1992). We cannot say that the trial court's finding that the district was not required to have a reduction-in-force policy in place is clearly erroneous.

In her second point, appellant argues that the future possibility of school reorganization and the possibility of adoption of a reduction-in-force policy cannot support a nonrenewal of her contract under the TFDA. Appellant's argument appears to be that, because the District had not been reorganized prior to her nonrenewal, the reorganization cannot be a factor in the decision not to renew her contract. Appellant admits that the decision to

reorganize the District was made in the 1999-2000 school year, *after* the decision had been made not to renew her contract. The parties read *Spainhour v. Dover School District*, 331 Ark. 53, 958 S.W.2d 528 (1998), as requiring that a school board not have any preconceived notions when deciding whether or not to renew a teacher's contract. However, we do not interpret the case that way.

In *Spainhour*, the superintendent sent a letter on April 12, stating that he was recommending that the teacher's contract not be renewed because of possible loss of federal funds and that he intended to present the matter to the school board at its May 9 meeting, which was less than thirty days after receipt of the nonrenewal recommendation. The board held its meeting on May 9 as scheduled and decided not to renew Spainhour's contract. Spainhour timely requested a hearing by letter dated May 12, 1994, but the board did not conduct that hearing until May 18, 1994, *after* it had already accepted the superintendent's recommendation not to renew Spainhour's contract. The supreme court held that the Dover School District failed to strictly comply with section 6-17-1509 by failing to give Spainhour a hearing *before* it voted not to renew her contract. The court also stated that the second hearing appeared to comply with the TFDA because the attorneys asked the board members before the second hearing whether they could be fair and impartial and keep an open mind. We believe that a plan to reorganize a district and eliminate positions is not the same as directly voting whether to renew a specific teacher's contract. We affirm on this point.

In her third point, appellant argues that the District did not strictly comply with its own policies regarding the date for employing principals and that the nonrenewal of appellant's contract was void. The District had a policy stating that the "selection" of principals will take place at the February board meeting. Under Ark. Code Ann. § 6-17-204(a) (1999), the provisions of the District's personnel policies were incorporated into appellant's contract and appellant was entitled to rely on those provisions. *Junction City Sch. Dist. v. Alphin, supra.* Appellant argues that this had the effect of requiring the District to make its decision on nonrenewal of principals earlier than the May 1 deadline provided in Ark. Code Ann. § 6-17-1506. Appellant's argument continues

that the District failed to comply with its own February deadline, rendering the decision not to renew her contract void under Ark. Code Ann. § 6-17-1503.

Appellant raised this issue below, and the question was litigated at trial. However, the trial court did not specifically rule on this point. Our courts have repeatedly held that a party's failure to obtain a ruling is a procedural bar to this court's consideration of the issue on appeal. *See, e.g., Doe v. Baum*, 348 Ark. 259, 72 S.W.3d 476 (2002); *E-Z Cash Advance, Inc. v. Harris*, 347 Ark. 132, 60 S.W.3d 436 (2001); *Barker v. Clark*, 343 Ark. 8, 33 S.W.3d 476 (2000). This rule applies with equal force in cases brought under the TFDA as appealed from circuit court. *See Higginbotham v. Junction City Sch. Dist.*, 332 Ark. 556, 966 S.W.2d 877 (1998). Accordingly, we are precluded from reviewing this issue on appeal.

Affirmed.

BIRD and GRIFFEN, JJ., agree.

Amanda TROUT *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 03-332 146 S.W.3d 895

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered January 28, 2004

[Petition for rehearing denied March 3, 2004.*]

* PITTMAN and BIRD, JJ., would grant rehearing.

Barbara A. Ketring-Beuch, for appellant.

Gray Allen Turner, for appellee.

Gail Laster, attorney *ad litem*.

ANDREE LAYTON ROAF, Judge. Amanda Trout appeals from the trial court's order terminating her parental rights to two of her children, D.T. and W.T. On appeal, Trout argues that the trial court erred in (1) terminating her parental rights against the weight of the evidence presented at the termination hearing and (2) terminating her parental rights as to W.T. but because the child had not been out of the home for a period of one year. We reverse and remand.

During most of these proceedings, Amanda Trout was married to Andrew Trout, from whom she is now divorced. Amanda is the mother of three children, E.D., D.T., now four, and W.T., now two. Her older son, E.D., was living with his grandmother because he was afraid of Andrew, who had once thrown him across a room. Andrew, who is the father of W.T., had his parental rights terminated in the same hearing, but he does not appeal.

Amanda first became involved with DHS in 1999, when Andrew's son, J.T., was placed into DHS custody and declared dependent-neglected due to environmental neglect because the home was filthy. Amanda began receiving services at this time, including individual counseling and parenting classes. In December 2000, Amanda's infant son, D.T., was also placed into DHS custody due to allegations of sexual abuse against Amanda with regard to J.T. The allegations were not proven, and both children were returned to the Trouts in March 2001. However, further incidents ensued, including an altercation between Amanda and Andrew in March in which Amanda allegedly threw J.T. out of the car and left Andrew and J.T. to walk four miles home. DHS again removed J.T., and both Amanda and Andrew were arrested at this time for outstanding warrants unrelated to this case. D.T. was also

placed into DHS custody at that time because there was no one left to care for him.

At the May 24, 2001 adjudication hearing, the trial court found that Andrew had abused J.T. by slapping him and that D.T. was at risk of harm from Andrew given his previous treatment of Amanda's older son. The court also found that Amanda and Andrew had engaged in emotional abuse by cursing at each other and then forcing the child to walk four miles home, and by engaging in physical altercations and other acts in their home in front of J.T. and D.T. Relying on both their prior behavior and their psychological evaluations, the court found that Amanda and Andrew were unfit parents and that D.T. was dependent-neglected. The goal was set as reunification, and the court ordered that both parents undergo counseling and anger-management therapy.

A permanency planning hearing was held on December 11, 2001. At the hearing, the evidence showed that while Amanda had not fully complied with the case plan or court orders, she had a baby, W.T., in September 2001, and had heart problems for which doctors were attempting to stabilize her medication. Amanda was unemployed and was also still married to Andrew, although she testified that she was no longer living with him. Amanda testified that she had missed some visitations because of health problems. Amanda's DHS caseworker testified that there was a potential for reunification if Amanda complied with the court orders and became stable enough to care for her children.

Several review hearings were conducted in the ensuing months. At the January 2002 review hearing, the evidence showed that Amanda had divorced Andrew, had been awarded full custody of W.T., and had attended most of her visitations with D.T. However, she was still unemployed. Amanda testified that she had not been attending counseling or anger-management classes because she was waiting on Medicaid approval. Amanda stated that Andrew had not been to her home, and that she had met Andrew at a restaurant in order to get a child-support payment from him and to give him a copy of the divorce papers. The caseworker stated that Amanda's home was suitable, and was the cleanest home she had seen since working on the case, that Amanda had plenty of food, and that her utilities were on. Amanda stipulated to W.T.'s adjudication as dependent-neglected at this hearing because of her prior problems with maintaining a stable place to live.

In the March 2002 review hearing, the evidence established that Amanda had maintained a stable home and had attempted to attend therapy. She was still unemployed; however, the DHS caseworker testified that Amanda's visitation had been consistent, that she had not had any contact with Andrew to her knowledge, that she had been trying to comply with the case plan and court orders, and that her stability was much improved. The caseworker recommended that Amanda begin having unsupervised and weekend visits with D.T., in preparation for returning him to the home in July, and recommended reunification with both children.

However, in May 2002, W.T. was placed into DHS custody because of environmental conditions in Amanda's home on a visit and because Amanda was believed to have allowed Andrew to have contact with the children. After Amanda began weekend visits with D.T., DHS received two complaints from the daycare facility that D.T. was dirty after returning from his visits and had a cut on his ear and scars on his knees. D.T. had told his foster parent that Andrew had pushed him down and pulled his ear. DHS went to Amanda's home in May to discuss the reports and to check the home for safety. The caseworker testified that the home smelled and that there was trash in the kitchen, a cat litter box in the living room, car parts and dogs in the yard, and fans running in W.T.'s room. The caseworker recommended that W.T. remain in DHS custody and that Amanda's weekend visits with D.T. be suspended. Amanda denied that she had returned D.T. to daycare dirty. She also denied that Andrew had been staying there, although she did testify that she had a male roommate to help out with the bills. Amanda testified that she saw Andrew about once a week and that she borrowed his car, although they usually met at Wal-Mart.

At the planning hearing in August 2002, employees from D.T.'s daycare facility testified about the earlier incidents in April when D.T. had returned from weekend visits dirty and with a skinned knee. Amanda had been in a car accident in June while riding with Andrew and had lost an unborn child. Amanda had completed parenting classes, but had not been participating in counseling; she had visited D.T. and W.T. regularly. According to her caseworker, Amanda was not in compliance with the case plan or court orders at that time, and she now recommended termination of Amanda's parental rights.

Amanda testified that she bought a trailer and a car with part of her $10,000 settlement from the automobile accident. She

explained that she had trouble participating in counseling because of a delay in her Medicaid approval and that she could not afford to pay for therapy herself because she had cardiology expenses. Amanda testified that she now had reliable transportation and that she had put in several job applications. She also stated that she had worked at Denny's for a short time as a waitress, but could not continue because of her health problems. Amanda testified that she had gone back to school but that they had also sent her home because of her medical problems. She further testified that she would have enough money to get through the next eight months if she did not have to pay any medical bills.

At the final review hearing in October 2002, there was additional testimony that Amanda had missed a counseling appointment. Her caseworker recommended that Amanda's parental rights be terminated based on the history of the case and the parents' lack of compliance. She further testified that she had been to Amanda's new home and that it was neat and clean. W.T.'s pediatrician testified that W.T. had been diagnosed as "failure to thrive" and had worsened since being in foster care. Amanda testified that she still did not have a job but that she was working with an agency that helps disabled persons to find jobs. According to Amanda, she had missed the counseling appointment because she thought they would be closed since it was a holiday. Amanda testified that she had not seen Andrew, except at the DHS office, and that she had rectified the situation for which her children were removed, primarily her relationship with Andrew and her housing and utility problems.

The termination hearing was held in November 2002. There was once again testimony about the conditions in Amanda's home back in May when W.T. had been taken into DHS custody. An adoption specialist with DHS testified that there were available families willing to adopt D.T. and W.T. and that the likelihood of their adoption was very great. Amanda's caseworker testified that she had been the caseworker since 1999, and that Amanda had been offered individual and family counseling, parenting classes, employment services, and home-based services. She testified that, to her knowledge, Amanda had not been to counseling. She also stated that Amanda was still looking for employment. She conceded that Amanda's new home was suitable for children; however, she testified that she did not know if Amanda could maintain stability without assistance. The caseworker further testified that DHS had provided services for three years and that Amanda would comply, but then would "fall by the wayside." She testified that it

was troubling that Amanda has continued to maintain contact with Andrew.

Amanda testified that she had been employed at Waffle House for three days, although if that job interfered with her job-training program at Arkansas Rehabilitative Services, she would have to quit. She further testified that she had been to two counseling sessions with her new therapist and had undergone an anger-management assessment. She stated that she was now on blood-pressure medication and could work. Amanda testified that her mobile- home lot rental was paid up for four months in advance and that she would be able to pay for her utilities and food due to her new job. Amanda stated that she had remedied most of her problems while continuing to work on the rest, and that the settlement money had helped her start over. She stated that Andrew was out of her life for good and that she was working hard to make sure that she did not make the same mistakes in the future.

Following the hearing, the trial court found clear and convincing evidence to terminate Amanda's and Andrew's parental rights. The court took judicial notice of the prior terminations with respect to Andrew's three other children. The court also took into consideration Amanda's psychological evaluation from May 2001, in which she was diagnosed as having an adjustment disorder, a personality disorder, and borderline intellectual functioning. The psychologist had at that time recommended that she receive counseling, anger management, and parenting classes, as well as find a job, before reunification should take place. However, the psychologist also stated that Amanda was in an "abusive relationship" with Andrew, and that he could not recommend returning D.T. to the home because it "will be filled with chaos, arguing, physical altercations, and inconsistent discipline." The trial court also found that Amanda continued to associate with Andrew even after both children were placed into foster care and questioned her credibility, noting that she had spent all of her settlement money from the accident and "was again relying on the charity of others to pay her bills." The court further stated that it would not give a lot of weight to "eleventh-hour improvements," and that Amanda had not had a sufficient length of stability to indicate a reasonable likelihood that she would get D.T. and W.T. back in her home in the foreseeable future. The court found that it was in both children's best interests to terminate Amanda's parental rights because she was still an unfit mother and there was little likelihood that services to the family would result in successful reunification. This appeal ensued.

On appeal, Amanda argues that the trial court erred in terminating her parental rights against the weight of the evidence presented at trial. Amanda contends that the trial court erred because she had complied with the majority of the court's orders and was addressing her employment situation at the time of the termination hearing. She asserts that the trial court should have allowed her more time to continue with reunification efforts and to prove that the changes she had made were permanent.

The rights of natural parents are not to be passed over lightly; however, parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *J.T. v. Arkansas Dep't of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997). A trial court's order terminating parental rights must be based upon findings proven by clear and convincing evidence. Ark. Code Ann. § 9-27-341(b)(3) (Repl. 2002); *Ullom v. Arkansas Dep't of Human Servs.*, 67 Ark. App. 77, 992 S.W.2d 813 (1999). Clear and convincing evidence is defined as that degree of proof that will produce in the fact finder a firm conviction as to the allegation sought to be established. *Ullom, supra.* On appeal, the appellate court will not reverse the trial court's ruling unless its findings are clearly erroneous. *Id.* 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 made. *Brewer v. Arkansas Dep't of Human Servs.*, 71 Ark. App. 364, 43 S.W.3d 196 (2001). Also, this court defers to the trial court's evaluation of the credibility of witnesses. *Ullom, supra.*

Amanda's parental rights were terminated pursuant to Ark. Code Ann. § 9-27-341(b)(3) (Repl. 2002), which states that an order terminating parental rights shall be based upon a finding by clear and convincing evidence that is in the best interest of the juvenile, including consideration of the likelihood of adoption and the potential harm, specifically addressing the effect on the health and safety of the child, caused by continuing contact with the parent. The order terminating parental rights also must be based on a showing of clear and convincing evidence as to one or more of the grounds for termination listed in section 9-27-341(b)(3)(B). The applicable grounds relied upon by the trial court in this case are:

> (i)(a) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the home for twelve

(12) months and, despite a meaningful effort by the department to rehabilitate the home and correct the conditions which caused removal, those conditions have not been remedied by the parent.

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(ix)(a) The parent is found by a court of competent jurisdiction, including the juvenile division of circuit court, to:

(3) Have subjected the child to aggravated circumstances.

According to Ark. Code Ann. § 9-27-303(6)(A) (Repl. 2002), "aggravated circumstances" means that a child has been abandoned, chronically abused, subjected to extreme or repeated cruelty, or sexually abused, or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification. In this case, the trial court found that there was little likelihood that services to the family would result in successful reunification of Amanda and either D.T. or W.T., as well as finding that her parental rights as to D.T. should be terminated under section 9-27-341(b)(3)(B)(i)(a).

Amanda first came to the attention of DHS during her marriage to Andrew Trout. Her son D.T.'s placement in DHS custody initially arose as a result of an altercation between Amanda and Andrew in March 2001, and W.T., born in September 2001, was taken into custody in May 2002 based upon the conditions in Amanda's home on a visit, and also because it was suspected that Amanda had allowed Andrew to be around the children. Although Amanda had made substantial improvements prior to the time of the termination hearing in November 2002, the trial court stated that it was not required to consider "eleventh-hour" improvements. At the time of the termination hearing, D.T. had been in DHS custody for approximately nineteen months and W.T. approximately five months. Although reunification with D.T. had been recommended by DHS at both the January and March 2002 review hearings, DHS's recommendation changed to termination at the August 2002 permanency planning hearing, based substantially on its prior involvement with Amanda during the pendency of the case involving Andrew's children, the visit to Amanda's home in May, and reports by D.T.'s daycare workers.

[redacted] We do not agree that the evidence in this case shows only "eleventh-hour" improvements by Amanda. Amanda's older child, D.T., came into DHS custody during the spring of 2001 when Amanda was in the midst of what the psychologist described

as an abusive relationship and when she was apparently well into a pregnancy with her youngest child, W.T. Her testimony about significant ongoing medical problems was not contradicted. In the course of less than a year, Amanda completed parenting classes, began rehabilitative services, obtained an appropriate home and transportation, addressed her medical problems, and obtained employment, and commenced counseling. Amanda did experience a setback in her progress in May 2002, based on a single visit to her home and on reports by daycare workers that D.T. returned from visits dirty and with skinned knees. However, her home was otherwise described very favorably throughout the duration of this case, including subsequent to the May 2002 incident. Moreover, DHS witnesses testified that they had no knowledge of Andrew's presence in Amanda's home after August 2001. Amanda was never ordered to not have contact with Andrew in any event. While the trial court's comments suggest that Amanda had squandered the funds received from the accident settlement, she in fact acquired a home, automobile, and paid her lot rental months in advance in the effort to achieve stability.

The trial court characterized Amanda's progress as "eleventh-hour" improvements that he was not required to consider, apparently in reference to Ark. Code Ann. § 9-27-338(9)(4)(B)(iii) (Repl. 2002), which provides:

> A parent's resumption of contact or overtures toward participating in the case plan or following the orders of the court in the months or weeks immediately preceding the permanency hearing are insufficient grounds for retaining reunification as the permanency plan.

This provision pertains to the permanency planning hearing, which occurred back in December 2001, after which reunification was and continued to be the goal in this case until the May 2002 hearing, a proceeding from which Amanda was never allowed to recover. Moreover, the evidence reflects continuous and steady progress by Amanda in addressing her problems. Given the foregoing, we cannot conclude that the trial court's decision to terminate her parental rights based on her failure to remedy the conditions causing removal is supported by clear and convincing evidence. Since the trial court's finding of aggravated circumstances was likewise predicated solely upon a finding of little likelihood that services would result in successful reunification, this ground must also fail. Consequently, we need not address Amanda's second argument that the trial court erred

in terminating her parental rights as to W.T. because the child had not been out of the home for a period of one year.

Since we are not privy to what has occurred since the last hearing date in November 2002, we express no opinion as to whether or when custody should be returned to Amanda. In fact, the correct outcome of this litigation may still involve the termination of her parental rights; however, any such determination must be based upon clear and convincing evidence that a statutory requirement for termination has been met. We leave that decision to the trial court upon remand of this case.

Reversed and remanded.

HART, ROBBINS, and VAUGHT, JJ., agree.

PITTMAN and BIRD, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. I respectfully dissent from the majority's decision to reverse the trial court's order terminating appellant's parental rights to her two young children.

At the time of the final hearing in this case, one of appellant's children had been out of the home for over twelve months and the other for less than twelve months. The case began when the oldest of these children was removed because of allegations of sexual and physical abuse against another child in the home. It was found that the charges of physical abuse against this child were meritorious, and that the father posed a danger to all of the children. As the case proceeded, appellant's home was found to be unsanitary in the extreme, so environmental abuse was added as a condition to be rectified.

A new child was born, and was included in the case plan and removed from the home for a time as a result of one of the chaotic and frequently violent episodes that characterized the lives of appellant and her husband. Appellant eventually divorced her husband, completed some of the court-ordered counseling, and obtained new housing. However, there was evidence that appellant maintained frequent contact with her ex-husband and exposed the children to him, including one episode where the ex-husband, driving despite a long-suspended license, was involved in a car wreck that resulted in the death of appellant's unborn child. There was also evidence that she did not complete the court-ordered counseling or employ reasonable efforts to do so within the time allotted, and that her unsanitary and unhealthy living habits had followed her to her new housing. Accordingly, the trial judge

terminated her parental rights to the two children, and this appeal followed.

For reversal, appellant contends that there was insufficient evidence to terminate her parental rights to the eldest child; that the trial judge exhibited bias against her; and that the trial court erred in terminating her parental rights to the youngest child, who had not been out of the home for twelve months. I would affirm.

Although termination of parental rights is an extreme remedy in derogation of the natural rights of the parents, it is equally true that parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Wade v. Arkansas Department of Human Services*, 337 Ark. 353, 990 S.W.2d 509 (1999). The question before us is whether the trial court clearly erred in finding that there was clear and convincing evidence of facts warranting termination of parental rights. *Johnson v. Department of Human Services*, 78 Ark. App. 112, 82 S.W.3d 183 (2002).

I believe the evidence clearly supports a finding that several significant new factors arose after the filing of the petition, including appellant having willfully maintained contact with and exposed the children to danger from her ex-husband who, it appears, preferred to give up custodial rights and visitation rather than participate in anger-management therapy. That appellant flagrantly continued her relationship with her ex-husband is tragically demonstrated by the death of appellant's unborn child during the pendency of these proceedings, while appellant was riding in a car driven by her ex-husband. There was also evidence that, although appellant and her child-abuser ex-husband were ostensibly separated, they were frequently seen together in town by ADHS employees, and that, on one occasion, appellant's ex-husband answered the telephone at her residence one morning and told the caller appellant was asleep. This evidence of continued contact is extremely significant, especially in light of evidence that, after appellant and her ex-husband were divorced, appellant's son was seen with cuts and scars and told a family service worker that his father pushed him down and pulled his ear.

The evidence also supports a finding that the environmental neglect was not remedied. Given the long span of time that appellant had been working on these problems with only transitory improvement, I think that the trial judge could also properly find that appellant manifested the indifference or incapacity to remedy the issues causing removal of her eldest child.

The bulk of appellant's brief is devoted to allegations that the

trial judge was biased. However, there is no indication that she raised the issue below, and the issue of judicial bias is not preserved for appellate review where appellant neither objects to any statements made by the trial judge nor moves for the judge's recusal. *Nichols v. State*, 69 Ark. App. 212, 11 S.W.3d 19 (2000).

Finally, given the evidence supporting termination of appellant's parental rights with respect to her eldest child, it is clear that the trial court acted properly in terminating her parental rights to her youngest child. A twelve-month period outside the home is unnecessary under several circumstances, including cases where the parent is found by a court of competent jurisdiction to have had his parental rights involuntarily terminated as to a sibling of the child, Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(a)(4); or where, subsequent to the filing of the original petition for dependency-neglect, other factors or issues arose which demonstrate that return of the juvenile to the family home is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances which prevent return of the juvenile to the family home. Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(a).

We have often stated that there are 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. *See, e.g., Mason v. Mason*, 82 Ark. App. 133, 111 S.W.3d 855 (2003). In matters involving the welfare of young children, we give great weight to the trial judge's personal observations, *Johnson v. Department of Human Services, supra,* and in resolving the question of whether the trial court clearly erred in finding that facts existed warranting termination of appellant's parental rights, we are obliged to give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Id.* The reason for this heightened standard of deference is that the trial judge had an opportunity that we do not have, *i.e.*, to observe the litigants and determine from their manner, as well as their testimony, their sincerity, their apparent interest, and their affection, or lack of affection, for the child. *See Qualls v. Qualls*, 250 Ark. 328, 465 S.W.2d 110 (1971).

Giving the trial judge's superior opportunity the deference to which it is entitled, I cannot agree that he clearly erred in finding that facts existed warranting termination of appellant's parental rights.

BIRD, J., joins in this dissent.

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