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Melissa TIPTON *v.* Zeb Taylor AARON

CA 03-932 185 S.W.3d 142

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 16, 2004

John W. Walker, P.A., by: *John W. Walker*; *Arrington Law Firm*, by: *Claudene T. Arrington*; and *Terrence Cain*, for appellant.

Keil & Goodson, by: *John C. Goodson*, for appellee.

JOHN F. STROUD, JR., Chief Judge. This is an unusual custody case. The child is Colten Rance Tipton, who was born out of wedlock in November 1995. His mother is Mellisa Tipton, appellant, and it is undisputed that his father is Zeb Aaron, appellee, both of whom were minors at the time of the birth. Mellisa's parents, Billy and Tina Tipton, were appointed guardians of the child in January 1996 because of the minor status of the parents. Zeb and his parents have been involved in the child's life since his birth, but have made no significant financial contributions toward his support. Zeb did not initiate paternity proceedings until June 2002, when the Tiptons and the child moved to Virginia Beach, Virginia, because Billy Tipton had lost his job, was not able to find work in or around Hope, and had learned of an employment opportunity in Virginia Beach. As a part of the paternity proceedings, Zeb sought custody of the child and, in turn, Mellisa, in her response, also sought custody. The maternal-grandparent guardians took the position that it was time for them to relinquish their guardianship and that it would be preferable for custody to be granted to their daughter, Mellisa. At the conclusion of the final hearing in this matter, the trial court awarded custody of the child to Zeb. On appeal, Mellisa contends that the trial court clearly erred in awarding custody to him. We reverse and remand.

As part of her overall contention that the trial court's award of custody to Zeb was against the clear preponderance of the evidence, Mellisa argues that the trial court used an impermissible basis for deciding custody. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), the United States Supreme Court held that private racial biases and the possible injury that they might inflict are not permissible considerations for the removal of a child from the custody of its natural mother. The Court explained:

> It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.
>
> The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother.

> We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held."

466 U.S. at 433 (citations omitted).

At trial, appellee elicited testimony about the fact that Mellisa's husband, Justin, is biracial; that she is pregnant with Justin's child; and that her three-year-old daughter is also biracial, while Colten is Caucasian. In addition, appellee presented witnesses who testified, generally, that it would concern them for Colten to be placed in an interracial household. This line of inquiry can be fairly said to have permeated the hearing, yet no objection was raised. At the conclusion of the testimony, the trial court asked if the parties were "aware of any law or cases dealing with, in Arkansas specifically, a child not of an interracial marriage being placed into an interracial marriage," and the parties responded that they were not. In ruling from the bench, the trial court commented that the fact that Mellisa's home was biracial "should not have any bearing whatsoever on the fact that Colten has been around there and has had a good home there." He went on to say, however, "I do believe that it will create problems for him in the future." Clearly, to the extent that the trial court might have relied upon such a basis in awarding custody to Zeb, it would have been error to do so. However, because no objection in this regard was raised below, it was not preserved for our review. Our law is well settled that issues raised for the first time on appeal, even constitutional ones, will not be considered. *London v. State*, 354 Ark. 313, 125 S.W.3d 813 (2003). We therefore do not decide the case on that basis.

In child-custody cases, we review the evidence *de novo*, but we do not reverse the findings of the trial court unless it is shown that they are clearly contrary to the preponderance of the evidence. *Durham v. Durham*, 82 Ark. App. 562, 120 S.W.3d 129 (2003). 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. *Sheppard v. Speir*, 85 Ark. App. 481, 157

S.W.3d 583 (2004). In custody cases, the primary consideration is the welfare and best interests of the child involved, while other considerations are merely secondary. *Eaton v. Dixon*, 69 Ark. App. 9, 9 S.W.3d 535 (2000); Ark. Code Ann. § 9-13-101(a) (Supp. 2003) (award of custody shall be made without regard to the sex of the parent, but solely in accordance with the welfare and best interest of the child). Custody awards are not made or changed to gratify the desires of either parent, or to reward or punish either of them. *Durham v. Durham, supra.* 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).

Usually, when we address cases involving change of custody, a child is being moved from one parent to another. In those cases, the original decree is a final adjudication that one parent or the other was the proper person to have care and custody of the children. *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003). 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. *White v. Taylor*, 19 Ark. App. 104, 717 S.W.2d 497 (1986). For a change of custody, the chancellor must first determine that a material change in circumstances has occurred since the last order of custody; if that threshold requirement is met, he must then determine who should have custody with the sole consideration being the best interest of the children. *Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996). This court has further held that its reasons for requiring more stringent standards for modifications than for initial custody determinations are to promote stability and continuity in the life of the child, and to discourage the repeated litigation of the same issues. *Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001). Of course, whether an initial proceeding or a modification proceeding, the polestar remains the best interest and welfare of the child. *Id.*

Here, we have something of a hybrid situation in that a change of custody was sought and granted, but it was a change from the custody of the guardian maternal grandparents to the father, rather than a change between parents. That is, it is a change of custody, but neither of the parents to whom custody might have been awarded have had legal custody in the past. Both parties seem

to agree that even in this unusual situation, a material change of circumstances must be established. To the extent that such a change must be shown under these circumstances, we find that the requirement is clearly satisfied. The natural parents are older, they are no longer minors, and they seek to assume the care and custody of Colten. In addition, the maternal guardian grandparents seek to relinquish that role. Accordingly, the lower court's primary focus was appropriately on the best interests of the child, and, on appeal, we must decide whether he clearly erred in awarding custody to Zeb. After a careful *de novo* review of the evidence in this case, we are left with a definite and firm conviction that a mistake has been made.

At the February 5, 2003 hearing, Billy Tipton, Colten's maternal grandfather, testified that he and his wife were Colten's guardians. He explained that he and his wife, Tina, and Mellisa had moved to Virginia Beach, Virginia, approximately eight months earlier and that Colten was in the first grade. He acknowledged that he and his wife were asking the court to award custody of the child to someone other than themselves. He stated that his daughter, Mellisa, had gotten married on January 25, 2003, to Justin Reliford; that Justin was from Hope, Arkansas; and that he was twenty-four or twenty-five years old. He stated that Justin had no criminal record and that he was "mixed," black and white. He said that Colten was not an interracial child. He acknowledged that Mellisa had used marijuana when she was younger. He explained that Colten's absences from school were due to missing a week for the October hearing, three days for strep throat when they returned to Virginia, two "snow days," and a week for the current hearing. He explained the problems that Colten was having in school and the efforts that they were making to improve his school work. He also explained that they were working with his teacher and that they were having him see a counselor to help him deal with the custody matters.

Mr. Tipton stated that he and his wife wanted the guardianship terminated, but that they were available to help if the court should determine that neither of the parents was ready to assume responsibility. He stated that he did not know of anything that would be harmful if Mellisa had custody and that she was "pretty level headed." He said that he had concerns about Zeb because he was a convicted felon and had a track record of "getting on the wagon and jumping off." He said that he was concerned about the way Colten would be raised with Zeb; that he had seen children in

Zeb's family "threatened with the law" if they do something wrong, which was not the way a child should be raised; and that it scared him. He said that the values they have instilled in Colten for seven years "could be torn down in seconds."

Mellisa Tipton, the child's mother, testified that she had recently married Justin Reliford; that he was "interracial" but Colten was not; and that they live in a two-bedroom apartment, along with her three-year-old daughter, who is also biracial. She said that she had no reservations about raising a Caucasian child in an interracial marriage. She acknowledged that she had used marijuana in the past, but not around the child, and that the last time she had done so was about a year ago. She stated that her explanation for Colten's poor grades was that he was under a lot of stress about the court proceedings, but that she and her mother and father were working with him and he was getting better. She stated that she does not consult with his teachers directly because her parents are listed as the guardians on the papers at school, but that her parents tell her daily what is going on. Mellisa explained what her husband does for a living and that Justin and Colten have a very good relationship. She stated that she has no record of convictions and that she no longer smokes. She stated that she does not foresee any problems with raising a child in an interracial household. She also explained that where they live in Virginia, there are a lot of biracial children and interracial couples. She said that Colten fits in well there.

Mellisa stated that her main concern about Zeb being granted custody is that he would teach Colten to hate his sister because when Colten returns from visits he says his sister has "cooties." She also stated her concerns about Zeb's problems with drugs and that Colten might "get hold of some." She explained that Zeb had been convicted and served time for possession of drugs and that he went to rehab but had then relapsed about a year or year and a half ago. She said that one time when Colten was very young, he had called and said that his dad was asleep on the couch and he couldn't wake him. She said that she stayed on the phone with him until her parents were able to get to Zeb's house. She said that happened before Zeb ever served time for possession.

Mellisa testified that since high school, she has worked most of the time and that she has contributed to Colten's support. She said that except for eight months of the seven years since Colten was born, she had lived in her parents' house, that she had bought clothes for Colten, that she had helped with the costs of food, and

that she had helped with Colten's care. She stated that she now lives about fifteen minutes from both the school and her parents' house, and that her parents would continue to keep both Colten and his sister after school while she worked. Mellisa stated that she wants Colten to respect everybody no matter what color, and that she does not think that would happen with Zeb, and that she wants Colten to show respect, for example by saying "yes ma'am" and "yes sir," and that does not happen with Zeb. She stated that she does not like name calling and saying "stupid, idiot and shut up," but that such terms are used at Zeb's house. She stated, however, that she does want Colten to spend time with Zeb and his family when it does not affect his schooling. Mellisa testified that she is paid every two weeks and that her take home pay is between $500 and $600.

Appellee then presented his case. Janice Quillen testified that she has known Zeb since he was a baby; that she has observed Zeb and Colten together; and that their relationship is warm, loving, and caring. She said that it concerns her that the child might be placed in an interracial household with the mother and that he would be better off with the father.

Lynn Kimball testified that she works at Springhill High School; that she has known Zeb for eleven years; and that she has observed the loving relationship among Colten, Zeb, and Zeb's family. She said that it would concern her for Colten to be placed in an interracial household; that she did not understand why anyone would be put in that situation because of the "different cultures between Colten being Caucasian and the stepfather being black"; that she thinks it would cause difficulties in raising Colten; and that she based that opinion on her personal observations in working in the school system.

Judy Kay Kidd testified that she has known Zeb since kindergarten; that she has observed his loving relationship with Colten; and that it would concern her for Colten to be placed in a biracial home.

Alicia Aaron Reed, Zeb's sister, testified that Zeb loves Colten dearly; that she would have problems with Colten being placed in a biracial home; and that "that's what we're here to prevent." She stated that Zeb was past his drug problems; that "in this part of the country" a biracial home is not highly accepted; and that it is becoming more common in other parts of the country.

Zeb Aaron, the child's father, testified that he works at Klipsch in Hope, Arkansas. He said that he has worked there for

approximately six months and that prior to that he worked at Meyer's Bakeries. He said that before Colten was taken to Virginia, he had him every weekend. He said that he is now married to a woman named Amanda. He explained that he is still on probation from his drug conviction; that he is regularly tested for drug use; and that he has not tested positive for the last year and a half. He said that prior to their moving to Virginia, neither the guardians nor Mellisa had restricted his access to Colten because of drug use.

Zeb testified that his concerns about Mellisa getting custody are that she has been there when it was convenient for her, and that he does not think it is right for his son to be placed in her custody with the stepfather and "interracial things." He said that he does not believe that would be right, and that he does not think it would be fair to Colten because of "what he's going to hear growing up and everything he is going to be around."

He stated that his prior drug use involved methamphetamine; that he has smoked marijuana; that he has never used drugs in front of Colten; and that he did not recall ever being under the influence of drugs around Colten. He said that his first rehab was July 31, 1998 through August 28, 1998, and his second was August 21, 2001 through September 12, 2001. He said that the last time he used drugs was before he went to rehab the second time. He stated that he did not recall ever being physically violent toward Mellisa in high school. He said that he brings home approximately $250 a week in his job. With respect to his financial support of Colten, Zeb testified that he "bought him clothes and different stuff when he needed it," and that when Colten started primary school, he gave Tina Tipton $50 or $75 to get Colten some new clothes.

Zeb read his response to an interrogatory in which he explained why he thought it was in Colten's best interest to be with him. Summarizing, he said that the Tipton grandparents were obsessed with Colten; that he had hung in with his son and visited him as much as he could or as much as they would let him; that he knew he had made mistakes in the past, but he had always spent as much time as he could with Colten; that he doesn't agree with the example that Mellisa is setting for Colten; that she has only been there when it was convenient for her; that she has given Colten a black sister by one man and turned around and married another black man; that that doesn't teach Colten anything good about how a family is supposed to be; that Mellisa never really wanted him until now; that he doesn't want his son living in a home with

a black stepfather because it's not right; that he and his family love Colten a lot; that he can provide a more stable home for him; and that it would be impossible to be the father Colten needs when he is 1200 miles away. He denied ever saying anything bad to Colten about Brooke, Colten's half-sister. He stated that he "did not believe in the interracial thing and the mixing"; that "some people accept it, but it's not right"; that they may accept it "up yonder," but "down here it's not really accepted"; that Colten will have problems going through school and everywhere when they go out; and that Colten is going to be the "oddball."

Appellant presented her rebuttal. Sun Bennett testified that she has known both families since sixth and seventh grade and that she witnessed Zeb throw Mellisa against the wall and hold her there one time in junior high or high school. She described how Zeb acts when he is on drugs; she said that she observed that conduct one time at her home in the spring of 2002 when Zeb kept asking her how her husband would feel if he came home and Zeb was taking photos of her naked. She said that she told her husband and then contacted the Tiptons and told them her suspicions that Zeb was on drugs. She said that they then contacted Zeb's parents. Finally, she stated her approval of Colten being raised in a biracial home.

Holly Herrington, Mellisa's sister, testified that she lived in the Tipton home until they moved to Virginia; that she never saw anything that would cause her concern about Mellisa being awarded custody; that she would be concerned about Zeb having custody because about a year ago he had asked her if he could take naked pictures of her and also because of his drug use; that she condoned interracial marriages; and that she had seen her sister use marijuana once or twice.

Karen Dougan testified that she was Billy Tipton's niece and that she had no concerns about Mellisa's ability to care for Colten. She said that she would be concerned about Zeb because one time he came over when she was babysitting Colten and he wanted to take Colten. She said that she could smell alcohol on his breath. She said that she would not let him take Colten and that "he wasn't happy about it." She said that happened about a year ago. She said that she condones interracial marriages and thinks that they are healthy.

Tina Tipton, Mellisa's mother, testified about an incident that occurred about a year and a half earlier where Zeb came to her house to see Colten and "acted really funny." She said that his eyes

were dilated and that he was not the Zeb she was used to. She said that he made her feel very uncomfortable. After he left and she went into the bathroom, she heard a tapping on the bathroom window; it was Zeb, asking to use her phone because his truck was broken. She put on her robe and handed him a phone through the door, but did not let him in; he returned to his truck and it started right up.

Tina stated that she wants Mellisa to have custody of Colten because she thinks Mellisa would be a good mother and nurturer; that Mellisa would raise him to have respect for himself and others; and that Tina and her husband would always be there to help with support. She said that she never wanted to take away the fact that Zeb and his family love Colten and that Colten loves them, but that her concern is that when he gets around them, "he turns into a completely different child." She said that he loses his manners and says words that they do not let him say. She said that she also worries about the racial issue. She said that Colten loves his sister and that he should not be taught to think of her in any derogatory way. She described the relationship between Colten and Justin as very good. She also stated that they would facilitate visitation with Zeb and his family. She described the differences in schools in Virginia and how Colten was adjusting. She described the differences between Hope, Arkansas, and Virginia Beach, Virginia, with Virginia Beach being more accepting of interracial marriages and families. She stated that sometimes when Colten returns from visiting his father he says, "My sister has different germs. She's a different color."

Our review of the evidence in this case leaves us with a definite and firm conviction that a mistake was made in finding that it would be in Colten's best interests for Zeb to have custody. A summary of the testimony previously set forth in detail is helpful.

Mellisa has had a loving relationship with Colten. She has worked since high school and provided financial support for him. She has been in the household with Colten for all but approximately eight months, and she has helped with his care. Her child-rearing philosophy is to teach respect for elders, to discourage name-calling, and to respect differences in other persons. Her new husband, Justin, has a good job, a good relationship with Colten, and does not have any type of criminal record. The Virginia Beach locale has a diverse population, where interracial households are not unusual. Colten has a good relationship with his half-sister, Brooke. The maternal grandparents, who had legal

and physical custody for seven years, would live nearby and help with after-school care. Moreover, Mellisa explained that the reason she has not had direct contact with the school is because her parents are listed as the contacts in the school records, but that her parents keep her informed and that they all work with Colten on his school work. We are also very mindful of the fact that Colten and Brooke were both born out of wedlock and that Mellisa has used marijuana on an occasional basis.

Zeb, too, has a loving relationship with Colten and has exercised routine visitation with him. Zeb's parents live nearby in Hope, Arkansas. Zeb has also remarried and has another child. At the time of the hearing, he was still on probation for a drug conviction for possession of methamphetamine. He went to rehab, relapsed, and went to rehab again. He is tested regularly because of his probation status and has had no positive tests in the last one-and-a-half years. He provided no financial support for Colten to speak of, other than occasionally buying clothes and school supplies. His paternity status is not disputed, but nevertheless he did not make formal efforts to legalize his status until Mellisa moved to Virginia. There was testimony that Colten would return from visits with Zeb and engage in name-calling and bad manners. Finally, Zeb readily acknowledges that he does not approve of the interracial household established by Melissa, and that he does not think that it is right for Colten to live there.

In examining this evidence, we hold that the trial court was clearly erroneous in awarding custody of the child to Zeb, and that it would be in his best interests for custody to be placed with Mellisa. It is clear that Mellisa has had more direct involvement in the day-to-day care and financial support of Colten. She is married to a man who has a good relationship with Colten and who has a good job. They live close to her parents, who have served as Colten's guardians his entire life. Moreover, they live in a diverse community, where interracial households are not unusual. Furthermore, Mellisa's child-rearing philosophy promotes racial tolerance, while Zeb's does not. Last, but certainly not least, at the time of the hearing Zeb had been to rehab twice and was still on probation for a drug conviction.

We, therefore, reverse and remand this case to the trial court for an award of custody to Mellisa and the setting of appropriate visitation for Colten to see his father.

Reversed and remanded.

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

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring. I join my colleagues in concluding that the trial court erred when it found that granting custody to the father is in the best interest of the child. I further believe that the trial judge erred when he improperly based his child-custody determination on racial bias contrary to the decision of the United States Supreme Court in *Palmore v. Sidoti,* 466 U.S. 429 (1984).

However, I write separately to address ethical and evidentiary aspects of the case that deserve judicial comment. The Supreme Court, in *Palmore, supra,* held that the Equal Protection Clause of the Fourteenth Amendment prohibits consideration of private racial bias in determining the best interest of a child in a custody case. Yet, in this case no objections were raised, and the trial judge did nothing, despite persistent questions from appellee's counsel regarding appellant's interracial family and despite the specious argument that Colten would likely experience problems from growing up in an interracial family.

Given the *Palmore* holding, the compelling question arises as to the extent that trial counsel are or should be allowed to examine witnesses regarding the existence of a private racial bias. In other words, does *Palmore* prohibit trial counsel from questioning witnesses regarding racial bias, and does *Palmore* allow or require a trial court, *sua sponte,* to preclude or limit this line of questioning, where no objection is raised? Because *Palmore* clearly prohibits the use of racial bias as a basis for a custody decision, this is not merely a matter of a trial court acting in a politically correct manner in hearing evidence and reaching a judicial determination. Rather, this is a matter of courts enforcing rights granted by the federal constitution and of preventing court proceedings from being converted into forums where bigotry is promoted and tolerated under the guise of trial advocacy.

The situation seems analogous to one in which testimony that is not admissible to prove a person's character may be admissible for other purposes, such as to prove motive, opportunity, or intent. Ark. R. Evid. 404(b). In other words, character evidence is only admissible for the purposes stated under Rule 404(b). Our courts have specifically held that such evidence is admissible to prove bias. *Jones. v. State,* 349 Ark. 331, 78 S.W.3d

104 (2002). The rationale under Rule 404(b) should apply here. While it seems relevant for a trial court making a custody determination to understand one parent's basis for objecting to the other parent receiving custody, such evidence admitted for any other purpose would seem to run afoul of *Palmore*. It would be appropriate to permit cross-examination to expose that a witness is motivated by racial bias for purposes of discrediting witness testimony consistent with *Palmore* and Rule 404(b). However, that is a far cry from eliciting direct testimony from a string of witnesses in support of a racial bias deemed impermissible by the *Palmore* holding.

The conduct of trial counsel for appellee in this regard is striking, to say the least. Time constraints during oral argument before this court prevented thorough inquiry about that conduct. However, there is no reason for cursory treatment of the conduct in an appellate opinion where the conduct caused the trial court to commit reversible error in violation of the Equal Protection Clause of the Fourteenth Amendment. Counsel for appellee was not content to merely elicit testimony from his client showing his client's objection to his son being reared in an interracial home. Counsel persisted with this line of examination with every witness.

During the February 5, 2003 custody hearing, counsel asked Billy Tipton, appellant's father, about his son-in-law's racial identity. He asked appellant whether her husband "is interracial," established that her son is not interracial and that her three-year-old daughter is interracial, and asked appellant if she had "any reservations raising a non-interracial child in an interracial marriage." Counsel also asked appellant if she would encourage her son "to participate in interracial relationships" and mentioned that appellant had "gotten married to this black man."

During direct examination of Janice Quillen, counsel for appellee mentioned that appellant has "an interracial marriage" and asked Quillen "[d]oes that cause you concern that the child will be placed in that type of environment with the mother?" During direct examination of Lynn Kimbell, a Springhill High School secretary, counsel asked whether "the possibility of placing the child in an inter or bi-racial marriage to be raised in Virginia" would cause the witness "any concern." During direct examination of Judy Kay Kidd, counsel asked the witness, "[w]ould placing the child in that environment (a bi-racial home with the mother) concern you?" During direct examination of Alicia Aaron Reed,

counsel asked if the witness was concerned that the trial court "has been asked to place this child in a bi-racial home."

When counsel for appellee cross-examined Sun Bennett, he asked whether she could "see any detriment to a child who is not biracial to be raised in a biracial home" and whether she encouraged "that lifestyle." One of the questions put to Holly Herington during cross-examination was "Do you see any difficulties in raising a child that is not interracial in an interracial home?" Cross-examination of Karen Dougan, appellant's cousin, included the following questions: "You would condone interracial marriages?" "You think they're healthy?" "You know of any detriment that could cause a child that is not interracial to be raised in a home like that?" And when counsel for appellee cross-examined Tina Upton, appellant's mother and the woman who practically raised Colten from birth, his inquiries included the following questions: "I assume you condone interracial marriages?" "I assume you condone raising a non-racial child in an interracial home?" "You disagree with all these people from Springhill [appellee's witnesses] that's testified today when each one said they don't agree with you?"

At no time before or after this line of questioning did counsel for appellee produce the slightest proof that Colten was subjected to any harm or risk of harm because his mother is married to a black man, because his sister is biracial, or from growing up in an interracial home. Nevertheless, counsel for appellee made the following remarks as part of his closing argument to the trial court:

> There's an issue here about whether a person approves or doesn't approve of interracial marriages or the raising, but it's not the approval or disapproval of interracial marriages. They're [appellant] asking to put a child who is not interracial in a situation to be raised by an interracial husband and wife and that creates a whole different scenario than an interracial child being raised in an interracial home. They want to talk about he needs to love his little interracial sister. Well, he's got another half sister that's not interracial. We feel that child would be safer here in Hempstead County, Arkansas. . . .

For its part, the trial court did nothing to suggest displeasure with the tactics of counsel for appellee. The only question it put to counsel for the parties at the close of the case was: "To counsel, are you aware of any law or cases dealing with, in Arkansas specifically,

a child not of an interracial marriage being placed into an interracial marriage?" Even if the trial court did not condone counsel's improper conduct, its ruling appears to have given it judicial approval. During its bench ruling, the trial court remarked as follows:

> As far as the home, the fact that it is biracial in Mellisa's [appellant's] case should not have any bearing whatsoever on the fact that Colten has been around there and has had a good home there. *I do believe that it will create problems for him in the future.*"

(Emphasis added.)

Aside from the unsubstantiated lay-opinion testimony of appellee and his witnesses (none of which was adduced upon an evidentiary foundation that Colten experienced problems, suffered any harm, or demonstrated any risk of being harmed while growing up in an interracial household), the trial court's assertion during its bench ruling that growing up in an interracial household would create problems for Colten was entirely without evidentiary basis. As the majority opinion holds, the trial court's reliance in rendering its decision on what amounted to animosity toward appellant's interracial marriage and household directly violated the holding in *Palmore, supra.* Again, the trial court's error was not merely by allowing this testimony, for it plainly demonstrated the biases of the witnesses. Ark. R. Evid. 404(b). The error lay in basing the custody decision on such bias.

Jurors, as fact-finders, are not to be swayed by prejudice. This is reflected in the fact that trial counsel are not allowed to make opening or closing comments that appeal to the jury's passion or prejudice. *Newman v. State,* 353 Ark. 258, 106 S.W.3d 438 (2003). Further, a factfinder may not consider evidence that serves no apparent purpose and that is used only to inflame a jury's passion. *Upton v. State,* 343 Ark 543, 36 S.W.3d 740 (2001). Here, the apparent purpose of eliciting testimony from witnesses other than appellee, who testified regarding racial bias, was to persuade the trial court based upon sheer prejudice. As such, that additional testimony was not only unhelpful in reaching a correct legal result regarding custody in light of *Palmore*; additional testimony to buttress the prejudiced views of appellee was also cumulative and redundant.

The question thus becomes, in a non-jury case, should a trial court be allowed to hear and rely upon evidence that is based upon prejudice, even where no objection to the admission of that

evidence is raised? The United States Supreme Court in *Palmore* stated that, while private biases may be outside of the reach of the law, the law cannot, directly or indirectly, give them effect. *Palmore, supra,* at 483. For trial counsel to elicit answers to questions concerning racial biases that are constitutionally prohibited and for the trial court to allow such questioning seems, at the least, to indirectly give these biases effect. However, even if *Palmore, supra,* does not require such self-restraint, it would seem that judges and attorneys, as officers of the court, should impose such restraints upon themselves out of respect for the ethical principles upon which our expectations of justice are based.

Canon 3(B)(2) the Arkansas Code of Judicial Conduct requires a judge to be faithful to the law and to maintain professional competence in the law. Canon 3(e) requires a judge to perform judicial duties without bias or prejudice. Canon 3(c) also prohibits a judge, in the performance of judicial duties, from manifesting bias or prejudice, by words or conduct. That Canon also expressly states that a judge shall not permit court officials or others subject to the judge's direction to manifest bias or prejudice. Surely, if federal law prohibits consideration of private biases in making custody determinations, a trial court is empowered, if not required, to raise the issue on its own — otherwise, how can a judge fulfill his or her duty under the judicial canons to be "faithful to the law" and to avoid the manifestation of bias or prejudice?

Finally, Rule 3.4(e) of the Model Rules of Professional Conduct prohibits attorneys from alluding to any matter that will not be supported by admissible evidence. If trial counsel are prohibited from appealing to the factfinder's sense of passion or prejudice in opening and closing remarks, which are not evidence, how much more so should trial counsel refrain from eliciting actual evidence that is constitutionally prohibited? Counsel for appellee may have been obliged to elicit testimony from appellee to show why his client objected to appellant being granted custody. Yet, I see no reason for eliciting such testimony from each of the other witnesses other than to appeal to what counsel or his client hoped would be a similarly prejudiced attitude in the trial judge. Doing so was not only in direct violation of the holding in *Palmore*; such conduct arguably was unethical under Rule 3:4.

While *Palmore, supra,* admittedly provides very little guidance on this issue, it is nonetheless incumbent upon our judges and attorneys, as sworn officers of the court, to conduct trials in a manner that is consistent with our laws and rules of professional

conduct. For trial counsel to deliberately and repeatedly elicit testimony regarding racial bias in contravention of federal law, and for the trial court to allow such testimony to be elicited and to rely upon that testimony in reaching its decision, seems to run counter to both *Palmore, supra,* and to our rules of professional conduct.

It is not asking too much of lawyers and judges to confront racial bias during court proceedings. To the contrary, one would ordinarily consider a court proceeding to be the most likely secular forum where racial bias would be immediately and firmly met with vigorous objections from legal counsel and a stern rebuke from judges sworn to uphold equal protection of the law. It seems ironic that, as we celebrate the fifty-year anniversary of *Brown v. Board of Education,* 347 U.S. 482 (1954), appellee's counsel in the instant case elicited, without limitation or objection, testimony regarding racial bias that would have compelled reversal if a proper objection had been raised. Sadly, this demonstrates that fifty years after *Brown,* and twenty years after *Palmore,* in the judicial context, we have not come as far regarding interracial understanding as some observers would believe or hope.

I am authorized to state that Judges Neal and Crabtree join in this opinion.

Sandy and Terry ANDERSON *v.*
Wendy and Jimmy MITTS

CA 03-965 185 S.W.3d 154

Court of Appeals of Arkansas
Division I
Opinion delivered June 16, 2004

Dick Jarboe; and *Grider Law Firm, PLC*, by: *M. Joseph Grider*, for appellants.

Stidham Law Firm, P.A., by: *Daniel T. Stidham*, for appellees.

JOHN F. STROUD, JR., Chief Judge. This case involves a child, T.J. Anderson, who received a severe burn to his left hand while staying at his maternal aunt's house when he was thirteen months old. Appellants, Terry and Sandy Anderson, are the child's parents. Appellees, Jimmy and Wendy Mitts, were married at the time, and Wendy is the child's maternal aunt. At trial, appellees sought, and were granted, a directed verdict at the close of appellants' case. We reverse and remand for a new trial.

Sandy Anderson, T.J.'s mother, testified that T.J. was born in 1994, and that he was eight years old at the time of trial. She said that at the time of the burn, September 25, 1995, he was thirteen months old. She explained that at the time T.J.'s hand was burned, they lived in a house owned by, and located next door to, her sister, Wendy. She said that she was painting on September 25; that Wendy asked to take T.J. to her house with her; and that it was not unusual for her to do that. Sandy testified that she was very familiar with the house in which her sister lived. She drew a rough sketch of the layout, showing the location of the couch, television, and wall heater. She said that she was nervous about the heater because she had small children and did not want them to brush up against it, and that she asked Wendy when she was taking T.J. home with her if the heater was on. She said that Wendy responded that it was not. Sandy stated that she learned about the burn just after it happened, that Wendy carried T.J. back to Sandy's house, and that T.J. was screaming. Sandy said that her husband took both her and T.J. to the emergency room.

Sandy also described the treatment for the burn and the follow-up therapy and surgery that T.J. had to undergo. She explained the disfigurement and the limitations in his use of the burned hand.

Sandy recounted that Wendy had told her that she felt responsible for what had happened. Sandy said that when she allowed T.J. to go to Wendy's house, she trusted Wendy to look after him and to protect him from getting into the heater. She said that in her opinion, the heater was located in a high-traffic area of the house because it was between the kitchen and the living room where all of the kids played. She also explained that the couch was positioned in such a way that if you were sitting on the couch watching television, your back would be to the heater.

Sandy stated that she and her sister often babysat each other's children; that she had Wendy's kids the most because she did not work outside of the home; and that they did not pay each other to babysit.

Wendy testified that when she first arrived home with T.J., the heater was off, and that her husband at the time, Jimmy Mitts, subsequently turned it on. She stated that she recalled reading the instruction manual for the heater and that it provided in part that young children should be carefully supervised when they were in the same room with the heater. She also agreed with Sandy that the heater was located in a high-traffic area and that the manual cautioned against locating the heaters in such areas. She said that she and her husband were on the couch, that the heater was behind them, that they heard T.J. cry out in pain, and that they jumped up and ran to him. She said that it never occurred to her that a child could get his hands up against the white-hot bricks inside the heater. She said that prior to the incident, T.J. had been in her lap on the couch; that her two children came into the room; that T.J. wanted to leave with them to go to a bedroom; that she watched him follow them around the corner to the bedroom; and that she thought that was where he was until she heard him cry. She said that it was probably fifteen to thirty minutes from the time he left her lap until the burn.

Jimmy Mitts testified that when he came home on September 25, T.J. was already at the house; that he turned the heater on; and that he was on the couch with his back to the heater when the injury occurred. He acknowledged being aware of the safety

precautions listed in the manual. He also agreed that a person had to be more cautious and careful in supervising a younger child like T.J.

In making his motion for a directed verdict, appellees' attorney argued that the child was a licensee; that the duty of care owed by appellees to the child as a licensee was not to injure him through wanton or willful conduct, which would require some intentional or utter disregard for the child's safety; and that the appellants failed to meet their burden of proof. Appellants' attorney countered that a distinction had to be made when the licensee was a thirteen-month-old baby and appellees had asked to keep him. He contended that they assumed the duty to exercise ordinary care for T.J. The trial court decided that "premises liability law was applicable regardless of the assumed liability concept and regardless of the tender age of the child." He directed a verdict in favor of the appellees.

Appellants raise two points of appeal: 1) that there was evidence from which a jury could find that the appellees were guilty of ordinary negligence, and 2) that the trial court erred in finding that the standard of care was willful or wanton negligence in granting the motion for directed verdict. These two points of appeal can best be discussed together, and it is more logical to address the appropriate standard of care first.

Appellants contend that the trial court erred in finding that the appropriate standard of care under these circumstances was the duty owed by a landowner to a licensee, *i.e.*, the duty not to cause injury by willful or wanton conduct. Instead, they argue that because T.J. was a thirteen-month-old child, the appropriate standard of care was the duty to exercise ordinary care to avoid injury to the child. We agree.

The trial court's analysis of this issue went astray when it focused on the child's status upon the land in determining what duty was owed by appellees. Our research did not reveal an Arkansas case directly on point, but an Alabama Supreme Court case explains the issues well. In *Standifer v. Pate*, 291 Ala. 434, 282 So. 2d 261 (1973), the Alabama Supreme Court overruled an earlier case in which it had held that a nine-year-old boy, for whom the property owner had undertaken to supervise activities, was a "mere licensee and therefore the duty owed him was not to

wilfully or wantonly injure him or not to negligently injure him after discovering his peril." In overruling that earlier case, the court explained in *Standifer*:

> While the allegations in the instant case are almost the same as those found in our recent case of *Nelson v. Gatlin*, we think that case must be overruled insofar as it may be inconsistent with the holding in the case at bar.
>
> As noted in the dissent of Mr. Justice Harwood in the *Nelson* case, the gravamen of the count is negligent supervision. The place at which such supervision occurred should not affect the duty owed the plaintiff. The location of the alleged breach of duty is unimportant, whether it occurred on the plaintiff's premises or elsewhere.
>
> We find such reasoning to be persuasive. As stated in *Nelson v. Gatlin*, the recognized duty owed by an occupier of land in Alabama to a licensee is not to wilfully or wantonly injure him, or not to negligently injure him after discovering him in peril.
>
> While this is a correct statement of the rule, it must be noted that this states only the duty [a]rising out of and [c]reated by the land occupier-licensee relationship. It in no way abrogates or insulates a land occupier from duties which arise from other relationships between himself and another on his premises. The occurrence of the breach of duty on one's own premises is a mere fortuity.
>
> Count Three in the instant case alleges a breach of duty arising out of a relationship of volunteer babysitter and child. In [a recent case] involving gratuitous safety inspection of business premises, this court held that a volunteer is under a duty, once he has acted or assumed the duty, to execute the tasks undertaken with reasonable care.

Id. at 436-37, 282 So. 2d at 263 (citations omitted).

Moreover, in a passage from a treatise on torts, *The Law of Torts*, which discusses children and premises liability, the author explains:

> Children, like adults, may be licensees, as for example where they are social guests or with adults who are social guests. In such cases, they are ordinarily owed only the care owed to adult licensees.

> However, where the defendant owes a duty of care to child trespassers under the rules stated below, he owes the same duty to child licensees. In addition to the limitation on duty implied in the licensee category, some authority holds that with children of tender years who are accompanied by parents, responsibility for their safety shifts to the parents, at least if the parents know of the danger. *On the other hand, if the landowner (or anyone else) has been entrusted with and accepted responsibility for supervising a child, he owes a duty of reasonable care to provide supervision regardless of the child's status on the land.*

Dan B. Dobbs, § 236 (West 2001) (emphasis added).

Appellees' reliance upon *Bader v. Lawson*, 320 Ark. 561, 898 S.W.2d 40 (1995), is misplaced. In *Bader*, unlike the instant case, the landowner did not undertake to supervise the care of the eight-year-old child involved in that case. The child came upon his property to jump on a trampoline in his back yard and was injured. It is precisely those types of premises-liability cases for which drawing distinctions in status in order to define duties make sense. Here, however, Wendy undertook the responsibility of caring for the thirteen-month-old child. She picked up the child from his house, where he was under the care of his mother, and took him to her own house. In doing so, she assumed a responsibility that went above and beyond any duty that might arise merely by virtue of the child's status upon the premises. As explained in the Alabama case, the location of any breach of that higher duty does not affect its analysis.

Consequently, because the trial court employed the wrong standard of care in ruling on the motion, we hold that it erred in directing a verdict in this case. There was sufficient evidence to submit to the jury on the issue of whether appellees breached their duty of ordinary care with respect to the child.

Reversed and remanded.

GLADWIN and ROBBINS, JJ., agree.

Patricia THOMAS and Charles Edward Thomas *v.*
Ruston PIERCE, M.D.

CA 03-632 184 S.W.3d 489

Court of Appeals of Arkansas
Division I
Opinion delivered June 16, 2004

[redacted]

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

Friday, Eldredge & Clark, LLP, by: *Laura Hensley Smith* and *Brandon James Harrison*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellants in this medical-malpractice case filed a complaint alleging that they had been injured as a result of medical malpractice by the appellee, and seeking damages in the amount of $2,150,000.00. In his answer, appellee requested that the case be dismissed, asserting that appellants'

claim for a specific amount of damages was in contravention of the Arkansas Medical Malpractice Act, and that appellants' complaint failed to state facts upon which relief can be granted. Appellants amended their complaint to remove the reference to a specific amount of damages. Appellee responded by filing an amended answer in which he again moved for dismissal on the same grounds asserted in his initial answer. The trial court granted appellee's motion to dismiss, and this appeal followed.

Appellants contend on appeal that the trial court erred in granting appellee's motion to dismiss. We agree, and we reverse and remand.

First, we note that appellants did amend their complaint to remove their claim for a specific amount of damages prior to appellee's second motion to dismiss and the trial court's order of dismissal; consequently, we discount this ground as a basis for the trial court's ruling. Refusal to permit the amendment under these circumstances would be an abuse of discretion. *Travis v. Houk,* 307 Ark. 84, 817 S.W.2d 207 (1991).

In determining whether to dismiss a complaint under Rule 12(b)(6), it is improper for the trial court to look beyond the complaint to decide the motion to dismiss. In order to properly dismiss the complaint, the trial court must find that the complaining parties either (1) failed to state general facts upon which relief could have been granted or (2) failed to include specific facts pertaining to one or more of the elements of one of its claims after accepting all facts contained in the complaint as true and in the light most favorable to the nonmoving party. *Bethel Baptist Church v. Church Mutual Insurance Co.*, 54 Ark. App. 262, 924 S.W.2d 494 (1996).

A pleading must contain, *inter alia*, a statement of facts, in ordinary and concise language, showing that the pleader is entitled to relief. Ark. R. Civ. P. 8(a). A pleading is deficient if it fails to set forth facts pertaining to an essential element of the cause of action. *Wiseman v. Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993). Arkansas is a state that requires fact pleading, and a pleading which sets forth mere conclusions is not sufficient under the Arkansas Rules of Civil Procedure. *Mann v. Orrell*, 322 Ark. 701, 706, 912 S.W.2d 1 (1995). Nevertheless, pleadings are to be liberally construed and are sufficient if they advise a party of its

obligations and allege a breach of them. *Bethel Baptist Church v. Church Mutual Insurance Co., supra.*

Pursuant to Ark. Code Ann. § 16-114-206 (1987), the elements to be proven in any action for medical injury are the applicable standard of care; that the medical provider failed to act in accordance with that standard; and that such failure was a proximate cause of the plaintiff's injuries. *National Bank of Commerce v. Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996). The standard of care applicable to a medical malpractice case is defined by statute as "the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he practices or in a similar locality." Ark. Code Ann. § 16-114-206(a)(1) (1987).

In their complaint, appellants asserted that there was an existing standard of care, as defined by statute, in the community; that the care and treatment received failed to meet that standard by failing to timely schedule and perform a caesarean section; and that this failure was the proximate cause of neurological damage to the child.

The appellees argue that this complaint set forth mere conclusions and was therefore properly dismissed. We do not agree. To the contrary, the appellants' complaint contained a detailed recitation of the facts alleged to constitute negligence and proximate cause, including the facts that appellant was a very small woman; that the baby was very large and in a breech position; that appellant requested a caesarean section throughout; that, despite his knowledge of these facts, the defendant required her, after achieving maximum dilation, to go through over four hours of hard labor before performing a caesarean section; that defendant's failure to timely schedule and perform a caesarean section was a breach of the applicable standard of care that constituted negligence; and that, as a result of defendant's failure to timely schedule and perform a caesarean section, there ensued a long and difficult labor that caused the child to suffer neurological damage and the mother to suffer injury to her bladder and associated nerves.

There is no question that appellants' complaint did not recite, as mere conclusions of law, that the treatment rendered by appellee was negligent and that appellants were injured as a result. *Compare Rabalaias v. Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985). Instead, the complaint clearly and concisely relates certain events

alleged to have happened at a particular time that would support such conclusions. Whether appellants can prove these alleged facts depends upon the evidence that they marshal at trial, but appellants have in their complaint alleged facts sufficiently specific to enable the reader to picture particular events, and the results thereof, in sufficient detail to state a cause of action for medical malpractice.

Reversed and remanded.

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

David E. LEWIS *v.* Louvenia K. LEWIS

CA 03-1168 185 S.W.3d 621

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 16, 2004

Law Office of Sara M. Hartness, by: *Sara M. Hartness*, for appellant.

Haddock & Tisdale, P.A., by: *James W. Haddock*, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The parties were divorced in 1993 by a decree awarding custody of the parties' minor child to appellant. No provision for payment of child support by appellee was made in the decree. The decree also provided that appellant had been on active military duty for sixteen years during the course of the marriage but had not at the time of the divorce satisfied the requirement for retirement from active duty, and established a formula for awarding a portion of appellant's prospective military retirement benefits to appellee.[1]

The Uniformed Services Former Spouses Protection Act, 10 U.S.C.A. § 1408, establishes a procedure for an ex-spouse to receive his or her portion of military retirement benefits directly from the federal government. Appellee did not comply with these procedures when appellant retired in 1996; consequently, she did not receive her portion of the retirement benefits directly from the government, nor did she receive her portion from appellant. Almost seven years later, she brought a motion for contempt alleging that appellant failed to pay her portion of the retirement benefits. Appellant asserted laches and estoppel as a defense, and testified that the parties entered into an oral agreement shortly after the decree was entered whereby appellant would not seek an award of child support in return for appellee's agreement to forgo her portion of the military retirement benefits until their child had completed her education.

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[1] No appeal was taken from this order and no argument has been made concerning whether nonvested military retirement benefits are marital property subject to division. *See Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993); *Holaway v. Holaway*, 70 Ark. App. 240, 16 S.W.3d 302 (2000).

The trial judge did not consider appellant's defenses of laches and estoppel, stating in his letter opinion that "[t]his court does not believe such an oral agreement regarding child support would be enforceable in any event." The letter opinion was expressly incorporated into the decree granting appellee judgment for back retirement benefits in the amount of $30,087.50. This appeal followed.

For reversal, appellant contends that the trial court erred in interpreting the decree so as to impose a burden on appellant to ensure that appellee was paid the portion of the military retirement benefits awarded her under the decree, and in disregarding appellant's arguments regarding laches and equitable estoppel. Appellant's second point is meritorious, and we reverse and remand.

Appellant first contends that the trial court, by ordering him to pay appellee the back retirement benefits to which she was found to be entitled, improperly placed a burden on appellant that was not imposed by the prior order. We do not agree. Nothing in the decree required appellee to collect her share of the benefits directly from the government; she was simply found to be entitled to this property, and the trial court could properly enforce its decree to ensure that it was delivered to her. *See Thomas v. Thomas*, 246 Ark. 1126, 443 S.W.2d 534 (1969).

The second argument hinges on whether or not the trial judge erroneously believed that estoppel and laches were unavailable. We think that his comment in his letter opinion demonstrates that he did. The trial judge's stated reason for concluding that laches and estoppel could not be based on an agreement to forego child support was that such agreement regarding child support would not be enforceable. It is true that the trial court always retains jurisdiction over child-support issues as a matter of public policy, no matter what the parties' independent contract provides, *Harris v. Harris,* 82 Ark. App. 321, 107 S.W.3d 897 (2003), and that an agreement promising not to seek child support therefore would not be an enforceable contract. However, the appellant here was not seeking to enforce a promise, but instead was asserting that an agreement that had been completely executed had given rise to an estoppel.

Estoppel arises where, by the fault of one party, another has been induced, ignorantly or innocently, to change his position for the worse in such a manner that it would operate as a

virtual fraud upon him to allow the party by whom he has been misled to assert the right in controversy. *Bethell v. Bethell*, 268 Ark. 409, 597 S.W.2d 576 (1980). Estoppel does apply to child-support matters. Estoppel has been applied in a case where a father failed to pay child support as ordered, but was actually supporting his children in his home, and the contempt citation for the arrearage was not filed until after the mother removed the children and the father was no longer supporting them. *Ramsey v. Ramsey*, 43 Ark. App. 91, 861 S.W.2d 313 (1993). Similarly, it has been held that long delay by a wife in invoking the process of the court to enforce a decree may give rise to an estoppel against her claiming an accrued arrearage. *Bethell v. Bethell, supra.*

The same principle applies to the defense of laches. The Arkansas Supreme Court has held that:

> There is no hard and fast rule as to what constitutes laches. It is well settled that a court of equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and where injustice would be done in the particular case by granting the relief asked. It is usually said that the two most important circumstances in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other in so far as it relates to the remedy.

Padgett v. Bank of Eureka Springs, 279 Ark. 367, 376-77, 651 S.W.2d 460, 465 (1983). Here there was testimony of an agreement, detrimental reliance, and resultant injury, and there is no question that there was an "undue and unexplained" delay of seven years in seeking the retirement benefits to which appellee was entitled under the decree. Under these circumstances, we think that the trial judge clearly could have applied laches or estoppel had he found that application of those doctrines was warranted by the facts. Because he did not do so because of a mistake of law, we remand for him to determine whether the facts so warrant.

Reversed and remanded.

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

GRIFFEN, J., concurs.

Linda CAMARILLO-COX *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 03-861 185 S.W.3d 133

Court of Appeals of Arkansas
Division I
Opinion delivered June 16, 2004
[Rehearing denied September 29, 2004.*]

* PITTMAN, J., would grant rehearing and wrote a dissenting opinion that was not for publication.

Janet L. Bledsoe, for appellant.

Gray Allen Turner, for appellee.

JOHN B. ROBBINS, Judge. Appellant Linda Camarillo-Cox appeals the termination of her parental rights to four children, A.S. (male born 1/17/94), S.S. (female born 11/13/95), J.N. (male born 12/9/99), and M.N. (male born 3/3/01), as entered by the Benton County Circuit Court.[1] The Department of Human Services (DHS) sought termination on the basis that the children had been out of the home for more than twelve months, and despite meaningful effort by DHS to help remedy the conditions that caused removal, those conditions were not remedied by appellant. DHS also argued that the children had been subjected to aggravated conditions in that appellant manifested indifference or incapacity to correct those conditions, and that she had not provided meaningful support or contact during the pendency of the case. The trial judge found that DHS had proved its contentions by clear and convincing evidence. On appeal,

[1] The legal father of J.N. and M.N. participated in the permanency planning hearing, entering his objection to proceed because he was not properly notified of DHS's intervention and actions. The trial court resolved that issue by ordering that the goal with regard to him be continued efforts at reunification. He is not appealing.

Any and all putative fathers of A.S. and S.S. were deemed to have their parental rights terminated by the order on appeal. No putative father of A.S. or S.S. appeals.

appellant argues that the trial judge clearly erred by finding that DHS proved grounds to terminate parental rights by clear and convincing evidence. We reverse and remand.

Termination of parental rights is an extreme remedy in derogation of the natural rights of the parents. *Wright v. Arkansas Dep't of Human Servs.*, 83 Ark. App. 1, 115 S.W.3d 332 (2003). Nevertheless, parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Crawford v. Arkansas Dep't of Human Servs.*, 330 Ark. 152, 951 S.W.2d 310 (1997). Pursuant to Arkansas Code Annotated section 9-27-341(b)(3) (Repl. 2002), the facts warranting termination of parental rights must be proven by clear and convincing evidence. Clear and convincing evidence is the degree of proof that will produce in the fact-finder a firm conviction regarding the allegation sought to be established. *Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992). In reviewing the trial court's evaluation of the evidence, we will not reverse unless the trial court clearly erred in finding that the relevant facts were established by clear and convincing evidence. *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).

The legislative intent, found in Ark. Code Ann. § 9-27-341(a)(3) (Supp. 2003), states that the intent is to provide permanency in a juvenile's life in all instances where return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare and it appears from the evidence that a return to the family home cannot be accomplished in a reasonable period of time, as viewed from the juvenile's perspective.

With these parameters of appellate review, we examine the evidence. Appellant first made contact with DHS when a protective-services case was opened on May 29, 2001, after A.S. was found a mile away from home by a police officer. DHS offered parenting classes and child care to appellant, which were refused. DHS provided the family with food stamps, and the children were on Medicaid. S.S. had severely crossed eyes, because of which she needed to wear corrective eyeglasses. During visits, DHS personnel rarely observed S.S. wearing them. Appellant was known to be depressed and on medication; however, appellant took the medicine sporadically at best.

Appellant's children came into protective custody on August 22, 2001, when the children were in their maternal grandparents' care at their Siloam Springs, Arkansas, trailer. The grandmother, a disabled woman, informed a DHS caseworker that she was unable physically or financially to continue to care for the children for her daughter in their two-bedroom trailer. As the caseworker interviewed the children, appellant arrived and accused her mother of lying. Then, appellant gathered the children's social security cards and birth certificates, handed the documents over to the caseworker, said she was giving up, and told the caseworker to put the children in foster care. Appellant announced that she was leaving on a bus for Texas, said she was going to kill herself, entered her car, and drove away. Emergency custody took place that day.

On September 5, 2001, the trial court placed the children all together with their maternal aunt and uncle. Also in September, an adjudication hearing was conducted wherein the children were determined to be dependent-neglected. Appellant appeared at that hearing, stipulating to probable cause. Appellant's counsel stated that appellant was having problems with her medications and did not have a home of her own at the time. The trial judge ordered appellant to complete the following tasks in order to have the children return: (1) attend individual counseling; (2) obtain and maintain stable and appropriate housing; (3) obtain stable employment; (4) keep DHS notified of her address and employment status; and (5) cooperate with DHS in achieving the case plan goals.

On November 20, 2001, a review hearing was conducted in which it was learned that appellant married Abie Cox, a man convicted of a sex-related offense. Appellant contended that it was not as bad as portrayed, because when Abie was seventeen he had consensual sex with a fourteen-year-old girl, whose father was mad at him. Appellant testified that she was still living with her parents in Siloam Springs, but that she had been approved for government housing and was on a waiting list for an apartment. Appellant said that there were five people living in her parents' trailer. Appellant said she was trying to get caught up on her debts. Appellant explained that she had been working for a month and a half, that her weekly income of $173 exceeded her expenditures, but that she could not make her payments because she owed late fees on top of the bills. Appellant stated that she visited her children at her aunt and uncle's house about once a week and gave them about $20 per week for the children. Appellant was not attending counseling, but appellant said she would attend counseling only in Siloam Springs,

to which she preferred to drive herself if she had the gasoline. Appellant said she could not be counseled at Ozark Guidance Center because she owed money there from earlier sessions, though she preferred to have counseling with her regular counselor, Megan, who worked for Ozark Guidance Center.

A DHS family service worker, Stormy Randolph, confirmed that the maternal aunt and uncle said appellant visited about once a week, and she stated that DHS was providing appellant with parenting classes. However, Ms. Randolph was concerned that reunification might not occur in the near future because appellant was not attending counseling for her depression, she was not earning enough to support herself, much less four children, given her limited hours of work, she had not obtained housing on her own, and she had married Mr. Cox, who was a sex offender. Ms. Randolph said that DHS could provide the counseling and the transportation to Rogers where those services were available, but appellant did not want to because her physician was in Siloam Springs.

The trial judge concluded that DHS had made reasonable efforts, but that DHS should assist more in the acquisition of housing. He commented that appellant was argumentative and said that she could take care of things on her own, but that her performance had indicated otherwise. The judge was unwilling to find that appellant's husband was a danger to the children without more proof. The judge directed appellant to visit her children, to continue to look for appropriate housing, to regularly attend counseling, and that if she were making support payments, to have proof of it.

On January 15, 2002, an emergency hearing was conducted because the children's aunt and uncle decided that they no longer wished to have the children. They did not understand that custody would last as long as it had. The children returned to the custody of DHS, and the children were sent to foster homes.

On February 19, 2002, a review hearing took place. It was learned that the children had been referred to counseling since being taken back into DHS's custody, that appellant's husband had been incarcerated for a parole violation, and that appellant had not yet attained her own housing or an adequate income to care for four children. The judge noted that the children had been out of the home for about six months, and further, "I'm afraid that all too often, young parents believe that if they just come and tell me that

they've attempted to do things, that that will be good enough." The judge reiterated that the law requires that "they actually accomplish things, so that their children's interests are first." The judge told appellant that he would rather she be scared to lose her children and work extraordinarily hard than to have to terminate her rights. The judge ordered the children to remain in foster care, that the two older children receive counseling, and that efforts be made to ensure that S.S. wore her glasses. The judge reaffirmed the case-plan requirements on appellant, adding that she must take her medication.

At a review hearing on May 7, 2002, evaluations indicated that appellant suffers from major depression and exhibited some behavioral problems. Appellant's counselor, Megan, was losing hope that appellant could be a fit parent. The judge cautioned appellant's counsel to understand that DHS was moving toward a permanency planning hearing, that the children had been out of the home for nearly a year, and that if she did not make major progress she could expect to lose her parental rights. The judge outlined the requirements on appellant: stable employment; stable housing; attend counseling; take medication; complete parenting classes; maintain contact with DHS; attend visits or notify for cancellation or rescheduling; and cooperate with DHS to reach goals.

A permanency planning hearing was conducted on August 13, 2002, and Miguel Nava came forward for the first time claiming to be the father of J.N. and M.N. Mr. Nava was appointed counsel. The maternal grandparents sought to intervene, which was granted. At the conclusion, the trial judge set the case for a termination hearing in November 2002. The order filed of record from the permanency planning hearing ordered that appellant comply with the following terms and conditions: maintain stable employment; obtain stable and appropriate housing; inform DHS of her address and phone number; attend counseling; take her medication; attend regularly scheduled visits with the children and notify DHS of any changes or cancellations; and cooperate with DHS on the case plan goals.

At appellant's request, a continuance was granted, so the termination hearing did not occur until December 30, 2002. Appellant appeared and testified that she had her own three-bedroom apartment in Siloam Springs that she had lived in for about five or six months. She had been married for about a year, but her husband had not lived with her except for the last two

months due to his incarceration. She said that before that, "I lived here and there, with my parents, and with friends." Appellant said she worked for a company that produced Hallmark cards making $7.50 an hour, but that she and her husband were currently laid off. They expected to be recalled to work the first week in January. Though she did not have a sitter ready, she said her mother could help watch the children while she and her husband worked. Although she had missed some visits due to illness or work, she said she visited her children every Friday. Appellant said she was regularly taking a prescription medication called Celexa for her depression and had done so for about four months. She acknowledged that she had this prescription starting in the spring of 2001 but that she did not take it as prescribed and even stopped taking it for a while. Appellant said that she had her own counselor, Megan Lescher at Ozark Guidance, who she saw usually twice per week in the spring of 2001, but she stopped seeing her and only scheduled another appointment the Friday before the termination hearing.

Appellant believed that though she could not handle the pressure in the beginning, she had become very able to do so as long as she took her medicine. She felt more able because her bills were paid current, her father had bought her a car, she could sell things she did not need to pay bills, she had family to help her, and she was ready to meet her children's needs. She explained their needs as love, food, air, shelter, and discipline. Appellant testified that she was sure she could work something out for childcare during work hours, and the older two would attend school.

Appellant acknowledged that Miguel Nava was the father of her two youngest children. She testified that they formerly lived together, he worked, and she stayed home, but in approximately April 2001, they separated because he stabbed her in the presence of the children. Appellant said that Miguel did not have much involvement in the children's lives after that, except that he did pay some support. Appellant acknowledged that two other men were the natural fathers of A.S. and S.S. She believed that A.S.'s father was deported to Mexico and that S.S.'s father was deceased.

Appellant complained that DHS did not help her find housing, pay rent or bills, offer to provide transportation, or provide counseling. Appellant said she had completed parenting classes. However, appellant agreed that she had told DHS that for the most part she wanted to do it on her own. Appellant testified that although she knew about her husband's parole conditions, she would be around to supervise her children and that they would not

be alone with him. Further, she offered to remove her husband from the household to avoid termination of her rights.

Her husband's parole officer, Jeff Bland, testified that Mr. Cox had been on parole since October 2002 and would be until 2006. Bland related that his parole had the usual conditions, plus he was (1) not to have unsupervised contact with minors, (2) to avoid high-risk situations, (3) to undergo periodic drug testing, and (4) to abstain from alcohol consumption. Bland said that he explained to appellant that she needed to think about taking him into her house given that she was trying to get her children back; she still wanted to take him. Bland said that Mr. Cox had been generally compliant with his parole conditions since October and had not tested positive for drugs.

Appellant's counselor, Megan Lescher, testified that she held a master's degree in counseling and provided counseling for a wide range of problems. She said she often referred patients to a psychiatrist with the idea that medication would help, and that 95% of the time, the psychiatrist agreed with her assessment. Lescher said that she first encountered appellant in January 2001 when appellant came in concerned about her son A.S. Lescher recognized that appellant had a flat affect, she cried and was despondent, she had nightmares, and she felt detached. Lescher eventually assessed appellant as having major depression, borderline personality traits, and post-traumatic stress disorder based upon a history of physical and sexual abuse. Lescher said that appellant was sporadic in coming to see her for counseling early on, making it to two or three sessions, and then just failing to make appointments for a while. Other than the Friday prior to this hearing, Lescher had not seen appellant since February 2002. Lescher said that appellant told her that she had six months of employment and was taking her medication. With that history, Lescher deemed her prognosis much better than in the beginning when she was consistently unreliable and unstable. However, Lescher admitted that she had not personally seen this new-found progress because she had only seen her in one recent one-hour session. Lescher said that the most important factor in appellant's stability was to stay on her medication.

Another counselor at Ozark Guidance, Don Beckman, testified that he held a master's degree and had been in the profession for about twenty-five years. Around February 2002, Beckman began work with A.S. and S.S., who were about eight and seven years old at that time. Beckman was assigned to them

because they were having difficulty being separated from their mother and being in foster care. A.S. expressed anger and aggression, and Beckman did not see much improvement in the four months he saw A.S. However, in those same four months, S.S. made great strides, which Beckman believed was in some part due to improvement with her vision.

A family therapist from Little Rock, Tina Rushing, testified that she had worked with A.S. since July 2002,[2] and that he exhibited depression, withdrawal, anxiety, and emotional sensitivity. She expected to see explosive aggression, but that did not happen. They worked on A.S. verbalizing his feelings instead of withdrawing. A.S. was receiving supportive services for learning disabilities in reading and spelling, and he was making progress. He expressed hope that he could return to his family, but he was angry and hurt that it was necessary to be removed. A.S. was also confused and hurt that his mother left him with his grandparents off and on since he was a toddler. Given that he was close to his siblings, he worried about termination and how it would affect his sister and brothers. Rushing expressed that A.S. needed permanency and that his life in "limbo" needed to end.

Lee Wade, three-year-old J.N.'s counselor, testified that J.N. initially expressed rigid, cautious, and guarded play that was not developmentally appropriate. J.N. had a high startle response, and he was overly aggressive for his age. Over the course of about eight months of treatment, Wade saw major improvement: more displays of exploration and confidence, and decreases in aggression. Wade did not believe that termination of parental rights would cause significant trauma for him.

Next came the testimony of Jennifer Graham, the DHS family services worker. Graham said that the children were presently eight (A.S.), seven (S.S.), three (J.N.), and one and a half (M.N.). Graham recalled that there was a protective services case opened on the family on May 29, 2001. Services were offered right away, but the children came into protective custody in August 2001 due to abandonment. Graham agreed that the children had been in several residential placements during the pendency of this case. A.S. had been in seven different placements, and S.S., J.N., and M.N. had been in four different placements. Currently the

[2] In the latter portion of their foster-care time, A.S. had been moved to the Little Rock area.

three youngest children were together in northwest Arkansas; the oldest was in Little Rock. Graham recounted the services provided including counseling, transportation, visits with family, medical/dental/vision treatment, and educational services.

Graham said that appellant had lived in her current apartment since August 5, 2002, but she understood that this was temporary housing. When Graham visited early on, there were two men living there with appellant, later joined by appellant's husband. Graham agreed that appellant had acquired appropriate furnishings in the months that followed. Graham testified that appellant missed some visits, but she usually appeared, sometimes late. Graham acknowledged that most of the missed visits were attributed to appellant's work schedule and some were due to DHS's need to cancel. Appellant never asked for transportation assistance with the exception of visits to the oldest child in Little Rock. Graham agreed that appellant brought little gifts, clothing, and sometimes money to the children during visits, but she said appellant did not pay child support to DHS. Graham listed the services provided to appellant as including counseling referrals, transportation, housing referrals, visitation, and parenting classes. Graham agreed that appellant had completed parenting classes.

Though appellant had attained an apartment with appropriate furnishings and some employment history, and Graham acknowledged that appellant had basically completed her case plan, she did not deem these recent efforts to show stability. Graham testified that these positive changes occurred at or around the time that the termination hearing was set at the August 2002 permanency planning hearing. Graham recalled that there were referrals for counseling in August 2002, but there was no counselor assigned to her and no appointment made; appellant was on the waiting list. She stated that there was nothing else DHS could offer that would ensure reunification in a short period of time. Graham pointed out that the children had been out of the home for sixteen months, that there were prospects for all of them to be adopted and even one that might take all four children together, and that the children's best interest was served by termination of parental rights.

In argument of counsel, it became clear that Mr. Nava's rights were not going to be terminated at this point. However, because the two older children's fathers were either deceased or did not appear, there was concern that the children as a sibling group would be split up. Counsel for DHS suggested that it was

possible for A.S. and S.S. to be adopted together. The attorney ad litem, given this quandary, continued to support the position that appellant's parental rights to all four children should be terminated.

The judge rendered his findings from the bench, finding that it was his sad duty to terminate appellant's parental rights to all of the children, acknowledging that appellant loved them. The judge commented that appellant had been in and out of the children's lives, that the pattern had not substantially changed in the time while the children were out of her custody, and that it was in the children's best interest to give them an opportunity for stability and permanence in their lives. A.S. and S.S. were free to be adopted, while J.N. and M.N. had a pending case with their legal father. An order was filed on February 7, 2003, commemorating these findings. The order stated that DHS had proved that (1) the children had been out of the home for at least twelve months and that despite meaningful effort by DHS to rehabilitate the home and correct the conditions that caused removal, those conditions had not been remedied by the parent; (2) appellant had failed to provide meaningful contact or support while the children were out of her custody; and (3) appellant manifested an indifference or incapacity to correct the conditions leading to removal of the children. *See* Ark. Code Ann. § 9-27-341. This appeal resulted.

If any one of the bases for termination are supported by clear and convincing evidence, then we must affirm. We deem none of the alleged bases to be so supported, and we hold that they are clearly erroneous findings.

■ During the first twelve months that the children were out of the home, appellant undoubtedly manifested that she could not or would not do what was necessary to accomplish the return of her children. However, for the five months between the permanency planning hearing on August 13, 2002 and the termination hearing on December 30, 2002, appellant showed significant improvement and met nearly all of the case plan requirements. She attained employment, albeit at a temporary service, she acquired an apartment that was suitably furnished and clean, she was consistently taking her medicine, she completed more parenting classes than were required, she visited and gave small token gifts to her children, she maintained contact with DHS, and she reinstated counseling. Of the case plan goals set out for her to accomplish in order to gain the return of her children, she accomplished all except a steady course of counseling. Appellant

indeed attended counseling very little and very late. However, appellant had a history and rapport with her counselor, and her counselor was encouraged at her progress that she said she maintained for several months. Importantly, her counselor testified that the most important factor in her stability was taking her medication, which she was doing. Moreover, DHS acknowledged difficulty in making counseling available to appellant. In short, the unrebutted proof demonstrated that appellant made significant and sustained progress in the five months prior to termination of her parental rights. To find otherwise was clearly erroneous.

There were two alternative bases for termination that the trial judge found to be proved by clear and convincing evidence: (1) lack of meaningful contact or support; and (2) manifest unwillingness or incapacity to correct the conditions. These are likewise clearly erroneous findings. Any party seeking to terminate the parental relationship bears the heavy burden to prove by clear and convincing evidence that the parent has willfully failed to provide significant material support in accordance with the parent's means or to maintain meaningful contact with the juvenile. *See Minton v. Arkansas Dep't of Human Servs.*, 72 Ark. App. 290, 34 S.W.3d 776 (2000). Material support consists of either financial contributions or food, shelter, clothing, or other necessities where such contribution has been requested by the juvenile's custodian or ordered by a court of competent jurisdiction. *Id.* Appellant was not under any order to pay support, but in any event, it was uncontested that she sent money or gifts within her ability in her dire financial situation. Indeed, according to DHS, one of the reasons that it opposed returning the children was that it concluded she was not earning enough money. As concerns "meaningful contact," DHS conceded that she visited the children fairly regularly when she was not working. Because we have found error in the conclusion that appellant failed to remedy the conditions causing removal of her children, we consequently find reversible error in the finding that appellant manifested unwillingness or incapacity to remedy the conditions causing removal.

Reversed and remanded for proceedings consistent with this opinion.

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

Judy MICHAEL *v.* KEEP & TEACH, INC.

CA 03-978 185 S.W.3d 158

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered June 16, 2004

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Kenneth E. Buckner, for appellant.

Michael E. Ryburn, for appellee.

JOHN B. ROBBINS, Judge. Appellant Judy Michael appeals the decision of the Arkansas Workers' Compensation Commission. Appellant contends that the Commission's decision, denying her claim for the nine percent permanent anatomic impairment rating given by her treating physician, is not supported by substantial evidence. Due to the Commission's failure to render findings and draw a conclusion on the issue presented and litigated, we reverse and remand for additional findings of fact, conclusions of law, and such further proceedings as may be needed to comply with our opinion.

Appellant is the Director of the Keep & Teach Daycare located in Sheridan, Arkansas. She injured her back on Friday, August 24, 2001, while she was holding a child. The child was trying to break free, when appellant "popped" her back. The pain that appellant experienced over the weekend caused her to visit a physician on Monday. Her physician, Dr. Clyde Paul, diagnosed her condition as a lumbar strain. Appellant continued to experience pain, so she went to the emergency room. She underwent a magnetic resonance imagery (MRI) study and was referred to Dr. Sunder Krishnan, a neurosurgeon. After the employer's claim representative suggested that she visit Dr. Cathey for a second opinion, appellant went to Dr. Cathey one time on January 8, 2002. After meeting with Dr. Cathey, appellant returned to Dr. Krishnan for therapy. She was treated by Dr. Krishnan until he released her in April 2002. Dr. Krishnan signed a form stating that the appellant had a nine percent impairment rating to the body that

was more than fifty percent related to the injury at work. Dr. Cathey stated that he did not believe appellant sustained any impairment as a result of the August 24, 2001, injury. The administrative law judge denied her claim, and appellant appealed. The Commission adopted the administrative law judge's decision, found that appellant "failed to demonstrate by a preponderance of the evidence that the compensable injury was the major cause of the permanent disability or need for treatment (9% permanent impairment rating)," and denied her claim. This appeal followed.

We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if the findings are supported by substantial evidence. The Commission's decision will not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Superior Indus. v. Thomaston,* 72 Ark. App. 7, 32 S.W.3d 52 (2000). However, where it is clear what the appropriate law is but the Commission fails to apply the law to the facts of the case, it is appropriate to reverse and remand. *See, e.g., Westside High School v. Patterson*, 79 Ark. App. 281, 86 S.W.3d 412 (2002) (reversing and remanding, stating that "the Commission must apply the appropriate law to the evidence before it to reach a conclusion.")

We hold that the Commission erred in not rendering a conclusion of law on the only issue presented by the parties: whether appellant proved entitlement to the permanent partial impairment rating. The ALJ set forth the issue to be litigated as follows:

> Is claimant entitled to a permanent impairment rating of 9% to the whole body (respondent says that claimant is not entitled to any permanent impairment rating)?

This issue is reiterated and addressed in the discussion portion of the ALJ's opinion. Nevertheless, the conclusion of law specifically states that appellant failed to prove entitlement to *permanent disability or the need for treatment* because she did not prove that the compensable injury was the major cause therefor.

Arkansas Code Annotated sections 11-9-104(F)(ii)(a) and (b) (Supp. 2002) state:

> (a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or *impairment.*

> (b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong *disability* or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent *disability* or need for treatment.

(Emphasis added.) Arkansas Code Annotated section 11-9-102(14)(A) (Supp. 2002), defines a major cause to be more than fifty percent of the cause.

We hold that the Commission's decision is based on a flawed application of Ark. Code Ann. § 11-9-102(F)(ii). Although the Commission's opinion appropriately examined appellant's claim regarding the issue before it of permanent impairment, the Commission's conclusions addressed whether the compensable injury was the major cause of the permanent disability or need for treatment. We cannot perform appellate review until the issue raised and litigated is answered by the Commission.[1]

This error is made more evident because a finding on entitlement to disability is premature without appellant first proving entitlement to some impairment rating. Arkansas Code Annotated section 11-9-102(8) (Supp. 2002) defines disability as "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." In *Wren v. Sanders Plumbing Supply*, 83 Ark. App. 111, 117 S.W.3d 657 (2003), we cited *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000), for the proposition that the percentage of a claimant's permanent physical impairment must be established before the

[1] In response to the dissenting judges, we must point out where we are in agreement. First, we agree that the correct "issue" was brought forward to the ALJ, the Commission, and framed to us on appeal, which was entitlement to the impairment rating. Second, we also agree that on appeal from a decision from the Commission, we perform a substantial-evidence review to determine if the findings of fact support the conclusion of law to grant or deny benefits. Where we differ is that, at present, the question of law went unanswered. The statutory law, as cited by the Commission and the ALJ, is inapplicable to the issue as framed and the facts as found. Permanent disability and need for treatment are not at issue. To offer an appellate opinion about whether the findings of fact constitute substantial evidence to support denial of this claim for an impairment rating, where no such conclusion of law has yet been made, is premature.

Commission can consider a claim for permanent partial-disability benefits in excess of the impairment. *See also* Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2002).

In short, we hold that the Commission's decision to deny appellant's claim is based on an incorrect application of Ark. Code Ann. § 11-9-102(4)(F)(ii). Accordingly, we reverse that decision and remand the case so that the Commission can make appropriate findings of fact and conclusions of law for us to review.

Reversed and remanded.

HART and ROAF, JJ., agree.

GRIFFEN, J., concurs.

NEAL and CRABTREE, JJ., dissent.

OLLY NEAL, Judge, dissenting. I dissent in the reversal and remand of this case. The majority has determined that the Commission erred due to its incorrect application of Ark. Code Ann. § 11-9-102(4)(F)(ii)(b). The application of this statute was not the issue appellant brought before us; instead, the issue as framed by the appellant was "whether the finding of the Commission that the Appellant is not entitled to a permanent partial impairment rating of 9% to the whole body is supported by substantial evidence."

This is not an instance in which we have *de novo* review; our standard of review is that of substantial evidence. In denying permanent anatomical benefits, the Commission did not find that Ms. Michael was not permanently anatomically impaired. Rather, it determined that the compensable injury was not the major cause of any permanent impairment.

A claimant must prove a specific percentage of permanent impairment before he is eligible for permanent disability and wage-loss benefits, *Wren v. Sanders Plumbing Supply*, 83 Ark. App. 111, 117 S.W.3d 657 (2003), and here, the Commission's opinion displays a substantial basis for its denial of Ms. Michael's claim for permanent anatomical benefits. Although Dr. Krishnan determined that appellant's work-related injury was more than fifty percent of the cause of her impairment, Dr. Cathey determined that appellant's condition was due to degenerative changes preexisting her injury. A compensable injury must be established by medical evidence supported by objective findings, and medical opinions addressing compensability must be stated within a rea-

sonable degree of medical certainty. *See Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. *Id.* Further, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Jim Walter Homes Travelers Ins. v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003). While there was conflicting medical evidence in this case, it is well settled that it is the Commission's duty to resolve such conflicts. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001).

In this instance, the Commission's determination turned on its view of Dr. Krishnan's credibility and the weight to be given the evidence. The Commission specifically noted that appellant failed to demonstrate by a preponderance of the evidence that the compensable injury was the major cause of the permanent disability or need for treatment. I believe the Commission's decision displays a sufficient basis for the denial of the claim. There is no evidence in the record that supports the impairment rating given by Dr. Krishnan. Furthermore, no objective finding is in the record to support the impairment rating given. Accordingly, I would have affirmed this case based on the issue appellant brought before us.

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

Teresa Dawn BROOKS *v.* Stephen Wayne BROOKS

CA 03-793 185 S.W.3d 130

Court of Appeals of Arkansas
Division III
Opinion delivered June 16, 2004

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Mason Law Firm, by: *Chadd Mason*, for appellant.

Sexton Law Firm, by: *Jane Watson Sexton*, for appellee.

WENDELL L. GRIFFEN, Judge. Teresa Brooks appeals the trial court's modification of her original decree of divorce and child custody and visitation agreement. Appellant argues that the circuit court erred in finding that a material change in circumstance occurred by virtue of the Fourth Judicial District's adoption of a new "suggested visitation schedule." As a result of the change, the court modified appellant's visitation agreement. We hold that subsequent adoption by the court of a new visitation schedule was not a material change of circumstance to justify the modification of the divorce decree and child visitation agreement. Thus, we reverse and remand this case for further proceedings consistent with this decision.

Appellant and appellee Stephen Brooks were divorced in the Washington County Circuit Court on July 10, 1998. Appellant and appellee had three minor children, Jerrod, Lauren, and Jacob Brooks. Appellant was given full custody of Lauren and Jacob, and appellee was given full custody of Jerrod. The divorce decree included the following language concerning visitation:

> Visitation shall be in accordance with this Court's standard visitation order. Visitation dates are to be arranged in such a manner as to permit all of the children to be together with each of the parties during each visitation session.

The parties exercised visitation pursuant to the court's standard visitation order for five years. While under the standard visitation schedule ("old schedule"), appellant and appellee did not have any problems. They were able to work around difficult situations, such as baseball practices, under the old schedule. From the first of March until July, appellant allowed appellee to have an additional hour and thirty minutes of visitation four days out of the week so that he could coach their son's baseball team.

Under the old schedule, appellant also modified visitation to accommodate appellee for hunting and fishing reasons. In addition, she allowed him to spend additional time with their son Jacob. Appellant also allowed appellee to spend time with the children when she and her husband went out of town. Under the old schedule, appellee did not exercise any of his visitation between August and October for the two years preceding the hearing because he was busy with his business.

In June 2002, the Fourth Judicial District, of which Washington County Circuit Court is a member, adopted a new suggested visitation schedule. On February 6, 2003, appellee filed a petition for modification in which he requested that his visitation order be modified so as to allow him visitation pursuant to the new suggested visitation schedule that was adopted in June 2002. According to appellee, no change of circumstances occurred over the six-month period before he filed for modification. Appellee opined that the change of circumstance was the fact that the court came up with a new visitation schedule. The new schedule would allow him to spend more time with his children, and he suggested that additional time with him would be in the children's best interest.

Appellant opposed the new visitation schedule, but on May 23, 2003, the trial court granted appellee's petition for modification, finding that the trial court's adoption of a revised suggested visitation schedule constituted a material change in circumstances. The trial court found that the revised suggested visitation schedule was analogous to Administrative Order No. 10 concerning child support guidelines, in that the adoption of new guidelines constituted a material change in circumstances. This appeal resulted.

The standard of review in this case is *de novo*, but we will not reverse the trial court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Thompson v. Thompson,* 63 Ark. App. 89, 974 S.W.2d 494 (1988). A finding is clearly erroneous when, even though there is evidence to support it, the appellate court is left with the definite and firm conviction that a mistake has been made. *Burnette v. Perkins & Assoc.,* 343 Ark. 237, 33 S.W.3d 145 (2000).

We use a rigid standard to determine whether a material change of circumstances exists to justify modification of a visitation order. Modification of visitation rights is not permitted unless there is a sufficient change in circumstances pertinent to visitation. *Leonard v. Stidham,* 59 Ark. App. 5, 952 S.W.2d 189 (1997). Disagreements between the parties concerning the extent of visitation authorized by an indefinite decree may be resolved by setting out definite visitation rights. *Id.*

This case does not involve an indefinite decree concerning the extent of visitation. The parties' divorce decree explicitly states, that "[v]isitation shall be in accordance with this court's standard visitation order. Visitation dates are to be arranged in such a manner as to permit all of the children to be together with each of the parties during each visitation session." The court's standard visitation order set out a detailed visitation schedule for the non-custodial parent. The following is an example of the provisions under the old schedule:

> 1. Alternate weekends commencing at 6:00 p.m. Friday and continuing until 6 p.m. Sunday except that all special, holiday and summer visitation as hereinafter set forth shall take precedence. Alternate weekend visitation missed due to conflicts with special, holiday or summer visitation will not be made up.
>
> 2. Thanksgiving-Even numbered years, commencing at 6:00 p.m. Wednesday before Thanksgiving and continuing until 6:00 p.m. Sunday.
>
> 3. Christmas-Odd numbered years commencing at 6:00 p.m. on the day school dismisses for the Christmas break and continuing until 10:00 a.m. Christmas Day. In even numbered years, commencing at 10:00 a.m. Christmas Day and continuing until 6:00 p.m. the day before school starts.

Neither party testified that he or she did not understand the visitation schedule. To the contrary, there was testimony from appellee that

visitation under the old visitation schedule was successful. The parents were working well together, and there were no complaints concerning visitation. Appellee filed for modification because he favored the new visitation schedule recently adopted by the Fourth Chancery Circuit Court and because the new schedule would allow him to spend more time with his children. According to appellee, there was no change in circumstance leading up to his modification motion, but the court's adoption of a new visitation schedule constituted a material change.

The court held that the standard visitation order was replaced in July 2002 with a new "suggested visitation order," and the change from the former "standard visitation order" to the current "suggested visitation schedule" constituted a major change in circumstances with respect to visitation in the instant case. At the hearing, the trial judge commented,

> I consider this schedule just like Administrative Order No. 10 says, anytime the Child Support Charts are changed, that, in and of itself, is a material change of circumstances. This schedule is a material change of circumstances in my opinion.

The trial judge was incorrect. There are intrinsic differences between the Fourth Judicial District's adoption of a new visitation schedule and a change in child support guidelines. First of all, the supreme court adopted Administrative Order Number 10 because the child-support guidelines were subject to change at least every four years. In addition, the child support guidelines are applicable throughout Arkansas and provide consistency among the courts.

Decisions regarding changes in visitation should be based on what has changed in the lives and conduct of the parties and how such changes affect the best interest of the children involved. The change ordered in this case had nothing to do with the lives and conduct of the parties. Therefore, the court's decision was clearly erroneous. We reverse and remand for proceedings consistent with this opinion.

Reversed and remanded.

HART and ROAF, JJ., agree.

STATE of Arkansas OFFICE OF CHILD SUPPORT ENFORCEMENT *v.* James HARRIS

CA 03-1245 185 S.W.3d 120

Court of Appeals of Arkansas
Division II
Opinion delivered June 16, 2004

Greg Mitchell, for appellant.

No response.

TERRY CRABTREE, Judge. In this one-brief appeal, the Office of Child Support Enforcement appeals from an order that allowed appellee to credit the payment of social security disability benefits made to his adult daughter against a child-support arrearage. Appellant argues on appeal that the trial court erred in ruling that the payment of benefits to the child, as opposed to the mother, satisfied the arrearage. We affirm.

In May 1991, an order was entered requiring appellee, James Harris, to pay $72 a week in support of his minor children based on a petition filed by appellant on behalf of the children's mother, Diedra Harris. In March 1995, appellee's support obligation was increased to $82 a week. In March 1996, appellant filed a motion for contempt alleging an arrearage in support. In April 1997, an agreed order was entered that granted appellant judgment in the amount of $4,076 for the accrued arrearage and that reduced appellee's obligation to $62 a week.

The present motion for contempt was filed by appellant in March 2003. The motion again noted that the mother had assigned her rights to child support to appellant;[1] that appellee's support obligation had abated as of August 8, 2002, when the youngest child, Mary, attained the age of majority; but that appellee had accumulated a substantial arrearage in support.

At the hearing, it was disclosed that the arrearage was $4,295.28. It was further revealed that appellee had become disabled and that Mary had received a lump-sum payment of social

[1] Appellant has made no argument that an assignment has any effect on the outcome of this case.

security disability benefits in the amount of $5,051.25. Of that amount, she gave $1,300 to her mother. Appellant conceded that appellee should be given a $1,300 credit against the arrearage, but it argued that appellee was entitled to no further credit because "the mother hasn't gotten it. She is the one over the years that paid to raise the child out of her pocket, feeding the child, clothes, rent." The trial court ruled that the disability payments made to the child completely discharged the arrearage. This appeal followed.

In *Hinton v. Hinton,* 211 Ark. 159, 199 S.W.2d 591 (1947), the supreme court held that military allotments assigned to a child could be credited toward the father's child-support obligation. The court ruled, however, that the father could not use any overpayments to offset future support. In *Cash v. Cash,* 234 Ark. 603, 353 S.W.2d 348 (1962), the court held that a father was entitled to credit social security retirement benefits received by the child against his child-support payments. In so holding, the court observed that such benefits were not gratuitous but earned, and the court was persuaded that the equities tipped in favor of allowing credit to the father under the circumstances of the case. *See also, e.g., Davis v. Davis,* 79 Ark. App. 178, 84 S.W.3d 447 (2002); *Cantrell v. Cantrell,* 10 Ark. App. 357, 664 S.W.2d 493 (1984). *Cf. Thompson v. Thompson,* 254 Ark. 881, 496 S.W.2d 425 (1973).

Appellant accepts that it is settled law in Arkansas that social security benefits can be substituted for child-support payments. Appellant argues, however, that this case presents a unique situation because the lump-sum payment was not made during the child's minority and was paid directly to the adult child and not her mother to whom the child support was owed. Appellant further argues that the trial court erred by not considering factors such as the financial impact on the mother, the financial standing of the appellee, and the length of appellee's disability.

A trial court's ruling on child-support issues is reviewed *de novo* by this court, and the trial court's findings are not disturbed unless they are clearly erroneous. *Allen v. Allen,* 82 Ark. App. 42, 110 S.W.3d 772 (2003). We are not convinced that the trial court clearly erred. An order of support is for the benefit of children, even though it is directed to be paid to the mother or other custodian. *Miller v. Miller,* 929 S.W.2d 202 (Ky. Ct. App. 1996). Our law provides that, once a child turns eighteen, he or she may file a petition to collect unpaid support from the non-

supporting parent. Ark. Code Ann. § 9-14-105(c) (Repl. 2002). Thus, the trial court's decision is not without justification. With respect to the factors appellant contends the trial court failed to consider, appellant did not present those arguments to the trial court. It is well-settled that we will not hear arguments raised for the first time on appeal. *Judkins v. Hoover,* 351 Ark. 552, 95 S.W.3d 768 (2003).[2] We affirm the trial court's decision.

Affirmed.

BIRD and VAUGHT, JJ., agree.

Gordon L. GIBSON *v.* Connie GIBSON

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Divisions I, II, and III
Opinion delivered June 16, 2004

[2] There are differing views as to whether social security benefits can be credited toward *arrearages* in child support. Some courts do not allow it. *See, e.g., Mask v. Mask,* 620 P.2d 883 (N.M. 1980); *Fowler v. Fowler,* 244 A.2d 375 (Conn. 1968); *McLaskey v. McLaskey,* 543 S.W.2d 832 (Mo. Ct. App. 1976); *Fuller v. Fuller,* 360 N.E.2d 357 (Ohio Ct. App. 1976). Others permit it, but allow credit only for arrearages that accrue during the period of disability. *See, e.g., Frens v. Frens,* 478 N.W.2d 750 (Mich. Ct. App. 1991); *Miller v. Miller,* 929 S.W.2d 202 (Ky. Ct. App. 1996); *Children and Youth Services of Allegheny County v. Chorgo,* 491 A.2d 1374 (Pa. Super. Ct. 1985). Appellant did not argue below that arrearages, per se, were not subject to discharge. For this reason and because the record was not developed on this issue, we leave that question for another day.

Dover, Dixon, Horne, PLLC, by: *W. Michael Reif* and *Nona Morris*, for appellant.

Patty Law Firm, by: *Claibourne W. Patty, Jr.*, for appellee.

KAREN R. BAKER, Judge. Appellant, Gordon Gibson, appeals the trial court's denial of his petition to terminate alimony provided to appellee, Connie Gibson, pursuant to the parties' divorce decree. He raises three points on appeal: (1) The trial court erred in not finding the requests for admissions admitted due to appellee's failure to file a timely response; (2) The trial court erred in failing to find that Michael Black and appellee, Connie Gibson, were living in the same household; and (3) The trial court did not have jurisdiction to modify the definition of cohabitation in the order. We affirm as modified.

The parties were divorced in 1999. The decree ordered Dr. Gibson to pay alimony for November and December of 1998 in the amount of $9000 per month; $3000 per month for twelve

months beginning January 1, 1999; $2500 per month for twelve months beginning January 1, 2000; $2000 per month for five years beginning on January 1, 2001; and $1500 per month for four years beginning on January 1, 2006. The decree also included the following court-devised provision:

> The alimony will terminate upon either party's death or the remarriage or cohabitation by the Plaintiff [Connie]. Cohabitation means spending at least four nights per week from 12:00 p.m. until 6:00 a.m. in the same household with another party with whom the Plaintiff is not married or related.

On June 4, 1999, an order was filed based upon a joint motion from the parties to correct a clerical mistake concerning the alimony provision. The provision provided, in pertinent part:

> Cohabitation means spending at least four (4) nights per week from 12:00 *a.m. (midnight)* until 6:00 a.m. in the same household with another party *of the opposite sex* with whom the Plaintiff is not married or related.

(Emphasis added to note changes in decree language). Neither party appealed the original order or the initial changes to the original order.

On June 14, 2002, Dr. Gibson filed a motion to terminate alimony and for reimbursement of alimony, alleging that Ms. Gibson had been cohabitating with Michael Black since July 1999. In that motion, he asserted that because Ms. Gibson was living with Mr. Black, alimony should be terminated and that Ms. Gibson should be required to repay him $81,000 in alimony that he had paid since she had begun such cohabitation.

A return of service form filed in the record of this case states that a Keith C. Friedrich, an investigator, signed the return of service declaring that he had served a copy of the motion, along with a notice of hearing set, requests for admissions, and interrogatories "[b]y handing it to the person identified as Connie Gibson" at 7:13 a.m., on June 19, 2002, at 3850 Urban St., Wheatridge, Colorado. On that same date, these documents were faxed to the attorney who had represented Ms. Gibson in the divorce action.

Ms. Gibson filed an answer to Dr. Gibson's motion to terminate alimony on June 21, 2002; however, no answers were filed regarding the requests for admissions or the interrogatories. The requests for admissions consisted of two requests:

> (1) Admit that you are cohabitating with Michael Black as that term is defined in the Divorce Decree entered on January 15, 1999, and Order which was entered on June 4, 1999;
>
> (2) Admit you did not notify Defendant you were cohabitating with Michael Black.

On August 8, 2002, Dr. Gordon filed a motion to deem facts admitted and for summary judgment based upon those deemed admissions. Ms. Gibson filed an answer to that motion on August 10, 2002, and an answer to the requests for admission on August 21. She amended her answer to the motion to deem facts admitted and for summary judgment on September 30, 2002, one day prior to trial, denying that she had been served with any requests for admissions and asserting that a factual question existed as to whether she was romantically involved with her tenant. In his reply to her amended answer, Dr. Gordon contended that Ms. Gibson's failure to respond to the requests for admissions deemed them to be admitted, and he further contended that, because she was deemed to be cohabitating with Michael Black, there was no factual issue as to whether she was romantically involved with him.

At the hearing, the trial judge denied Dr. Gibson's motion to deem facts admitted. The court accepted Ms. Gibson's explanation that she was not served with the requests for admissions when she was served with the other documents filed in this case. The court noted that given the magnitude of what Ms. Gibson stood to lose, combined with her declaration that she had not received the requests, the court accepted her explanation and refused to deem the requests admitted. In addition, on its own motion, the court expanded the definition of "cohabitation" to provide:

> Cohabitation means spending at least four (4) nights per week from 12:00 a.m. (midnight) until 6:00 a.m. in the same household with another party of the opposite sex with whom the Plaintiff is not married or related *and with whom the Plaintiff has or has had an intimate or romantic relationship.*

(Emphasis added to indicate addition).

The judge also denied Dr. Gibson's motion for summary judgment. After hearing testimony on the motion to terminate alimony, the court denied that motion as well. Dr. Gibson appealed the denial of his motion, asserting three points of error.

We review equity cases such as this *de novo* on appeal; this court reviews the trial judge's findings of fact and affirms them unless they are clearly erroneous. *Cole v. Cole*, 82 Ark. App. 47, 110 S.W.3d 310 (2003). To demonstrate that the trial court's ruling was erroneous, an appellant must show that the trial court abused its discretion by making a decision that was arbitrary or groundless. *Id.*

Dr. Gibson first alleges that the trial court erred in not finding the requests for admissions admitted due to Ms. Gibson's failure to file a timely response. He relies upon Rule 36 of the Arkansas Rules of Civil Procedure, specifically the statement that "[t]he matter is admitted unless, within 30 days after service of the request, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection."

Through the years, it has been the policy of our supreme court to require compliance with the rule governing responses to request for admissions by making it a practice of deeming the requests admitted when the responses are not on time. *See Womack v. Horton*, 283 Ark. 227, 674 S.W.2d 935 (1984). However, the particular facts of each case must be examined and, when the facts warrant, acceptance of late responses is required. *Id.*

In this case, Ms. Gibson asserted that she did not receive the requests for admissions with the other documents served upon her at her home in Colorado. In the cases cited and relied upon by Dr. Gibson, the only issue was whether the requests had been answered in the time and manner required by Rule 36. We find this case factually similar to *Beck v. Merritt*, 280 Ark. 331, 657 S.W.2d 549 (1983). In *Beck*, there was a factual dispute as to whether the requests for admission were ever received. The trial court accepted the non-receipt as factual, and, in accepting that explanation as the reason that answers to the requests had not been filed, set aside a judgment entered pursuant to the admissions.

Similarly, the trial judge in this case accepted Ms. Gibson's explanation that the requests were not timely answered because she did not receive them at the time the other papers were served upon her. The trial court found this explanation consistent with the fact that Ms. Gibson stood to lose a substantial amount of support in the pending litiagation. Therefore, we cannot say that the trial judge's finding was arbitrary or groundless.

For his second point on appeal, Dr. Gibson alleges that the trial court erred in failing to find that Michael Black and Connie

Gibson were living in the same household. It is undisputed that Mr. Black and Ms. Gibson were living in the same house. Ms. Gibson testified that Mr. Black was a tenant who paid rent to her for living in her residence. Dr. Gibson characterized this arrangement as Mr. Black contributing financially to the household.

The issue in this case is whether the judge's finding that Connie Gibson and Michael Black were not living in the same household is clearly erroneous. Resolution of this question involves more than a determination of whether they were living in the same house, regardless of whether they were romantically involved. The trial judge referred to the definition of household contained in *Black's Law Dictionary* and stated "that household means a family living together" and also means "those who dwell under the same roof and compose a family." However, the trial judge further stated that she understood that in this context "to be in the same family, you do not have to be married and you do not have to be related." Thus, the trial judge recognized that factors in addition to residence in the same house were required before Mr. Black could be considered a member of Ms. Gibson's household.

" 'Household' is commonly and popularly understood as comprising an economic unit. A boarder may reside in one's house, but not in one's *household*." *Smith v. Southern Farm Bureau Casualty Ins. Co.*, 353 Ark. 188, 198, 114 S.W.3d 205, 210 (2003) (emphasis in original) (J. Corbin, concurring). The majority in *Smith* recognized that the term "family" has come to mean any group of persons who live, sleep, cook and eat upon the premises "as a single housekeeping unit." The court further found that if this definition were used in the context of the language of the insurance policy — "any member of your family residing in your household" — would be redundant as both "family" and "household" would have the same meaning. Therefore, the majority defined "family" in the context of the insurance policy language as meaning a blood or legal relationship.

The trial judge in this case specifically stated that the term "family" as used to define "household" did not mean relatives by blood or marriage. Interpreting the language of the divorce decree in the context of alimony requires an economic analysis more in keeping with defining family as a single housekeeping unit. *See Byrd v. Byrd*, 252 Ark. 202, 478 S.W.2d 45 (1972) (holding that in absence of showing that former wife's paramour had assumed any responsibility for her care and maintenance or

that she had assumed his name and held herself out publicly as his wife, alimony could not be terminated). Furthermore, the trial court had complete authority to interpet the divorce decree she had previously entered in this case. *See Abbott v. Abbott*, 79 Ark. App. 413, 90 S.W. 3d 10 (2002). As a general rule, judgments are construed like any other instrument; the determinative factor is the intention of the court, as gathered from the judgment itself and the record. *Id.* We give deference to the advantaged position and prerogatives of the trial judge as the finder of the facts; we allow the court considerable latitude of discretion as to the orders made; and we will not upset its judgment and substitute our own unless it clearly appears that the court abused its prerogatives. *Barker v. Barker*, 271 Ark. 956, 611 S.W.2d 787 (1981) (*citing Erickson v. Beardall*, 20 Utah 2d 287, 437 P.2d 210 (1968)).

In this case, the trial judge found that Mr. Black's relationship with Ms. Gibson was not one of sharing economic responsibility, and that he was neither a member of her "household" nor a member of her "family." There is certainly sufficient evidence to support the trial judge's findings, particularly when family is defined "as a single housekeeping unit" rather than as relatives by blood or marriage.

The trial judge cited several factors supporting the conclusion that the two did not reside in the same household, including:

> . . . the fact that the Plaintiff and Mr. Black did not go any places alone, that she has not slept in the same room with Mr. Black, that Mr. Black now lives in the basement of the home that Mrs. Gibson is living in, that he pays $1,000 per month rent, and assists in home and yard maintenance.

The judge also noted that the living arrangements of Mr. Black and Ms. Gibson were very close to the circumstances that existed at the time of the parties' divorce. Ms. Gibson testified that it was advantageous for her and her divorced daughter to have a male companion in the house because the situation with her daughter's former husband made them fearful for their physical safety. Ms. Gibson testified that she and Mr. Black have no joint bank accounts, credit cards, or other financial holdings, obligations, or ties but for the fact that he pays rent to Ms. Gibson.

[redacted] Dr. Gibson testified that during the course of the marriage he socialized with Mike Black and that Mike Black had helped move the parties' daughter with Ms. Gibson because Dr.

Gibson's schedule was too busy. Further, Dr. Gibson testified that during the course of the marriage, it was not unusual for a third party to stay in the couple's home. Given this testimony, we cannot say that the trial judge's determination that Mr. Black was not a member of Ms. Gibson's household was clearly erroneous.

Nevertheless, Dr. Gibson complains that the trial court's order implies that Dr. Gibson had the burden to prove that Ms. Gibson was romantically involved with Mr. Black. We hold that whether or not Ms. Gibson and Mr. Black were romantically involved is not determinative of whether termination of alimony was appropriate.

In *Herman v. Herman*, 335 Ark. 36, 977 S .W.2d 209 (1998), our supreme court addressed a situation in which there was testimony that an ex-wife and her boyfriend lived in a permanent sexual relationship that is everything but marital in name. The supreme court reversed the trial court, holding that it was clearly erroneous in finding that the cohabitation of the ex-wife and another man amounted to changed circumstances that warranted the termination of the ex-husband's alimony obligation. The court explained:

> The [trial court]'s reasoning also conflicts with our holding in *Byrd v. Byrd*, 252 Ark. 202, 478 S.W.2d 45 (1972), which clearly indicates that marriage and nonmarital cohabitation are not equivalent for purposes of determining whether a former spouse is entitled to continue receiving alimony. Without deciding the issue, we suggested that a spouse who cohabitates with a third party might lose his or her entitlement to alimony if (1) the third-party "companion" has assumed responsibility for the spouse's "care and maintenance"; or (2) the spouse has assumed his or her companion's name and held himself or herself out publicly as the companion's spouse.

Id. at 39-40, 977 S.W.2d at 211. The court concluded that Ms. Herman's cohabitation with Mr. Purifoy, had not changed Ms. Herman's financial circumstances or diminished her need for alimony.

Therefore, the trial judge's decision in this case accurately reflects our supreme court's rulings identifying the conditions for the termination of alimony. *See also Cole v. Cole, supra* (explaining that the purpose of alimony is to rectify economic

imbalance in the earning power and the standard of living of the parties to a divorce in light of the particular facts of each case).

In his third point on appeal, Dr. Gibson asserts that the trial court did not have jurisdiction to modify the definition of cohabitation in the order. We agree that the trial court was without jurisdiction to modify the divorce decree's definition of cohabitation. *See Abbott v. Abbott*, 79 Ark. App. 413, 90 S.W.3d 10 (2002); Ark. R. Civ. P. 60. However, as discussed above, whether or not Ms. Gibson had a romantic or intimate relationship with Mr. Black does not determine the issue of whether or not alimony should be terminated. Accordingly, we modify the trial court's order to strike the added phrase "and with whom the Plaintiff has or has had an intimate or romantic relationship" from the definition of cohabitation.

Affirmed as modified.

HART, GRIFFEN, VAUGHT and ROAF, JJ., agree.

STROUD, C.J., GLADWIN, NEAL and CRABTREE, JJ., dissent.

JOHN F. STROUD, JR., Chief Judge, dissenting. The controlling issue in this case is Gordon Gibson's second point of appeal, that the trial court erred in failing to find that Connie Gibson and Michael Black were living in the same household under the definition of "cohabitation" that was set forth in the June 4, 1999 order that corrected clerical mistakes in the divorce decree. The trial court's failure to terminate Gordon's obligation to pay alimony to Connie under the trial court's own contrived definition of cohabitation is clearly erroneous.

In finding that Connie and Black did not live in the same household, the majority has looked to the concurring opinion in *Smith v. Southern Farm Bureau Cas. Ins. Co.*, 353 Ark. 188, 114 S.W.3d 205 (2003), which was an insurance case concerning who was covered by insurance under the phrase "you or any member of your family residing in your household." In this case, it is clear that Connie and Black resided in the same household, and the trial court erred in holding otherwise. According to Connie, Mike Black moved to Colorado at the end of September 1997. She moved to Lakewood, Colorado, in February/March 1999, and Mike Black moved into that house in July 1999. Connie sold her first house in November/December 2000 and moved into a new house in Wheatridge, Colorado, and Mike Black moved with her into that house as well. Connie admitted that she lived in the same

houses with Mike Black, although she claimed that he was a tenant who paid her $1000 per month in rent. She said that she had written leases with Black for both of the houses in which he had lived with her. However, she admitted that she did not report her "rental income" on her tax return, nor did she inform her insurance agent that she was renting out any portion of her house. Although she denied any romantic relationship with Black, she admitted that she had told him that she loved him, that he spent holidays with her and her family, that he went on vacations with her and her family, and that Black was listed as Mike Gibson on her athletic club membership because she had signed up as a "***household.***" (Emphasis added.) She also said that she was lenient when Black got behind on his rent, and that she sometimes allowed him to pay his rent by purchasing items for her from the sporting goods store where he worked, using his employee discount.

The trial court pointed out several different factors that went into her decision that Connie Gibson and Michael Black were not living in the same household; however, all of those factors are irrelevant in light of the definition of "cohabitation" in the divorce decree, which is "spending at least four (4) nights per week from 12:00 a.m. (midnight) until 6:00 a.m. in the same household with another party of the opposite sex with whom the Plaintiff is not married or related." Using that definition, coupled with the fact that Connie admitted that Black lived with her, the only conclusion that can be drawn is that Connie violated the prohibition against cohabitation as defined by the trial court in the parties' decree, as amended by joint motion on June 4, 1999. Gordon was entitled to rely upon the definition of "cohabitation" set forth in the 1999 joint amendment to the divorce decree, and Connie's living arrangements were clearly in violation of that provision.

The majority cites *Herman v. Herman*, 335 Ark. 36, 977 S.W.2d 209 (1998), in which the supreme court reinstated an ex-wife's alimony payments even though she was living in a sexual relationship with another man, holding that her cohabitation had not changed her financial circumstances or lessened her need for alimony. However, *Herman* is inapplicable to this case, as there was no provision in the *Herman* case that cohabitation would terminate alimony, as is the scenario in the present case. Here, the trial judge elected to fashion her own definition of cohabitation, which was more restrictive than the meaning provided in Arkansas case law; therefore, Arkansas case law regarding cohabitation is not applicable.

Although not relevant to the basis of this dissenting opinion, I feel I must comment on Gordon's point of appeal concerning the denial of his motion to deem facts admitted after Connie failed to answer the requests for admissions. On August 8, 2002, Gordon filed his motion to deem facts admitted; Connie filed an answer to that motion on August 19, 2002, and an answer to the requests for admission on August 21. She amended her answer to the motion to deem facts admitted on September 30, 2002, *one day prior to trial*, to deny that she had been served with any requests for admission. The trial judge found that Connie had not received the requests for admissions and denied Gordon's motion to deem facts admitted although Connie had failed to answer them in the required period of time, and even though a disinterested third party had executed a return of service verifying that he had indeed served such documents along with the other documents that Connie does not deny receiving. In denying Gordon's motion to deem facts admitted, the trial judge stated:

> What we have from the Plaintiff [Connie], is her intention that she did not receive the request for admissions. In coupling that with the magnitude of what stands to be lost in this case, I have to accept her intention that she has not received the request for admission when she was served with the other documents, and the Court will deny the motion to deem that the request for admissions be admitted.

Today's majority opinion reinforces that improper basis for the continuation of alimony.

I would reverse and remand for termination of alimony. I am authorized to state that Judges Gladwin and Neal join in this dissent.

TERRY CRABTREE, Judge, dissenting. I write separately to underscore my belief that the trial court turned a blind eye to the undisputed facts of this case. The evidence adduced at trial established that Michael lived in Connie's house; that Michael participated in multiple holiday celebrations with Connie and her family; that Michael accompanied Connie or her family on various vacations including trips to the Bahamas and Disney World; that Connie cooked for Michael; that the couple professed love for each other; that the couple exchanged greeting cards memorializing their love; that Michael was listed on Connie's athletic-club membership as one of her "household" and using the name "Michael Gibson"; and that Michael received mail at Connie's residence addressed to "Michael

Gibson." Although Connie claimed that Michael was merely a tenant in her home, she produced no evidence of any rental payment made from Michael to her. In addition, Connie has never declared any rental payments as income on her income tax returns. These facts taken together clearly demonstrate that Connie and Michael resided in not only the same house but also in the same household.

GLADWIN, J., joins in this dissent.

Mark B. BEATTY and Patsy D. Beatty *v.*
James G. HAGGARD and Sarah Haggard

CA 03-879 184 S.W.3d 479

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 16, 2004

[Rehearing denied August 25, 2004.]

James F. Lane, P.A., for appellants.

Graddy & Adkisson, P.A., by: *William C. Adkisson*, for appellees.

ANDREE LAYTON ROAF, Judge. Appellants Mark and Patsy Beatty brought an action for rescission of a real-estate contract against appellees James and Sarah Haggard based on constructive fraud. The Beattys appeal from the trial court's decision that they failed to prove either actual or constructive fraud by clear and convincing evidence. On appeal, the Beattys argue that the trial court erred in: (1) finding that the necessary burden of proof for constructive fraud was clear and convincing evidence; and (2) finding that they had failed to prove the necessary elements of either actual or construc-

tive fraud. We agree that the trial court clearly erred in finding that the Beattys had failed to prove the elements of fraud, and reverse and remand.

On April 24, 2000, the Beattys entered into a real-estate contract with the Haggards to purchase their home located in Faulkner County for $174,800. The Haggards provided the Beattys with an owner's property disclosure statement, dated January 10, 2000, in which they indicated that there had not been any "room additions, structural modifications or other alterations or repairs" made since the property was originally constructed; that there had not been "any settling from any cause, or slippage, sliding or other poor soil conditions"; that there had not been any known defects in the structure or substructure of any improvements; and that there were no other known defects in the property.

After discovering evidence of settling in the house, the Beattys filed suit against the Haggards in October 2001. The Beattys alleged in their complaint that subsequent to taking possession, they noticed "cracks in the ceiling of certain areas of the residence, separation of the floor trim in the same areas, cracks in the mortar of the brick work and vertical cracks in the bricks themselves on the north side of the residence." In addition, the Beattys alleged that upon further investigation, they discovered that the house was settling on its north side and that the Haggards had poured additional concrete along and adjacent to the foundation at the northeast corner of the home, "in an apparent (but unsuccessful) attempt to stop the settlement." The Beattys further stated that this additional concrete was covered with dirt and grass and was not visible at the time of purchase. They alleged that the Haggards were aware of the settlement problem, that the problem was not disclosed on the owner's disclosure statement, that they relied upon the disclosure statement, and that they would not have bought the home had the settlement problems been disclosed. The Beattys alleged that the failure to disclose the foundation or settlement problems constituted a constructive fraud against them, and they prayed for rescission of the purchase, or in the alternative, damages for the cost to repair the residence, for loss of value, and other consequential damages.

The Haggards denied the allegations and moved for summary judgment, which was denied by the trial court. The Haggards also filed a motion requesting that the trial be bifurcated on the issues of liability and damages, which was granted.

The evidence presented at trial on the liability issue established that James Haggard was an experienced builder, that the Haggards had the home in question built in 1995 by their son, John Haggard, who was in the business of building homes, and that they were the only occupants of the home until they sold it to the Beattys. In October 1999, James Haggard testified that he noticed some small cracks in the sheetrock above the east window in a bedroom on the northeastern corner of the house and above the interior door in that bedroom. He stated that there was also a small crack above the bathroom window on the north side of the house. Mr. Haggard further discovered some cracks in the mortar of the exterior brick on the north side beneath the bathroom window and on the east side of the house. He called his son out to examine the cracks, and they decided to dig down to the base of the concrete footing of the house along the northeastern corner to see if the cracking was the result of a structural problem.

Mr. Haggard and his son enlisted David Tindall, who used his backhoe to do the digging, and Joe Gormley to assist with the work. Mr. Haggard stated that they dug several feet along the north and east sides, although he stopped at the sewer cutoff on the north side. He testified that they found no cracks or other structural damage to the footing. Instead of replacing the loose dirt where they had dug, Mr. Haggard testified that they decided to pour concrete in the hole because otherwise, when it rained, the soft dirt would have compacted and collected water next to the footing of the house. He stated that this was just a precaution, as they found no structural damage, and that this concrete was not affixed to the foundation with rebar. He then covered up the concrete with dirt, and he testified that the concrete would not have been visible to the Beattys or to the home inspector.

Mr. Haggard testified that he also had someone come out and "tuck point" the mortar that had cracked on the brick exterior of the house. To repair the cracks in the sheetrock in the northeastern bedroom, he put mud on them, repainted, and put a new wallpaper border over them. When the Beattys visited the home prior to their purchase and to their receipt of the disclosure statement, Mr. Haggard testified that he pointed out where the mortar had been tuck pointed, although he did not mention the other repairs or the additional concrete. He further stated that he had accidentally used a different colored mortar when tuck pointing the cracks and that it would have been obvious to anyone that the mortar had been replaced in those areas.

Mr. Haggard testified that all of these repairs were "cosmetic" and that he did not disclose the repairs on the owner's disclosure statement. He stated that he did not mention the excavation and additional concrete in the disclosure statement because there were no questions that would have required him to do so. When asked about the question that stated, "Are there room additions, structural modifications or other alterations or repairs made to the Property since the Property was originally constructed[,]" Mr. Haggard testified that he answered "No" because he interpreted that question as referring only to structural alterations or repairs. Because he stated that all of the repairs he had performed had been cosmetic, not structural, Mr. Haggard did not list them. He also answered in the negative to the question that asked whether there had been any settling from any cause. Mr. Haggard testified at trial that he "had no idea if there was or wasn't settlement at this house," although he did not see any evidence of settling when he dug down to the footing. He further testified that he answered the questions on the disclosure statement truthfully, to the best of his knowledge, and that he had no intent to deceive anyone.

Lyman Walker, a home inspector, testified that he inspected the Haggards' home prior to the purchase by the Beattys. Walker stated that he was not aware of the excavation and additional concrete poured at the northeastern corner of the house or of the cracks in the sheetrock in the corner bedroom. If he had been aware of the additional concrete, Walker testified that he would have included it in his report because it is an "abnormal circumstance," which would merit further investigation as to its purpose. He stated that he would probably have recommended to the Beattys that they have a structural engineer look at the house if he had known about the concrete and that he believed he and the Beattys should have been told about it. Walker testified that he did not recall seeing a different colored mortar on certain areas of the exterior of the home, although he did note in his report that there were some hairline cracks in the exterior brick. Walker stated in his report that these cracks were probably the result of minor settlement and that they should be monitored for a year to eighteen months. He testified that he did not find evidence of any significant settling during his inspection.

According to Walker, minor cracks found in the interior of a home are typically cosmetic in nature. However, when shown a picture of a crack above the east window in the northeastern

bedroom, taken after the Beattys had possession of the house, Walker testified that he would have noted that type of crack in his inspection report, particularly if he had already found cracks on the exterior, because they could be related. When asked what he would have done had he been aware of cracks in the mortar, interior cracks above the window and the interior door opposite that window, and excavation and the installation of additional concrete on the northeast corner, Walker again testified that he would have recommended a structural engineer.

Michelle Henson, a wallpaper hanger, also testified on behalf of the Beattys. She stated that she was removing wallpaper in one of the bedrooms when she found a large crack, a quarter of an inch wide, that ran from the top of a window to the ceiling. She testified that the crack had been patched on top of the original wallpaper and that new wallpaper had been placed over it. Henson also stated that she repaired other cracks over doors or windows in the house.

Mark Beatty testified that he and his wife received a copy of the owner's property disclosure in March 2000 and that it was one of the main documents that they relied upon in purchasing the home. He stated that all of the questions on the disclosure were answered "No," and that they trusted the Haggards' word that there was not anything wrong with the home. Mr. Beatty testified that he did not notice any cracks in the exterior or interior of the home before he purchased it, except for one crack over the hearth. He stated that he was aware that the inspection report mentioned some minor cracks or minor settlement, but that he assumed it was not a major problem because the report did not discuss the issue in depth. Mr. Beatty first learned of the concrete along the northeastern corner of the house in July 2000, when he was planting shrubbery and his shovel hit the concrete. He phoned Mr. Haggard to ask why the concrete was there, and Mr. Haggard told him that it was there for reinforcement. Mr. Beatty testified that he again phoned Mr. Haggard in August 2000, when he had some foundation experts at the house who needed more information. Mr. Beatty stated that Mr. Haggard told him the size of the concrete and that there was not any rebar in it. The concrete had been poured into a trench two feet wide, two feet deep, and approximately thirteen feet long.

According to Mr. Beatty, the disclosure statement required Mr. Haggard to list all repairs made to the home, and he was misled by the failure to disclose the excavation and additional concrete. Mr. Beatty further testified that this nondisclosure constituted

constructive fraud. Patsy Beatty also testified that if the disclosure statement had mentioned the excavation and concrete at the northeast corner, as well as the sheetrock repairs in the bedroom, they would not have purchased the house, and that the failure to disclose this information constituted constructive fraud.

Stephen Horvath, a licensed real-estate appraiser, testified by stipulation that he inspected the residence on April 10, 2000. During his inspection, Horvath noticed cracks in the mortar on the north and east sides of the house and that mortar work had been performed, but did not see the concrete that had been poured in that area because it was covered with grass. If he had known about the additional concrete, Horvath testified that he would have mentioned it in his appraisal and would have requested that the mortgage company do a structural inspection of the house.

On behalf of the Haggards, David Tindall testified that he assisted in digging down to the footing of the house in October 1999. He stated that the footing was structurally sound and that Mr. Haggard was an honest and truthful person. However, Tindall also testified that he considered digging by the footing to be house repair. He further stated that cracks in the mortar do not indicate whether there is a foundation problem and that a person would not necessarily be concerned about just cracks in the mortar.

John Haggard, the Haggards' son who built the house, testified that he helped his father with the excavation and the pouring of the additional concrete. He stated that there was not anything wrong with the footing and that the concrete was not intended to repair or strengthen the footing, as it was poured beside, not underneath it. However, Joe Gormley, who also assisted in the excavation, testified that the additional concrete was poured so that it would go underneath and support, or join, the footing. Gormley stated that he would not describe their work as a "repair" on the home.

Following the evidence and the submission of briefs as to the correct standard of review, the trial court found that the Beattys failed to meet their burden of clear and convincing evidence and that they failed to prove the necessary elements of either actual or constructive fraud. The Beattys appeal from this decision.

The Beattys argue that the trial court erred in finding that they failed to carry the necessary burden of proof of clear and convincing evidence of constructive fraud. They contend that many cases discussing constructive fraud use a preponderance-of-

the-evidence standard and that there is a distinction between the burden of proof required for actual fraud as compared to constructive fraud, which is what they alleged in this case.

There are cases involving constructive fraud that use a preponderance-of-the-evidence standard. *See, e.g., Roach v. Concord Boat Corp.*, 317 Ark. 474, 880 S.W.2d 305 (1994); *Stewart v. Clark*, 195 Ark. 943, 115 S.W.2d 887 (1938). Other cases have used a clear and convincing, or a "clear, strong, and satisfactory" proof standard. *Knight v. Day*, 343 Ark. 402, 36 S.W.3d 300 (2001); *Lane v. Rachel*, 239 Ark. 400, 389 S.W.2d 621 (1965). Still others have used a "substantial evidence" standard. *Farm Bureau Policy Holders & Members v. Farm Bureau Mut. Ins. Co.*, 335 Ark. 285, 984 S.W.2d 6 (1998); *Bain v. Deal*, 251 Ark. 905, 475 S.W.2d 708 (1972).

However, these differing standards have been examined and at least partially explained by our supreme court. In *Clay v. Brand*, 236 Ark. 236, 365 S.W.2d 256 (1963), the supreme court noted that two different burdens of proof of fraud had been used in the past with respect to written instruments. "One, the ordinary rule which requires proof of fraud by a preponderance of the evidence and two, the stricter rule which requires proof of fraud by a preponderance of the evidence which is clear and convincing." *Id.* at 241, 365 S.W.2d at 259. Where it is alleged that the contract was obtained by misrepresentation, the preponderance-of-the-evidence standard applies; however, a stricter degree of proof is required when a solemn written instrument is to be upset. *Id.* at 242. In *Clay*, the trial court rescinded a real estate contract on the basis of misrepresentations as to the adequacy of the water supply. *Id.* Finding that the contract was silent with reference to the water supply and that the proof thus did not alter or contradict any of the written terms of the contract, the court found that the preponderance-of-the-evidence standard should apply. *Id.*

This distinction was recognized by this court in *Strout Realty, Inc. v. Burghoff*, 19 Ark. App. 176, 718 S.W.2d 469 (1986), where the purchaser of real estate sought to rescind the contract on the basis of the vendors' fraudulent misrepresentations as the adequacy of the water supply, the income potential of the property, and the amount of acreage conveyed. Finding that the allegation of fraud as to the amount of land to be sold directly contradicted the amount of land set forth in the contract and deed, and also that the allegations of fraud as to the water supply and the income potential

contradict that clause in the contract stating that the purchasers were relying on their own investigation of the matter, this court held that the allegations were attempting to overturn a written instrument by proof that alters its written terms and that the clear and convincing evidence thus applied. *Id.* This court again discussed this distinction in *Riley v. Hoisington*, 80 Ark. App. 346, 96 S.W.3d 743 (2003), where the purchasers of real estate were granted rescission of the contract due to fraudulent misrepresentations on the owner's disclosure statement relating to flooding in the home. We held that the facts and pleadings of the case required that the clear-and-convincing-evidence standard apply. *Id.*

Based upon the use of the clear-and-convincing standard in both *Strout Realty* and *Riley*, the trial court did not err in requiring the Beattys to prove constructive fraud, which in this case was alleged based on nondisclosures in the owner's disclosure statement just as in *Riley*, by clear and convincing evidence.

The Beattys also argue that the trial court erred in finding that they failed to prove the necessary elements of either actual or constructive fraud. This court reviews equity cases *de novo*; however, the trial court's findings of fact will not be reversed unless they are clearly erroneous. *Riley v. Hoisington, supra.* A finding is clearly erroneous when, even though there is evidence to support it, the appellate court is left with a definite and firm conviction that a mistake has been made. *Id.*

To establish fraud, the following elements must be proven: (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; (5) damage suffered as a result of the reliance. *Id.* However, to rescind a contract based upon fraud, it is not necessary that actual fraud exist. *Id.* (citing *Lane v. Rachel, supra*). Representations are construed to be fraudulent when made by one who either knows the assurances are false or else not knowing the verity asserts them to be true. *Id.* Constructive fraud has been defined as a breach of a legal or equitable duty, which, irrespective of the moral guilt of the fraud feasor, the law declares to be fraudulent because of its tendency to deceive others. *Id.* Thus, neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud, and a seller's lack of knowledge of the material representations asserted by him to be

true or his good faith in making the representations is no defense to liability. *Id.* In fact, it has been said that constructive fraud generally involves a mere mistake of fact. *Bain v. Deal, supra* (quoting *Kersh Lake Drainage Dist. v. Johnson*, 203 Ark. 315, 157 S.W.2d 39 (1941)).

The Beattys argue that the Haggards' nondisclosure on their owner's property disclosure statement of the excavation and additional concrete constituted constructive fraud.[1] The Beattys contend that they reasonably relied upon the disclosure statement and that they would not have purchased the property had they known about the excavation and additional concrete along the northeastern corner of the house. The Haggards, however, assert that they were not required to disclose the repairs because they were merely cosmetic and not structural, as they did not find any evidence of settling in the exposed footing. The primary disagreement lies in the interpretation of question number 4 on the owner's property disclosure, which states: "Are there any room additions, structural modifications or other alterations or repairs made to the Property since the Property was originally constructed?" The Haggards argue that this question required them to list only structural repairs, while the Beattys contend that all repairs should have been disclosed pursuant to this question. However, under the Haggards' interpretation of this question, which is that the words "alterations" and "repairs" referred only to structural alterations or repairs, there would be no need to follow "structural modifications" with "*other* alterations or repairs." (Emphasis added).

Although the Haggards argued at trial that their actions in excavating and pouring additional concrete along the footing did not constitute a "repair" to the home, they themselves referred to this work as a "repair" on many occasions, including on checks written to pay for the excavation and concrete, on their answers to interrogatories, and in James Haggard's second affidavit. Also, the Haggards' witness, David Tindall, who assisted in the excavation work, testified that he considered digging by the side of the footing and pouring concrete to be house repair. The Haggards also contend that this repair was merely cosmetic because the additional concrete was not affixed in any way to the original footing. However, Mr. Haggard told Mr. Beatty that the additional con-

[1] The Beattys do not argue on appeal that the nondisclosure of the repairs made to the interior sheetrock constituted constructive fraud.

crete was there for reinforcement, and Joe Gormley testified that they dug around the footing in such a way that the new concrete would support or join up with the original footing. The home inspector, Lyman Walker, testified that he felt he and the Beattys should have been aware of the repair work along the footing, and both Walker and Horvath, the real estate appraiser, testified that they would have recommended that a structural engineer inspect the house if they had known of the excavation and additional concrete. Thus, the Haggards had a duty to disclose this information on the owner's disclosure statement, and their failure to disclose it constituted a material misrepresentation of fact.

■ The Haggards also argue that the Beattys failed to prove the remaining elements of fraud set out above, such as intent to induce reliance, justifiable reliance, and damages. The Beattys contend, however, that these elements need not be proven for constructive fraud, as compared to actual fraud. As with the standard of review for fraud, case law is confusing as to whether all of the elements, save the false representation of material fact element, which clearly must be proven, must be shown for constructive fraud. While the supreme court in *Farm Bureau Policy Holders & Members*, *supra*, listed the five elements as requirements for constructive fraud, in a later case, *Knight v. Day*, *supra*, the court stated in a footnote that it had inadvertently labeled those elements as those that must be established for constructive fraud, when they are actually the elements of fraud. Regardless of whether a particular case specifically states that these five elements must be proven for constructive fraud, almost all of the cases analyze the proof using these elements. *See, e.g.*, *Knight v. Day, supra.*

■ We further conclude that the trial court clearly erred in finding that the Beattys had failed to prove the remaining elements of constructive fraud by clear and convincing evidence. The Haggards clearly intended for the Beattys to rely on the owner's disclosure statement in deciding whether to purchase the house. In fact, the real estate contract states under Paragraph 16B that a written disclosure has been provided and "is warranted by the Seller to be the latest disclosure" and that the answers in the disclosure are "true, correct, and complete to the best of the Seller's knowledge." Also, the Beattys both testified that they relied upon the representations in the disclosure statement in purchasing the house. The Haggards contend that the Beattys

failed to prove that they suffered damage as a result of their reliance, but, as the Beattys argue, the Haggards filed a motion to bifurcate the trial, which was granted. Thus, there was no evidence presented as to damages at the initial trial on liability. The Beattys did allege in their complaint that they have noticed substantial evidence of settling on the home's north side, however, and there was testimony that they had two different foundation experts come out and look at the house. This is enough to show that they have suffered some damage as a result of their reliance. Of course, they will have the burden to prove the extent and amount of damage at the trial on the damages issue.

The Haggards also argue that an "as is" clause in the real-estate contract, as well as a "Buyer's Disclaimer of Reliance" clause, prevent recovery by the Beattys on the basis of fraud. While the sale of property "as is" generally relieves a vendor from liability for defects in that condition, unless the defects are patent, an "as is" clause does not bar an action by the vendee based on claims of fraud or misrepresentation. 77 AM. JUR. 2D *Vendor and Purchaser* § 327 (2003). Also, as the Beattys contend, the "Buyer's Disclaimer of Reliance" clause excludes from the disclaimer those representations specified herein "*including* any written disclosures provided by the seller." (Emphasis added). Thus, the Haggards' argument that these clauses in the real-estate contract bar this action by the Beattys is without merit. Because the trial court clearly erred in finding that the Beattys failed to prove their claim for constructive fraud by clear and convincing evidence, we reverse the trial court's decision and remand for a determination of damages.

Reversed and remanded.

PITTMAN, HART, NEAL, and BAKER, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I respectfully dissent from the decision reached by the majority and would affirm the trial court's decision. I agree with the majority that the burden of proof is the clear and convincing standard articulated in *Riley v. Hoisington*, 80 Ark. App. 346, 96 S.W.3d 743 (2003). However, I think the decision is affirmable under that authority.

Once we determine that the appropriate burden of proof was placed on the appellant at the trial court level, we review the

trial court's decision under the clearly erroneous standard of review. *Burdette v. Madison,* 209 Ark. 314, 719 S.W.2d 418 (1986). We do not decide whether we believe the appellant proved constructive fraud according to the clear and convincing standard. We will only set aside the trial court's finding of fact if it is clearly against the preponderance of the evidence, giving due regard to the trial court to judge the credibility of witnesses. *Id.* I do not believe the trial court's decision was clearly erroneous.

In *Riley,* this court discussed the five elements that have to be proven in order to establish fraud: (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; (5) damage suffered as a result of the reliance. Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others. *Riley v. Hoisington,* 80 Ark. App. 346, 96 S.W.3d 743 (2003). We have held fraud even in the complete absence of any moral wrong or evil intention. *Id.*

I am unable to hold that the trial court's ruling was clearly erroneous because appellants did not put forth adequate evidence that appellees made a false representation concerning a *material* fact. The only proof that goes to whether the excavation and additional concrete at the footing of the house is a material fact is the statement by appellants that they would have not bought the home had they known about the excavation ahead of time. Even appellants' witnesses did not testify that the excavation was material. Mr. Walker, a home inspector, testified that had he known about the excavation he would have recommended that the appellants hire a structural engineer to find out the purpose of the concrete. Stephen Horvath, a real estate appraiser, testified that had he known of the excavation he would have mentioned it in his appraisal and would have requested that the mortgage company do a structural inspection of the house.

The court weighed the testimony of appellees and their witnesses against the testimony of appellants and their witnesses. Appellant James Haggard testified that the purpose for the concrete was to provide a solid material outside of the footing and that the excavation was a precautionary measure. Everyone present for the excavation, David Tindall, John Haggard, and Joe Gormley,

agreed with James Haggard that the excavation was to check the footing, the footing did not have any cracks, and the concrete was precautionary.

Similarly, it is not clear whether appellees intended to induce action or inaction in reliance upon the representation. As mentioned above, appellees and their witnesses did not regard the excavation as a material change, but rather a cosmetic change. In order to measure justifiable reliance the trial court had to weigh the credibility of the witnesses. Appellants testified that they would not have bought the house had they known of the excavation and additional concrete. However, the testimony of appellants may not be enough to reverse the trial court's findings. Giving due regard to the trial court's ability to judge the credibility of the witnesses, I would affirm the trial court's decision.

Paul Eugene MASHBURN, Jr. *v.* STATE of Arkansas

CA CR 03-1121 189 S.W.3d 73

Court of Appeals of Arkansas
Division I
Opinion delivered June 23, 2004

Bowen & Wiggins Law Firm, PLLC, by: *J. Brooks Wiggins*, for appellant.

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

WENDELL L. GRIFFEN, Judge. Paul Mashburn appeals from the trial court's decision to revoke his probation for failure to register as a sex offender. Appellant contends that the trial court erred by interpreting Ark. Code Ann. §§ 12-12-904 (Repl. 2003) and 12-12-903 (Repl. 2003) as not allowing a thirty- day grace period for reporting a change of employment and by misinterpreting Ark. Code Ann. § 12-12-904(a)(2)(B) in light of the provisions of Ark. Code Ann. § 12-12-1303 (Repl. 2003). We affirm.

Appellant moved to Van Buren, Arkansas, after being convicted as a sex offender in Oklahoma. Appellant later pled guilty to failure to register as a sex offender on May 24, 2001, and was sentenced to six years' imprisonment with four of the years suspended. After he was released from prison, appellant registered as a sex offender. At the time appellant registered with the Van Buren Police Department, he was residing at 15 Fayetteville Road, Apt. #1, and he worked at O.K. Foods.

On May 14, 2003, Steve Weaver, a detective with the Van Buren Police Department, noticed that a report had been filed against appellant. The person who filed the report listed her residence as the same residence given to the police department by appellant. Officer Weaver checked with the Sheriff's office and found out that the Sheriff's office served appellant an eviction notice on April 7, 2003. On May 14, 2003, Officer Weaver located appellant at a location near Interstate 40 and Highway 59 and arrested him for failure to register as a sex offender.

Officer Weaver also contacted O.K. Foods and learned that appellant's last day in that employment was April 18, 2003. According to appellant, he was living in his car at the time he was arrested. At a revocation hearing, the trial court concluded that appellant violated Ark. Code Ann. § 12-12-904(a)(1) by failing to report a change in employment and by refusing to cooperate with the assessment process by intentionally failing to establish a residence in order to avoid the reporting requirements. The trial court revoked appellant's probation, and sentenced him to thirty-six months in the Arkansas Department of Correction.

In a revocation hearing, the State has the burden of proving a violation of a condition of probation or the suspended sentence by a preponderance of the evidence. *Williams v. State,* 351 Ark. 229, 91 S.W.3d 68 (2002). On appeal, we will uphold the trial court's findings unless they are clearly against the preponderance of the evidence. *Id.* We defer to the trial court's superior position for questions of credibility and weight to be given to testimony. *Id.*

Arkansas Code Annotated section 12-12-909(b)(1) (Repl. 2003), clearly states that before a change of address *within the state,* a sex offender shall report the change of address to the center no later than *ten days* before the offender establishes residency or is temporarily domiciled at the new address. (Emphasis added.) The legislature defined a "change of address" in Ark. Code Ann. § 12-12-903(4) in the following way:

> (4) "Change of address" or other words of similar import mean a change of residence or a change for more than thirty (30) days of temporary domicile, *change of location of employment,* education or training, or any other change that alters where an offender regularly spends a substantial amount of time.

(Emphasis added.) Arkansas Code Annotated section 12-12-904(a)(1) says that a person who fails to report changes of employment or who

refuses to cooperate with the assessment process will be guilty of a Class D felony. It is an affirmative defense to prosecution if the person provides the new address to the Arkansas Crime Information Center in writing no later than five business days after the offender establishes residency. Ark. Code Ann. § 12-12-904(a)(2)(A)(ii) (Repl. 2003).

Appellant does not dispute that he was unemployed from April 18, 2003, until he was arrested on May 14, 2003. However, appellant argues that he was allowed thirty days to report his change of employment under Ark. Code Ann. § 12-12-903(4). Appellant also cites *Williams v. State,* 351 Ark. 229, 91 S.W.3d 68 (2002), and the thirty-day provision that applies to sex offenders moving to or returning to this state from another jurisdiction.

In *Williams,* the defendant had returned to Arkansas from Arizona, but failed to register in Arkansas. According to Ark. Code Ann. § 12-12-906(a)(2)(A), a sex offender returning to Arkansas from another jurisdiction has to register no later than thirty days after the offender establishes residency in a municipality or county of the state. Since the defendant in *Williams* was returning from Arizona he had thirty days to register. In the present case, appellant's previous job was in Arkansas, so Ark. Code Ann. § 12-12-906(a)(2)(A) is not applicable.

Similarly, Ark. Code Ann. § 12-12-903(4) is only relevant to this case because it defines a change of address to include a change in the location of employment. The provision does not give a thirty day grace period for a sex offender to report a change in employment. The statute defines a change of residence to include a change for more than thirty days of temporary domicile. The term "more than thirty (30) days" only modifies temporary domicile, and is not relevant to when a sexual offender is required to report a change in the location of employment.

Arkansas Code Annotated section 12-12-909(b)(1) is the controlling statute in this case, and it requires a sex offender to report a change in employment no later than ten days before the offender establishes new employment. According to Ark. Code Ann. § 12-12-904, it is an affirmative defense to prosecution if the delay in reporting the change is caused by an eviction, a natural disaster, or any other unforseen circumstance, and the person provides notice of the change within five business days after new employment is established. Appellant did not assert an affirmative

defense for failure to register his change in employment. In addition, he did not prove his entitlement to an affirmative defense.

■ We examine acts in their entirety, and we reconcile provisions to make them consistent, harmonious, and sensible in order to give effect to every part of the statute. *Thomas v. Cornell,* 316 Ark. 366, 872 S.W.2d 370 (1994). Arkansas Code Annotated section 12-12-909 requires sex offenders to report changes in employment ten days before they occur. Arkansas Code Annotated section 12-12-904 provides sex offenders with an affirmative defense if they notify authorities no later than five days after changing employment. Reading the two statutes together makes it clear that appellant should have notified authorities ten days prior to changing employment, absent an affirmative defense. The legislature requires sex offenders to report changes in employment, and the loss of employment constitutes a change. Accordingly, the trial court did not err in interpreting Ark. Code Ann. §§ 12-12-904 and 12-12-903 as not allowing a thirty-day grace period for reporting a change in employment.

■ Appellant's second point is that the trial court erred in finding that he violated Ark. Code Ann. § 12-12-904(a)(2)(B) by refusing to cooperate with an assessment. We need not address appellant's second point on appeal. In order to revoke appellant's suspended sentence, the State only had to prove appellant violated one condition of the suspended sentence. *Peterson v. State,* 81 Ark. App. 226, 100 S.W.3d 66 (2003). We hold that appellant violated a condition of his suspended sentence when he failed to report his change in employment.

Affirmed.

GLADWIN and BIRD, JJ., agree.

William L. STROUD v. Delane CAGLE
and William Cagle

CA 03-1068 189 S.W.3d 76

Court of Appeals of Arkansas
Division III and IV
Opinion delivered June 23, 2004

Stanley D. Christopher, for appellant.

Baxter, Jensen, Young, & Houston, by: *Ray Baxter*, for appellee.

WENDELL L. GRIFFEN, Judge. William Stroud appeals from the trial court's order finding that his consent to the adoption of his son was not necessary because Stroud exceeded the period of time allowed by law in which to either support or to have substantial contact with his child[1]. Appellant alleges that the trial court erred in ruling that the requirements set forth in Ark. Code Ann. § 9-9-220(c)(1)(A)-(C) (Repl. 2002) were not applicable to this case because the effective date of the statute was after the date of the parties' divorce decree. We hold that the statute was not effective on the date that appellant's child support order was entered and the statute is not applicable to this case. Thus, we affirm.

Appellant was the natural father of the minor that is the subject of this dispute, B.S., born on January 22, 1998. At the time of the minor's birth, appellant was married to the child's natural

[1] This is a subsequent appeal from *Stroud v. Cagle*, 2003 WL 1901124 (Ark. App. April 16, 2003) CA02-1215, which the court of appeals dismissed because the order from which the appeal was taken was not a final order. The final hearing was held on May 30, 2003. The final order was filed on June 4, 2003.

mother Melissa Stroud. Melissa and appellant were divorced by a decree of the Saline County Chancery Court on May 3, 2001. Melissa was given custody of the child, and appellant was ordered to pay child support.

After the parties were divorced, appellant saw his child for the last time on either February 14 or February 15, 2001. According to Melissa Stroud, he never made any effort to see the child after that date. Appellee Delane Cagle, Melissa's mother and the child's maternal grandmother, filed a petition for adoption on May 14, 2002, because appellant's biological son requires speech and occupational therapy and does not have insurance coverage. Appellant was served with notice of the adoption papers on May 15, 2002. On June 28, 2002, appellant paid $4,000 in child support. This was the first time he paid any support for the child.

On July 23, 2002, the trial court found as a matter of law that appellant's consent to the adoption was unnecessary, and proceeded with the adoption hearing without his consent. Appellant appealed this order to the court of appeals, but we dismissed the appeal because the order from which appellant appealed was not final. The final order was filed on June 4, 2003. The final order of adoption awarded appellees legal custody and rights for all legal purposes to appellant's biological son.

■■ We review equity cases *de novo* on the record, but we do not reverse unless we determine that the trial court's findings were clearly erroneous. *Oliver v. Oliver,* 70 Ark. App. 403, 19 S.W.3d 630 (2000). Findings of fact shall not be set aside unless clearly erroneous. *Id.* We defer to the trial court's superior position to determine the credibility of the witnesses. *Id.* A trial court's interpretation of a statute is reviewed *de novo.* It is for the appellate court to decide what a statute means. *Nationsbank v. Murray Guard, Inc.,* 343 Ark. 437, 36 S.W.3d 291 (2001). Where the language of the statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language. *Ford v. Keith,* 338 Ark. 487, 996 S.W.2d 20 (1999).

Appellant's only point on appeal is that the trial court erred in ruling that the requirements set forth in Ark. Code Ann. § 9-9-220(c)(1)(A)-(C) (Repl. 2002) were not applicable to this case because the effective date of the statute occurred after the date of the parties' divorce decree. Ark. Code Ann § 9-9-220(c) (Repl. 1999) provided that the relationship of parent and child may be terminated by court order for abandonment. Ark. Code Ann.

§ 9-9-220(c)(1)(A)-(C) (Repl. 2002) added the following language found in subsections (c)(1)(A)-(C):

> (A) A child support order shall provide notice to the non-custodial parent that failure to pay child support or to visit the child for at least one (1) year shall provide the custodial parent with the right to initiate proceedings to terminate the parental rights of the non-custodial parent.
>
> (B) If the notification clause required by subdivision (c)(1)(A) is not in the child support order, the custodial parent, prior to termination of parental rights, shall notify the non-custodial parent that he or she intends to petition the court to terminate parental rights.
>
> (C)(1) The non-custodial parent shall have three (3) months from the filing of the petition to pay a substantial amount of past due payments owed and to establish a relationship with his or her child or children.
>
> (2) Once the requirements under subdivision (c)(1)(C)(1) are met, the custodial parent shall not be permitted to proceed with the adoption nor the termination of parental rights of the non-custodial parent.
>
> (3) The court may terminate parental rights of the non-custodial parent upon a showing that:
>
> (I) child support payments have not been made for one (1) year or the non-custodial parent has not visited the child in the preceding year and the non-custodial parent has not fulfilled the requirements of subdivision (c)(1)(C)(1); and
>
> (ii) It would be in the best interest of the child to terminate the parental relationship.

The trial court ruled that this statute did not apply to appellant's case because of the date that the divorce decree was entered. More specifically, the child-support order was a part of the May 3, 2001 divorce decree. The statute did not take effect until after that date. Thus, the trial court reasoned that the statute did not apply. We agree with the trial court.

■■ In order to determine whether the statute applies to this case, we must ascertain the date the statute went into effect. Ark. Code Ann. § 9-9-220(c)(1)(A)-(C) (Repl. 2002) was origi-

nally Act 1779 of 2001. Pursuant to Amendment 7 of the Arkansas Constitution, Acts of the General Assembly that do not contain an emergency clause or a specified effective date become effective on the ninety-first day after the legislature adjourns. *Tate v. Bennett,* 341 Ark. 829, 20 S.W.3d 370, 20 S.W.3d 370 (2000). Ark. Code Ann. § 9-9-220(c)(1)(A)-(C) (Repl. 2002) does not have an emergency clause or a specified effective date. Act 1770 was approved on April 18, 2001, so it became effective after August 13, 2001. This was subsequent to the filing of appellant's divorce decree.

Appellant argues that the statute should govern because it was in effect at the time of the filing of the May 14, 2002 Petition for Adoption and the statute does not state whether it should be applied retroactively or prospectively. Absent notice in the child-support order, the statute provided that the non-custodial parent would have three months from the filing of the petition to pay a substantial amount of the past due child-support payments and to establish a relationship with the child. The date on which the child-support order was filed governs whether Ark. Code Ann. § 9-9-220 is applicable. In this case, the order for child support was included in the original divorce decree. Therefore, the date of the divorce decree governs.

The legislature intended for those non-custodial parents whose child support orders were entered after August 13, 2001, to be affected by Ark. Code Ann. § 9-9-220(c)(1)(A)-(C) (Repl. 2002). Our law is clear that absent language in the legislative act to the contrary, statutes affecting substantive rights are to be given only prospective application. *Dover v. Barton,* 337 Ark. 186, 987 S.W.2d 705 (1999). Ark. Code Ann. § 9-9-220(c)(1)(A)-(C) (Repl. 2002) was meant to apply prospectively from August 13, 2001, not retroactively to May 3, 2001, the date the divorce decree was entered.

The trial court's ruling was not clearly erroneous. Ark. Code Ann. § 9-9-220(c)(1)(A)-(C) (Repl. 2002) was not applicable to appellant's case. Thus, we affirm.

Affirmed.

PITTMAN, NEAL, BAKER and ROAF, JJ., agree.

HART, J., dissents.

JOSEPHINE LINKER HART, Judge, dissenting. This is one of those rare cases where not a single fact is at issue and every

step we are required to take is guided by black-letter law. The sole issue in this case is whether the controlling authority is the version of Arkansas Code Annotated section 9-9-220 (Repl. 2002), that was on the books at the time that an adoption petition was filed, answered, tried, and granted. The well-settled rules of statutory interpretation compel me to believe that it was.

Arkansas Code Annotated section 9-9-220 provides in pertinent part:

> (c) In addition to any other proceeding provided by law, the relationship of parent and child may be terminated by a court order issued under this subchapter on any ground provided by other law for termination of the relationship, or on the following grounds:
>
> (1) Abandonment;
>
> (A) A child support order shall provide notice to the non-custodial parent that failure to pay child support or to visit the child for at least one (1) year shall provide the custodial parent with the right to initiate proceedings to terminate the parental rights of the non-custodial parent.
>
> (B) If the notification clause required by subdivision (c)(1)(A) is not in the child support order, the custodial parent, prior to termination of parental rights, shall notify the non-custodial parent that he or she intends to petition the court to terminate parental rights.
>
> (C)(1) The non-custodial parent shall have three (3) months from the filing of the petition to pay a substantial amount of past due payments owed and to establish a relationship with his or her child or children.
>
> (2) Once the requirements under subdivision (c)(1)(C)(1) are met, the custodial parent shall not be permitted to proceed with the adoption nor the termination of parental rights of the non-custodial parent.
>
> (3) The court may terminate parental rights of the non-custodial parent upon a showing that:
>
> (I) Child support payments have not been made for one (1) year or the non-custodial parent has not visited the child in the

> preceding year and the non-custodial parent has not fulfilled the requirements of subdivision (c)(1)(C)(1); and
>
> (ii) It would be in the best interest of the child to terminate the parental relationship.

It is undisputed that the child-support order contained within the natural parents' May 3, 2001, divorce decree did not contain the notification clause mandated in the same subparagraph. This fact is not remarkable because the version of Arkansas Code Annotated section 9-9-220 (Repl. 1999) that was in effect at the time did not require it.

The appellant William Stroud argued below, and again on appeal, that because his child support order did not have the notification clause, he was entitled to the protections of section 9-9-220(c)(1)(A)-(C). I agree. I can subscribe to no other conclusion because this argument rests soundly upon the rules of construction that we are bound to follow. It is so well settled as to be axiomatic that adoption proceedings are in derogation of the natural rights of parents, and statutes permitting such are to be construed in a light favoring continuation of the rights of natural parents. *See, e.g., Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992); *Swaffar v. Swaffar*, 309 Ark. 73,827 S.W.2d 140(1992); *In re Adoption of Parsons*, 302 Ark. 407, 791 S.W.2d 681 (1990); *Bush v. Dietz*, 284 Ark. 191, 680 S.W.2d 704 (1984); *Harper v. Caskin*, 265 Ark. 558, 580 S.W.2d 176 (1979); *Poe v. Case*, 263 Ark. 488, 490, 565 S.W.2d 612, 613 (1978); *Woodson v. Gee*, 221 Ark. 517, 254 S.W.2d 326 (1953); *Norris v. Dunn*, 184 Ark. 511, 43 S.W.2d 77 (1931); *Minton v. Arkansas Dep't of Human Servs.*, 72 Ark. App. 290, 34 S.W.3d 776 (2000); *Ried v. Frazee*; 61 Ark. App. 216; 966 S.W.2d 272 (1998); *Roberts v. Swim*, 268 Ark. 917, 597 S.W.2d 840 (Ark. App. 1980). The supreme court stated in *In The Matter of the Adoption of Glover*, 288 Ark. 59, 702 S.W.2d 12 (1986):

> [T]he power of the court in adoption proceedings to deprive a parent of her child, being in derogation of her natural right to it, and being a special power conferred by the statute, such statute should be strictly construed; that 'the law is solicitous toward maintaining the integrity of the natural relation of parent and child; and in adversary proceedings in adoption, where the absolute severance of that relation is sought, without the consent and against the protest of the parent, the inclination of the courts, as the law contemplates it should be, is in favor of maintaining the natural relation. . . . Every intendment should have been [in] favor of the claim of the mother

> under the evidence, and if the statute was open to construction and interpretation it should be construed in support of the right of the natural parent.

In this case, two legitimate interpretations are possible regarding whether the notice and opportunity to cure provisions contained within sub-paragraphs 9-9-220(c)(1)(B) and section 9-9-220(c)(1)(C)(1) apply. One interpretation preserves the rights of a natural parent; the other interpretation summarily cuts them off. I cannot agree that the majority's choice comports with clear and unambiguous precedent from our supreme court.

I am mindful of the fact that the legislature in 2003 did insert a provision into the statute which states: "(D) The provisions of subdivisions (c)(1)(A)-(C) of this section apply only to child support orders entered after August 13, 2001." However, it is of no moment. It is black letter law that generally courts may not, by construction, insert words or phrases in a statute. 73 AM. JUR. 2d *Statutes* § 123 (2001). In *Snowden v. Thompson*, 106 Ark. 517, 153 S.W. 823 (1913), the supreme court stated, "If the language be plain, unambiguous and uncontrolled by other parts of the act, or other acts or laws upon the same subject, the courts can not give it a different meaning." Here, the majority has looked beyond the plain wording of the statute to find ambiguity and in so doing has impermissibly invaded the legislature's province to change the plain and unambiguous meaning of section 9-9-220.

I also believe that the majority erred in not finding that the version of section 9-9-220 as amended by the legislature in 2001 was immediately applicable because it is procedural in nature. In *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987), we quoted with approval the following language from *Dargel v. Henderson*, 200 F.2d 564 (Emer. Ct. App. 1952): "We think that this conclusion is in accord with the settled rule that changes in procedural or remedial law are generally to be regarded as immediately applicable to existing causes of action and not merely to those which may accrue in the future unless a contrary intent is expressed in the statute." The test for whether a statute is procedural in nature is if it does not disturb vested rights, or create new obligations, but only supplies a new or more appropriate remedy to enforce an existing right or obligation. *Harrison v. Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962). The notice and opportunity to cure provisions contained within subparagraphs 9-9-220(c)(1)(B) and section 9-9-220(c)(1)(C)(1) clearly do not disturb a vested

right or create a new obligation. Statutory provisions concerning the relinquishment and termination of the parent and child relationship based on the failure of a parent to maintain contact with or support the child have been on the books for decades. *See* Ark. Stat. Ann. § 56-220 (Supp. 1985). The notice and opportunity to cure provisions merely provide a "more appropriate" way to enforce the termination provisions, not the right to terminate itself, and accordingly, must be found to be procedural in nature. *See Arkansas State Police v. Welch*, 28 Ark. App. 234, 772 S.W.2d 620 (1989).

I respectfully dissent.

David McELYEA *v.* STATE of Arkansas

CA CR 03-851 189 S.W.3d 67

Court of Appeals of Arkansas
Division IV
Opinion delivered June 23, 2004

[Rehearing denied July 28, 2004.]

Charles L. Stutte, for appellant.

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

OLLY NEAL, Judge. In this appeal from the Washington County Circuit Court, appellant David McElyea challenges "whether the trial court erred in holding that the offense of robbery did not require a specific culpable mental state for the element of employing or threatening to employ physical force."[1] As we understand appellant's argument, he submits a challenge to the sufficiency of the evidence convicting him. He also argues that the trial court abused its discretion in denying him the opportunity to make a proper argument to the jury, "thereby denying Appellant a fair trial and due process as guaranteed under the Constitution of the United States and the State of Arkansas." Because there was no evidence in the record to support appellant's arguments, we affirm.

Directed-verdict motions are treated as challenges to the sufficiency of the evidence. *Saulsberry v. State*, 81 Ark. App. 419, 102 S.W.3d 907 (2003). The test for determining sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial; substantial evidence is evidence

[1] We were unsuccessful in our attempt to certify this case to the supreme court.

forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003). Evidence is viewed in the light most favorable to the State; only evidence that supports a verdict is considered. *Payne v. State,* 86 Ark. App. 59, 159 S.W.3d 804 (2004); *Clements v. State,* 80 Ark. App. 137, 91 S.W.3d 532 (2002). When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it. *Saulsberry v. State, supra.*

Derek Brown, a Wal-Mart loss-prevention associate, testified that, as he entered Wal-Mart and passed through sporting goods, he observed appellant. Brown stated that appellant selected a Pur water purifier, walked towards the back of the store, and dropped the water purifier on the floor. When appellant bent over to pick up the purifier, Brown saw "a bulge in the back of [appellant's] jacket[.]" Brown followed appellant as he walked towards the front of the store. Appellant placed the water purifier into his shirt and proceeded to leave the store.

Brown confronted appellant on the sidewalk and identified himself as a Wal-Mart loss- prevention employee. Brown testified, "I showed him my badge, [and] I asked for our merchandise back." Brown noted that appellant was "pretty nervous." Brown stated that appellant took one purifier out, dropped it on the ground, and told Brown "that's all I've got, leave me alone or give me a break or something to that effect." Brown requested that appellant return to the store so that the necessary paperwork could be completed. Appellant attempted to abscond. Thereafter, Brown noted:

> I then turned, grabbed him by the jacket[;] it happened pretty quick, I think his right arm came out of the jacket first and then he spun around to where he was facing me and his left arm came out, he dropped the other water purifier and a bottle of lotion. At that time I stumbled and almost fell, caught myself, ran into the parking lot. I pursued him far enough to get a tag number and a make of car and called that into the police immediately.

Brown testified that appellant struck him so hard across the nose that his eyes began to water. Brown acknowledged that he did not know when exactly appellant struck him because it happened so quickly. On cross-examination, Brown stated that he did not state in his report that he was struck, but that appellant struck him and that he told several members of management that he was

struck. Brown testified that "I can't say if it was intentional, only he can tell you that." Brown further testified that he informed Officer Phillips that he had been hit during the struggle.

Officer Kevin Phillips testified that he responded to the call at Wal-Mart and that he spoke with Brown about the shoplifting incident. Phillips noted that Brown told him appellant struck him and Phillips observed that Brown's eyes were watery and that Brown had a red mark across his nose.

At the conclusion of the State's case-in-chief, appellant's counsel moved for a directed verdict, arguing:

> Your Honor, at this time the Defendant would move for a directed verdict on the grounds that the State has presented insufficient evidence to establish that there's a robbery that's been committed. I think that they have to prove both elements of the offense, one, that there was a theft and two, that there was the element of use of force with the intent to commit the theft or apprehension in getting away and I don't think they've risen to the level of showing that there's been sufficient physical force to meet that element and for those reasons I move for a directed verdict on those grounds.

The trial court denied the motion. Appellant renewed his motion at the close of the evidence, and the trial court denied his motion. Appellant was subsequently convicted and sentenced to eight years' imprisonment in the Arkansas Department of Correction. This appeal followed.

Not at issue is the undisputed fact that appellant committed a theft while inside the Wal-Mart store. Nevertheless, Derek Brown testified that appellant struck him across the nose, an act that elevated appellant's charge to a robbery. Under Arkansas Code Annotated section 5-12-102 (Repl. 1997), "a person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another." "Physical force" means any bodily impact, restraint, or confinement or the threat thereof." Ark. Code Ann. § 5-12-101 (Repl. 1997).

Appellant advances the following argument:

> It is disputed . . . whether Appellant ever intended to use force against the store employ[ee] to further his escape. There is no evidence that Appellant ever threatened the store employee, and

> the only evidence of bodily contact was the testimony of the store employee of Wal-Mart who never mentioned being struck in any of his store reports and even upon reviewing the store surveillance video could not identify exactly when and with which hand he was struck across the nose. Further, he could not tell if his being struck was an intentional act by appellant.

[redacted] Appellant's argument is misplaced. For purposes of the robbery statute, it is immaterial whether appellant ever intended to use physical force against Brown to further his escape. We hold that the word "purpose" found within the robbery statute relates only to the acts of "committing a felony or misdemeanor theft or resisting apprehension" and does not, as appellant urges, provide that the employment of physical force or the threat thereof be purposeful.

[redacted] For purposes of the statute, physical force means *any* bodily impact. *See* Ark. Code Ann. § 5-12-101 (Repl. 1997) (emphasis added). Here, the testimony from Brown is that appellant struck him in the nose. This testimony is corroborated by Officer Phillips's testimony that Brown told him appellant struck him. It is further corroborated by Phillips's testimony that Brown's eyes were watery and that Brown had a red mark across his nose. It is well-established that we do not weigh evidence presented at trial or weigh the credibility of witnesses, as these are matters to be resolved by the finder of fact. *Garner v. State*, 82 Ark. App. 496, 122 S.W.3d 24 (2003). Furthermore, a criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003). Since intent cannot be proven by direct evidence, members of the jury are allowed to draw upon their common knowledge and experience to infer it from the circumstances. *Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003) (citing *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002)). Accordingly, we affirm on this point.

Appellant also appears to assert that the court abused its discretion by denying him the opportunity to make "proper" argument to the jury during closing. He asserts that the court concluded that no *mens rea* was necessary for the physical force employed in a robbery. As the State correctly asserts, this is an inaccurate categorization of the court's ruling.

During closing arguments, defense counsel stated in part that "[t]his is a shoplifting case and that's really all that it is. And it should be prosecuted as a shoplifting. What this isn't is strong arm robbery. You know robbery, you've got to have the intent to be using physical force or — [.]" The State objected, stating, "Your Honor, that's not the law." The court sustained the objection. Defense counsel continued his closing argument, arguing:

> To sustain this charge, the State must prove beyond a reasonable doubt that with the purpose of committing a theft or resisting apprehension immediately thereafter that David McElyea employed or threatened to immediately employ physical force upon another. He ran out of his coat. I don't think it's robbery. Physical force, any bodily impact, restraint[,] or confinement. But remember what purpose is, its definition is provided also. A person acts with purpose with respect to his conduct when it is his conscious object to engage in that conduct. Derek Brown testified, he's already told us nobody can be certain that he ever intended to get hit, this wasn't his conscious object.

Again, the State objected and the trial court sustained the objection, stating, "Yes, I'm going to sustain the objection. I've ruled on this issue now for the third time and you know better than that." The court informed the jury that it would take a recess.

During recess, the court explained its ruling to defense counsel by stating:

> Now Mr. Stutte [defense counsel], I'll explain my ruling. There's absolutely no evidence in the record that this, the factual dispute is this: Whether or not physical force had been used. You maintain that it wasn't, the State maintains that it was. There's absolutely no evidence in the record of any unintentional conduct by this Defendant. Therefore, you're arguing facts that are outside the record and I'm not going to permit it. That's my ruling. The instruction speaks for itself.

Defense counsel also requested permission "to argue the jury instruction and my interpretation of those jury instructions and that purpose as a mental state with regards to the second element of robbery is required." The court informed defense counsel that "I understand your point, counsel. Again, my response to this argument is to make that argument you're arguing facts that are outside the record and I'm not going to permit you to do it. It's just that simple. Now let's proceed. Bring in the jury."

Here, the court explained that it sustained the State's objection because there was no evidence in the record to support the defense's assertion that appellant did not intend his conduct. We do not take notice of gratuitous assertions based on matters not in the record. *Turner v. State*, 349 Ark. 715, 80 S.W.3d 382 (2002). Nor are arguments proper which are outside the record or have no evidentiary support. *Wilkens v. State*, 261 Ark. 243, 547 S.W.2d 116 (1977). Because there was no evidence in the record to support defense counsel's assertion that appellant did not intend to strike appellant in the nose and because determinations of fact are for the jury, we find no error and affirm.

Affirmed.

PITTMAN, J., agrees.

BAKER, J., concurs.

KAREN R. BAKER, Judge, concurring. I must regretfully concur with the majority opinion because appellant does not raise or argue the fact that the Wal-Mart theft-prevention employee had no authority to arrest or detain appellant; therefore, since the employee had no authority to apprehend Mr. McElyea, appellant could not have been guilty of resisting apprehension.

In *Akins v. State*, 253 Ark. 273, 485 S.W.2d 535 (1972), the Arkansas Supreme Court reversed and dismissed a conviction for escape holding that where an appellant ran away from police officers, but he was not in lawful custody, he could not be guilty of escape. In that case, a detective with the Little Rock Police Department stopped the appellant on the street, showed him his badge, and told the appellant that he was under arrest for investigation of vending-machine burglaries. The court explained that no public offense was committed in the presence of the officers, defendant was not arrested in obedience to an arrest warrant, and the officers had no reasonable grounds for believing defendant had committed a felony; therefore, defendant was not in lawful custody at the time he ran away and thus, was not guilty of escape.

In the case before us, the employee is a private citizen. A private citizen has authority to arrest another pursuant to Ark. R. Crim. P. 4.1(b) (2004) and Ark. Code Ann. § 16-81-106(d) (Repl. 2003). Section 16-81-106(d) provides that a private person may make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony. Under this statute and

the described circumstances, an officer acting outside his jurisdiction has the authority to effect an arrest. *See Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990) (where the supreme court recognized the statutory principle in § 16-81-106(d)), but concluded Perry had been arrested on a misdemeanor, making the arrest invalid).

Arkansas Rule of Criminal Procedure 4.1(b) provides in pertinent part that:

> "a private person may make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony."

Arkansas Code Annotated § 16-81-106 provides in relevant part:

> (a) An arrest may be made by a certified law enforcement officer or by a private person.
>
> (b) A certified law enforcement officer may make an arrest:
>
> (1) In obedience to a warrant of arrest delivered to him; and
>
> (2)(A) Without a warrant, where a public offense is committed in his presence, or where he has reasonable grounds for believing that the person arrested has committed a felony.
>
> (B) In addition to any other warrantless arrest authority granted by law or court rule, a certified law enforcement officer may arrest a person for a misdemeanor without a warrant if the officer has probable cause to believe that the person has committed battery upon another person and the officer finds evidence of bodily harm, and the officer reasonably believes that there is danger of violence unless the person alleged to have committed the battery is arrested without delay.
>
> (c)(1) A certified law enforcement officer who is outside his jurisdiction may arrest, without warrant, a person who commits an offense within the officer's presence or view, if the offense is a felony or a misdemeanor.
>
> . . . .
>
> (d) A private person may make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony.

Therefore, a private citizen may apprehend a person only where he has reasonable grounds for believing the person committed a felony. A police officer cannot arrest an individual for misdemeanor theft unless the offense was committed in full view of the officer who witnessed the public offense. Because the Wal-Mart theft-prevention employee was a private citizen, he had no authority to arrest appellant; accordingly, appellant could not have been resisting apprehension.

Ralph WHITTEN *v.*
EDWARD TRUCKING/CORPORATE SOLUTIONS

CA 03-1238 189 S.W.3d 82

Court of Appeals of Arkansas
Division II
Opinion delivered June 23, 2004

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

Huckabay, Munson, Rowlett & Moore, P.A., by: *Melissa Ross* and *Carol Lockard Worley*, for appellees.

LARRY D. VAUGHT, Judge. The Workers' Compensation Commission affirmed and adopted a decision from an Administrative Law Judge (ALJ) that denied benefits to the appellant, Ralph Whitten. The Commission found that appellant did not sustain a compensable injury, but rather that he suffered from a non-compensable idiopathic fall. On appeal, appellant claims that the Commission's decision was not supported by substantial evidence. We affirm.

Appellant, age fifty-six, contends that he sustained a compensable injury on February 5, 2002, after he fell at his place of employment, Edward Trucking/Corporate Solutions. The appellee, Edward Trucking/Corporate Solutions, employed appellant as a dump-truck driver. On the day the injury occurred, appellant was on the premises with his truck, delivering fuel tickets to validate his work for the previous week in order to be paid. He was scheduled to leave immediately thereafter to deliver another load of sand to a customer in Muskogee, Oklahoma. As appellant was walking up the stairs to enter appellee's office, he reached for the door of the office, felt pain in his back, and fell to the ground. He neither tripped or stumbled, nor was he carrying anything heavy at the time of the fall.

Appellant filed his claim, which was denied as a non-compensable injury by the ALJ on October 4, 2002. The ALJ found that appellant was not engaged in a work-related activity at the time he fell, that there was insufficient evidence of an employment risk as the cause of the injury, and that fall the was idiopathic, stemming from one or more of the following: (1) a stroke or cerebral vascular accident; (2) a herniated disc at the L3-4 level; (3) a compressive lesion on his thoracic cord. The full Commission affirmed and adopted the ALJ's decision without further explanation, finding that the decision was supported by a preponderance of the credible evidence and correctly applied the law.

When a workers' compensation claim is denied, the substantial evidence standard of review requires us to affirm the

Commission if its opinion displays a substantial basis for denial of the relief sought by the worker. *Williams v. L & W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W.3d 383 (2004). In determining the sufficiency of the evidence to sustain the findings of the Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Caffey v. Sanyo Mf'g. Corp.*, 85 Ark. App. 342, 154 S.W.3d 274 (2004). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Williams, supra.* The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo. Id.* In making our review, we recognize that it is the Commission's function to determine the credibility of witnesses and the weight to be given their testimony. *Id.* Moreover, the Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Id.*

Appellant testified at the hearing. He offered no explanation or evidence as to the cause of the fall, except that it occurred after he reached for the office doorknob while climbing the stairs. The ALJ, whose opinion was subsequently affirmed and adopted by the Commission, concluded that appellant's incident was idiopathic. The Arkansas Supreme Court has distinguished injuries suffered from unexplained causes and injuries sustained from idiopathic causes:

> We first note that injuries sustained due to an unexplained cause are different from injuries where the cause is idiopathic. An idiopathic fall is one whose cause is personal in nature, or peculiar to the individual. 1 LARSON, WORKERS' COMPENSATION LAW, §§ 12.11 (1998); *see also Kuhn v. Majestic Hotel,* 324 Ark. 21, 918 S.W.2d 158 (1996); *Little Rock Convention & Visitors Bur. v. Pack,* 60 Ark. App. 82, 959 S.W.2d 415 (1997); *Moore v. Darling Store Fixtures,* 22 Ark. App. 21, 732 S.W.2d 496 (1987). Because an idiopathic fall is not related to employment, it is generally not compensable unless conditions related to employment contribute to

> the risk by placing the employee in a position, which increases the dangerous effect of the fall. LARSON, *supra.*

ERC Contractor Yard & Sales v. Robertson, 335 Ark. 63, 71, 977 S.W.2d 212, 216 (1998). A workers' compensation claimant bears the burden of proving that his injury was the result of an accident that arose in the course of his employment, and that it grew out of, or resulted from the employment. *Moore v. Darling Store Fixtures, supra.* "Arising out of the employment" refers to the origin or cause of the accident, while "in the course of the employment" refers to the time, place and circumstances under which the injury occurred. *See Little Rock Convention & Visitors Bureau, supra.* When a truly unexplained fall occurs while the employee is on the job and performing the duties of her employment, the injury resulting therefrom is compensable. *Id.* In *ERC Contractor Yard & Sales, supra,* the supreme court found that although the claimant's fall was caused by his alcohol withdrawal, which was a condition personal to him, his job requirement of working on scaffolding twelve to fifteen feet above the ground increased the dangerous effect of the fall. *Id.* Therefore, the court concluded that substantial evidence supported the Commission's finding that the workman suffered a compensable idiopathic fall. *Id.*

In the case at bar, the Commission found that appellant's fall was idiopathic and affirmed the ALJ's opinion, which stated that appellant had been diagnosed as suffering from three separate conditions, none of which were caused or aggravated by appellant's employment. The first was a stroke or cerebrovascular accident, the second was a herniated disc at the L3-4 level that was revealed on an MRI more than a year prior to this incident, and the third was a compressive lesion on his thoracic spinal chord. There was insufficient evidence that the February 5, 2002 fall caused either internal or external physical harm to appellant's body, which required medical services or resulted in disability, and no objective findings that established a new injury resulting from the fall. To the contrary, Dr. Rogers indicated that the fall may have been caused by the lesion on the thoracic chord. This evidence presented at the hearing provided the basis for the Commission's conclusion that appellant's injury was idiopathic rather than unexplained.

Furthermore, we are not persuaded that appellant's employment contributed to his accident. By appellant's own testimony, he established that he was simply ascending stairs to the

appellee's business office holding nothing heavier than his fuel tickets when the incident occurred. By contrast, in *ERC Contractor Yard & Sales, supra,* the claimant's job duties required him to be on scaffolding twelve to fifteen feet above the ground when his accident occurred. There, the Commission found that his injury was compensable, although it was also idiopathic, because of the increased risk associated with claimant's employment duties. In this instance, the evidence supports that appellant's fall was idiopathic, but it was not compensable as no evidence suggested that his employment contributed to his fall. Accordingly, this case is distinguishable from *ERC Contractor Yard & Sales, supra.*

Appellant has failed to establish by a preponderance of the credible evidence of record that his injury arose out of his employment. Additionally, he has not shown that his employment significantly increased his risk of injury. *See Moore v. Darling Store Fixtures, supra.* Therefore, we hold that substantial evidence supported the Commission's decision to deny him benefits.

Affirmed.

BAKER and ROAF, JJ., agree.

Jay ELLIOT *v.* MAVERICK TRANSPORTATION
and Liberty Mutual Fire Insurance Company

CA 03-1348 189 S.W.3d 62

Court of Appeals of Arkansas
Division III
Opinion delivered June 23, 2004

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

Michael E. Ryburn, for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Jay Elliot appeals from the Workers' Compensation Commission's decision barring his claim under the election of remedies doctrine, and alternatively holding that Elliot failed to prove by a preponderance of the evidence that he was entitled to additional medical treatment and temporary total disability benefits. We agree that Elliot's claim is barred by the election of remedies, and affirm.

Elliot, an Oklahoma resident, injured his back while employed as a truck driver for Maverick Transportation (Maverick), an Arkansas corporation, on January 18, 2001. Elliot's injury, which occurred in Warren Park, Illinois, resulted when he attempted to lift a heavy tarp. He felt his back pop, experienced pain

radiating into his right leg, and fell to the ground. Upon being notified of Elliot's injury, Maverick filed a workers' compensation claim in Arkansas, which paid Elliot $410 in weekly benefits. Elliot sought treatment from his family physician, Dr. Rick Robbins, on January 22, 2001. Dr. Robbins diagnosed Elliot with a lumbar strain and returned him to regular duty at work. Elliot continued to complain of pain and was taken off work. He underwent a CT scan, which revealed a disc bulge at L4-5 and budding at the L4 nerve root. Thereafter, Elliot began a regimen of physical therapy, which he complained made his back worse. Dr. Robbins stopped the physical therapy and referred him to Dr. Queeney, a neurosurgeon. Dr. Queeney performed an MRI and concluded that Elliot was not a candidate for surgery and referred him back to Dr. Robbins.

In the meantime, Elliot filed a workers' compensation claim in Oklahoma and began receiving benefits in Oklahoma. According to Elliot, his claim in Oklahoma was dismissed for lack of jurisdiction before a decision on the merits was reached. Also according to Elliot, the Oklahoma court refused to hear the case because he was hired in Arkansas and hurt in Illinois. Elliot's Oklahoma counsel then told him that he would find an attorney in Illinois, the place of injury, to represent him. Several weeks later, an attorney in Illinois contacted him and sent some papers, which Elliot signed. Elliot testified that he did not know what the papers were or whether or not a claim form was included in the paperwork. He subsequently received $473 in weekly benefits on the Illinois claim through September 24, 2001.

On April 2, 2001, Elliot was referred to Dr. Keith Holder. Dr. Holder diagnosed Elliot with a lumbar myofacial strain, recommended trammel injections and physical therapy, concluded that Elliot could return to work, with no lifting, pushing, or pulling of thirty pounds, and opined that he did not need any further medical treatment. Dissatisfied with Dr. Holder's prognosis, Elliot returned to Dr. Robbins on April 19, 2001, complaining of continued pain in the right lumbar region, with radiation into his right leg. Dr. Robbins instructed him to remain off work and referred him to Tulsa Neurological Spine Institute. Dr. Robbins concluded that Elliot had reached his maximum medical improvement, but also stated that Elliot's problems could not be fixed medically. Dr. Robbins continued Elliot off work, based on his continued complaints of pain. At Tulsa Neurological Spine Institute, Elliot was treated by Dr. James Rogers, who ultimately

concluded that after reviewing Elliot's MRI and bone scans he was "hard pressed to state what the main etiology" of Elliot's complaints are. Elliot also saw Dr. Dulowski, who noted that Elliot had "spasms of paravertebral muscles" and returned Elliot to work after examining him and diagnosing him with sciatica radiculopathy. Elliot received medical treatment through September 24, 2001.

On September 24, 2001, Maverick controverted Elliot's claim to any further medical treatment and to any further temporary total disability benefits. Elliot's Illinois counsel suggested that he retain counsel in Arkansas, and the claim filed in Illinois was voluntarily dismissed. Elliot retained Arkansas counsel and filed his workers' compensation claim in Arkansas. Maverick asserted that the claim was barred by the election of remedies doctrine.

A few weeks prior to the hearing in Arkansas, Elliot saw Dr. Holder again. During this examination, Dr. Holder attempted to perform a functional capacity test, which Elliot did not complete. According to Dr. Holder, Elliot displayed inconsistent results upon testing of his lumbar spine. He stated that Elliot's subjective complaints outweighed the objective findings. On September 18, 2002, Dr. Holder found that Elliot had reached maximum medical improvement and awarded him a 0% impairment rating with no recommendation for further treatment.

A hearing on the matter was held on September 26, 2002, and in her December 13, 2002 order, the Administrative Law Judge found that Elliot's claim was not barred by the election of remedies doctrine because Elliot voluntarily dismissed his Illinois claim before seeking an award of benefits to proceed with the Arkansas claim. Concluding that Elliot had not received an "official award" of compensation, the ALJ found that the election of remedies doctrine did not bar his claim. However, the ALJ found that Elliot did not prove that he was entitled to additional medical treatment or temporary total disability. Elliot appealed the decision that he had not proven by a preponderance of the evidence that he was entitled to continued medical treatment, and Maverick appealed the decision that the election of remedies doctrine did not bar Elliot's claim to the Commission. The Commission found that the election of remedies doctrine barred Elliot's recovery because he knowingly received benefits pursuant to Oklahoma law and actively initiated proceedings in Illinois. The Commission also, in the alternative, affirmed the ALJ's decision that Elliot had not met his burden of proof. Elliot appeals.

In considering appeals from decisions of the Commission, we view the evidence and all reasonable inferences therefrom in the light most favorable to the Commission's findings and will affirm the decision if the findings are supported by substantial evidence. *Williams v. Browns Sheet Metal/CNA Ins. Co.*, 81 Ark. App. 459, 105 S.W.3d 382 (2003). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* If reasonable minds could reach the Commission's decision, we must affirm the decision. *Id.* It is the exclusive function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *Id.* The credibility of witnesses' testimony is within the province of the Commission. *Id.*

Elliot argues that the Commission erred in finding that his claim was barred by the election of remedies doctrine because, although he received some workers' compensation benefits from the Illinois claim, he did not proceed to a hearing on the merits, "but instead the same were either dismissed for lack of jurisdiction or voluntarily dismissed."

In *Towery v. Hi-Speed Electrical Co.*, 75 Ark. App. 167, 56 S.W.3d 391 (2001), the employer-appellee in a workers' compensation action argued that the appellant's claim was barred by the election of remedies doctrine. In *Towery*, the appellant, an Arkansas resident, was injured in Arkansas while working for the appellee, a Tennessee corporation. The appellee filed a "First Report of Injury" in Tennessee, and the only other document in the Tennessee file was a notice indicating that the appellee was denying compensation. Apparently, during the pendency of the claim, the appellee's insurance carrier contacted the appellant and told him that he could file his claim in either Tennessee or Arkansas, but that his compensation rate would be higher if his claim were filed in Tennessee. Although the appellant verbally expressed a desire to file his claim in Tennessee, the Tennessee file did not contain any documents bearing his signature. The appellant subsequently filed his claim in Arkansas.

Citing *Biddle v. Smith & Campbell, Inc.*, 28 Ark. App. 46, 773 S.W.2d 840 (1989), the *Towery* court held that the election of remedies doctrine did not bar the appellant's claim. "[W]hether an election of remedies was made depends on whether the claimant actively initiated proceedings or knowingly received benefits pursuant to the laws of another state." *Towery*, 75 Ark. App. at 170,

56 S.W.3d at 394. The *Towery* court concluded that the appellant neither received benefits from Tennessee, nor did he actively initiate the Tennessee proceedings. The appellant did not file any documents in the Tennessee case, and his verbal preference was not indicative of actively initiating.

In *Biddle supra,* the Arkansas Workers' Compensation Commission found that the appellant's claim was barred by the election of remedies doctrine because she knowingly received benefits from Louisiana, and this court affirmed. The appellant, an Arkansas resident, was injured in Louisiana while working for the appellee, which had its principal place of business in Louisiana. The appellant began receiving benefits pursuant to Louisiana law through the appellee's insurance carrier. The appellate court affirmed the Commission, concluding that the appellant made an election of remedies by knowingly receiving benefits.

The *Biddle* court relied on *Houston Contracting Co. v. Young,* 267 Ark. 322, 590 S.W.2d 653 (1979). Although *Houston, supra,* dealt with conflicting statutes of limitation for two different states, the threshold issue was whether the claimant had made an election of remedies by proceeding under the laws of the first state. The *Houston* claimant was an Arkansas resident working for the appellant, a corporation authorized to do business in Arkansas with its headquarters in Houston, Texas, when he injured himself on a construction job in Texas. Thus, both Texas and Arkansas had jurisdiction over the matter. The claimant underwent medical treatment in Arkansas and Texas and the compensation carrier made payments under the Texas compensation law until the claimant employed counsel and filed a claim in Arkansas, after which the appellant stopped the payments.

Noting that the court of appeals relied on *Auslander v. Textile Workers Union of America,* 59 A.D.2d 90, 397 N.Y.S. 232 (1977), the supreme court stated:

> The court [of appeals] reasoned that the claimant, on the one hand, should be bound by his acceptance of an official award of compensation in one state if he had actively participated in the procurement of the award and if the employer or insurance carrier had not improperly or in bad faith channeled the claim into that state. If the claimant, on the other hand, did not know that the payments he was receiving were pursuant to the laws of another state, and the payments were not made under an official award, "an employer's or

> carrier's contention that the payment is 'under the laws of another state' is a self-serving claim which should not be given effect." The New York court concluded that the issue there was one of fact and remanded the cause to the compensation board for further proceedings.

Houston, 267 Ark. at 324, 590 S.W.2d at 654.

The *Houston* court agreed with the rationale of the court of appeals but disagreed with the court's assumption that no issue of fact was presented. The supreme court in *Houston* stated that no award appeared to have been made in Texas so it could not be said that the claimant elected to proceed under Texas law by actively participating in the procurement of compensation in that state. On the other hand, the claimant testified that his compensation checks came from Beaumont, Texas, and that he completed a form for the Texas board, describing how the accident happened and the treatment he had received. Thus, the *Houston* court concluded, "[T]his case, like the one in New York, falls somewhere between the two possible extremes. The Commission must weigh the competing considerations of policy to decide whether the running of the Arkansas statute was tolled by the Texas payments."[1] *Houston,* 267 Ark. at 324, 590 S.W.2d at 654.

Whether Elliot made an election of remedies is a question of fact. *Biddle, supra.* On appeal, this court is required to view the evidence in the light most favorable to the findings of the Commission and give the testimony the strongest probative value in favor of the Commission's order. *Biddle, supra.* The Commission found that Elliot had elected a remedy because he knowingly received benefits pursuant to Oklahoma law and actively initiated proceedings in Illinois, and we agree.

There is evidence that Elliot received benefits from both Oklahoma and Illinois. During his testimony, Elliot admitted receiving initial temporary total disability compensation payments of $410, which were increased to $473 when he filed his claim in

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[1] On remand, the Commission heard additional testimony and found that the claimant did not know he was being compensated under Texas law, and, therefore, his claim was not barred by the statute of limitations because the claimant did not actively participate in the procurement of an official award of compensation in Texas. This court affirmed the Commission's decision in *Houston Contracting Co. v. Young,* 270 Ark. 1009, 607 S.W.2d 83 (Ark. App. 1980).

Oklahoma. He testified that he did not understand the "whole jurisdictional thing," and thought the payments were coming from the same entity — "just workman's comp is what I thought." The Oklahoma claim was dismissed for lack of jurisdiction. However, when Elliot's claim was filed in Illinois, his compensation again increased from $473 to $600 and he also received a lump sum check for $4,499 to compensate for the lower rate at which he had been paid under Oklahoma law. At this point it was apparent that Elliot was being compensated based on the law of the state in which he filed his claim, despite his testimony that he was not certain whether or not he was being compensated in accordance with a particular state's law.

In sum, the *Houston* court held that a claimant elects a remedy when he or she "actively participates" in the procurement of an official award of compensation. In *Biddle, supra,* this court held that if a claimant "actively initiated" the proceedings, or "knowingly received benefits" pursuant to the laws of another state, then the claimant has elected a remedy. It is clear that Elliot actively initiated and participated in the proceedings in Illinois by signing papers sent to him by his Illinois counsel and agreeing to the filing of his claim in Illinois, and that he knowingly received benefits pursuant to this award. Accordingly, we hold that Elliot's claim is barred by the election of remedies doctrine and we, therefore, need not address his second issue.

Affirmed.

VAUGHT and BAKER, JJ., agree.

Shawn Darrel MOSELY *v.* STATE of Arkansas

CA CR 03-947 189 S.W.3d 456

Court of Appeals of Arkansas
Division IV
Opinion delivered June 30, 2004

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

No response.

JOHN F. STROUD, Chief Judge. Shawn Mosley was convicted in a jury trial of aggravated robbery and battery in the first degree. He was sentenced to forty years in the Arkansas Department of Correction on the aggravated-robbery conviction and ten years in the Arkansas Department of Correction on the first-degree battery conviction, with the sentences to be served concurrently.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Arkansas Rules of the Supreme Court and Court

of Appeals, appellant's counsel has filed a motion to withdraw on the grounds that the appeal is wholly without merit. Counsel's motion was accompanied by a brief referring to everything in the record that might arguably support an appeal, including a list of all rulings adverse to appellant made by the trial court on all objections, motions, and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal. The clerk of this court furnished appellant with a copy of his counsel's brief and notified him of his right to file *pro se* points of appeal; appellant has not filed any points.

At trial, Terry Jones testified that on September 11, 2001, he was at home with his girlfriend and their baby when he thought that he heard a knock on the door, but no one was there. He went into the kitchen, and he heard the door open and someone come in running. He heard someone say "break yourself," and he looked over his shoulder and saw a person he identified as appellant holding a small gun at his back. Jones said that he turned around and grabbed the gun with both hands, and he and appellant began to fight over the gun. Jones said that he was able to get a good look at the person during the struggle, and that the person was the appellant.

Jones then said that the door opened again, two other men came into the house, and one of them shot him, knocking him to the floor. Jones realized that he was holding the gun that he and appellant had been struggling over, and he began shooting at the three men, stating that he was still pulling the trigger when there was no ammunition left. He said that after he started firing the gun, all three men ran out the door, with the person he identified as appellant being the last to leave. Jones followed the men out of the house and into the driveway, and it was not until then that he realized that he had been shot. Jones was taken to UAMS, where he underwent surgery to remove his left testicle, which was damaged when he was shot. While Jones was in the hospital, he was shown a photographic lineup, from which he identified appellant as the person who had first entered his house and told him to "break yourself." Jones identified appellant again at trial. Jones was cross-examined about inconsistencies in statements that he had given the police, but he remained insistent that appellant was the person who had entered his house and told him to "break yourself."

Heath Helton, a Little Rock police officer, testified that he responded to Jones's house on the night of the incident, but that he

was just backup support for the first responding officer. He said that while he was at Jones's residence, he received another call to respond to St. Vincent's Hospital regarding a shooting report. Helton identified the person who had been shot and was receiving treatment at St. Vincent's as appellant. Although appellant initially gave the officers a false name, he eventually gave them his real name, and he said that while he was walking with his mother and girlfriend in the area of Thirteenth and Woodrow, a blue vehicle drove by and the passenger leaned out and shot him. However, Helton stated that the area was in his district, and that no one had reported a shooting in that area. Another officer, Little Rock Detective Ronnie Smith, testified that he interviewed appellant at St. Vincent's and viewed his injury, which appeared to be a fresh gunshot wound to the right side of his back.

At the close of the State's evidence, appellant moved for a directed verdict on both charges on the basis that the evidence was "completely irreconcilable" with Jones's testimony; this motion was denied. Appellant did not call any witnesses, and he did not renew his motion for directed verdict. However, his challenge to the sufficiency of the evidence was nevertheless preserved. When a defendant does not present any evidence after making his directed-verdict motion at the close of the State's case, further reliance on that motion is not waived. *Chrobak v. State*, 75 Ark. App. 281, 58 S.W.3d 387 (2001) (citing *Robinson v. State*, 317 Ark. 17, 875 S.W.2d 837 (1994)).

When the sufficiency of the evidence is challenged, the appellate court considers only that evidence which supports the guilty verdict, and the test is whether there is substantial evidence to support the verdict. *Blockman v. State*, 69 Ark. App. 192, 11 S.W.3d 562 (2000). Substantial evidence is evidence of such certainty and precision as to compel a conclusion one way or another. *Id.*

In this case, appellant's directed-verdict motion focused on the improbability of the victim's testimony and the inconsistencies in it. However, it is the jury's duty to weigh the evidence, and the jury may believe all or only a part of any witness's testimony. *Williams v. State*, 351 Ark. 215, 91 S.W.3d 54 (2002). The appellate courts are bound by the fact-finder's determination regarding the credibility of the witnesses. *Id.*; *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000). One eyewitness's testimony is sufficient to sustain a conviction, *Harmon, supra*, and

such testimony is not "clearly unbelievable" based only on the fact that it is uncorroborated or because it has been impeached. *Williams, supra.*

In this case, the victim, Terry Jones, was cross-examined at length by defense counsel regarding the inconsistencies in his testimony. However, he remained adamant that appellant was the person who had come into his house and told him to "break yourself." He identified appellant in a photo lineup, and he identified him again at trial. This testimony, which the jury apparently believed, is sufficient in and of itself to sustain appellant's convictions.

Other than the motion for directed verdict, there was only one other ruling decided adversely to appellant. In a motion in limine, appellant requested that the State be precluded from mentioning the date on which the offenses were committed, September 11, 2001, so that appellant would not be prejudiced by the terroristic acts that occurred on that date. The prosecutor responded that the date was relevant, but that he would not attempt to exploit the fact that the offenses occurred on September 11, 2001. The trial judge denied appellant's motion, noting that there was no indication that appellant was involved in terrorism and that he would not be prejudiced. The trial judge's ruling was correct. There was no evidence presented that appellant was involved in the terroristic acts that occurred in New York City on September 11, 2001, and the date of the commission of the offenses was clearly relevant to the case; therefore, appellant cannot demonstrate prejudice by the denial of his motion in limine. *See Hart v. State*, 77 Ark. App. 206, 72 S.W.3d 540 (2002).

From a review of the record and the brief presented to this court, appellant's counsel has complied with the requirements of Rule 4-3(j) of the Arkansas Rules of the Supreme Court and the Court of Appeals, and the appeal is wholly without merit. Counsel's motion to be relieved is granted, and appellant's judgments of conviction are affirmed.

Affirmed.

NEAL and CRABTREE, JJ., agree.

Carey and Patsy WYATT *v.*
ARKANSAS GAME & FISH COMMISSION

CA 03-845 189 S.W.3d 514

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 30, 2004

Oscar Stilley, for appellant.

Marian M. McMullan and *Kelly Halstead*; and *James F. Goodhart*, for appellee.

JOSEPHINE LINKER HART, Judge. This appeal is brought from an order quieting title to ten acres of land in the Arkansas Game & Fish Commission (AGFC). Appellants, who occupy approximately three of the ten acres, argue that the AGFC's deed

contains an indefinite description, which should not have been construed to pass title to the ten acres. We agree and reverse and remand the case.

The ten acres at issue are located in the SE 1/4 of the NE 1/4 of Section 11 in Newton County. Cave Creek meanders through the quarter in such a way that ten acres lie north and west of it. Appellants occupy three of the ten acres under a 1998 deed that contains the following description: "Part of the SE 1/4 of the NE 1/4 of Section 11, Township 15 North, Range 19 West, containing 3 acres more or less." Appellants admit that their deed contains an indefinite description because it does not particularly locate the three acres within the quarter. Nevertheless, they have asserted a claim to three acres lying north and west of Cave Creek since 1998. In 2000, the AGFC received a deed conveying "that part of the SE 1/4 of the NE 1/4 containing 7 acres, lying West and North of Cave Creek." Although the AGFC's deed, on its face, conveyed seven acres, the AGFC interpreted the deed to convey the entire ten-acre tract lying north and west of the creek, based on the rule of construction that references in a deed to acreage are secondary to references to artificial and natural monuments.

In 2001, the AGFC attempted to remove appellants from the subject area by filing a criminal-trespass action. Appellants sued the AGFC to quiet title to their three acres. The AGFC answered that appellants' title was void for lack of a definite description, and it counterclaimed to quiet title to the ten acres in itself. Alternatively, the AGFC asserted that, if it were not the titleholder of the ten acres by virtue of its deed, it was entitled to ownership of the property by virtue of its and its predecessors' adverse possession.

On September 16, 2002, the AGFC filed a motion for summary judgment, arguing that its deed should be interpreted to convey all ten acres lying north and west of the creek. Relying on the above mentioned rule of construction, the AGFC argued that, if the deed's reference to seven acres was removed from the description, as shown in the bracketed portion that follows, the deed would describe the entire acreage lying north and west of the creek as: "that part of the SE 1/4 of the NE 1/4 [containing 7 acres] lying West and North of Cave Creek. . . ." The AGFC's motion was accompanied by the affidavit of its own surveyor, Steve Parish, and the affidavit of another surveyor, William Cochrane, interpreting the legal description in the AGFC deed as transferring all of the land in the SE 1/4 of the NE 1/4 lying north and west of the creek.

Appellants, recognizing the infirmity in their own deed, responded to the motion by abandoning their quiet-title action and instead challenged the AGFC's ability to quiet title to the ten acres on the strength of its own deed.[1] They asserted that the AGFC's deed was indefinite because it failed to identify which seven acres of the ten acres lying north and west of the creek were being conveyed. Appellants further argued that the AGFC was not entitled to have its deed reformed to reflect a conveyance of all ten acres lying north and west of the creek.

After a hearing, the trial court granted summary judgment to the AGFC and deleted the deed's reference to seven acres. The court then entered an order interpreting the land description in the AGFC's deed as follows:

> All of the property lying West and North of Cave Creek in the SE 1/4 of the NE 1/4 of Section 11, Township 15 North, Range 19 West, Newton County, Arkansas.

The court did not address the AGFC's claim for adverse possession, having ruled in the AGFC's favor on the deed. Appellants now appeal from that order.

Normally, on a summary-judgment appeal, the evidence is viewed in the light most favorable to the party resisting the motion, with any doubts and inferences being resolved against the moving party. *Clarendon Nat'l Ins. Co. v. Roberts*, 82 Ark. App. 515, 120 S.W.3d 141 (2003); *Tunnel v. Progressive N. Ins. Co.*, 80 Ark. App. 215, 95 S.W.3d 1 (2003). However, where the parties agree on the facts, we simply determine whether the appellee was entitled to judgment as a matter of law. *See Browning v. Hicks*, 243 Ark. 394, 420 S.W.2d 545 (1967); *Clarendon Nat'l Ins. Co. v. Roberts, supra; Tunnel v. Progressive N. Ins. Co., supra.* In the proceedings below, the trial court considered the issue regarding the interpretation of the AGFC's deed as one of law, and appellants' counsel agreed. On appeal, appellants do not argue that a fact

[1] In an action to quiet title, the plaintiff (or in this case, the counterclaimant) must recover on the strength of his own title and not on the weakness of the defendant's title. *Wyatt v. Wycough*, 232 Ark. 760, 341 S.W.2d 18 (1960). Further, even though appellants' deed is void for lack of definiteness, appellants, being in possession of part of the disputed property, may still challenge the validity of the AGFC's deed. *See Irby v. Drusch*, 220 Ark. 250, 247 S.W.2d 204 (1952).

question remains but ask us to review the trial court's conclusion of law interpreting the AGFC deed as conveying ten acres. Therefore, the usual summary-judgment review standards do not pertain, and we will simply determine whether the AGFC was entitled to judgment as a matter of law. *See Browning v. Hicks, supra.*

In interpreting the AGFC deed as conveying all ten acres north and west of the creek, the trial court cited *Dierks Lumber & Coal Co. v. Tedford*, 201 Ark. 789, 146 S.W.2d 918 (1941), and *Turner v. Rice*, 178 Ark. 300, 10 S.W.2d 885 (1928), for the proposition that the acreage mentioned in a deed does not control the description of the granted premises. It is true that there are circumstances in which the quantity of acreage recited in a deed must yield to the land as described by monument, whether natural or artificial. Numerous cases have recognized that, where the quantity of acreage and the conveyance as described by monuments are in conflict, monuments are preferred to quantity of acres or distances in interpreting the deed. *See Rodger v. Crain*, 235 Ark. 211, 357 S.W.2d 527 (1962) (holding that, where a sales contract mistakenly recited boundary lines as being 330 feet when in fact they were about 270 feet, the corner-post monuments furnished the true description); *Wyatt v. Wycough*, 232 Ark. 760, 341 S.W.2d 18 (1960) (holding that incorrectly stated acreage does not lessen the certainty of the description where the description can be ascertained by reference to a river bed); *Scott v. Dunkel Box & Lumber Co.*, 106 Ark. 83, 152 S.W. 1025 (1912) (holding that the quantity of land recited in a description will be rejected if it is inconsistent with the actual area of the premises as indicated and ascertained by known monuments and boundaries). However, the trial court's usage of that rule in the case at bar was not well founded and resulted in the trial court's reforming the deed rather than merely interpreting it.

In the AGFC deed, there is no inconsistency between the quantity of land recited and the boundaries as shown by monuments, *i.e.*, Cave Creek. In fact, the reference to acreage and the reference to the creek are easily reconcilable. The deed simply conveys seven acres and then locates those acres north and west of the creek. Thus, the conveyance itself is not described by the creek but solely by acreage; the creek is mentioned only as a directional indicator of where the seven deeded acres lie, *i.e.*, north and west of the creek. As such, there is no need to elevate monuments over

acreage, and the deed should be interpreted as it reads on its face, conveying seven acres lying north and west of the creek.

When that is done, it is apparent that the deed contains an indefinite "part" description. A deed containing an indefinite property description is void and does not constitute color of title. *Belcher v. Stone*, 67 Ark. App. 256, 998 S.W.2d 759 (1999). Further, an indefinite description conveys no title. *See Browning v. Hicks*, *supra*. The supreme court has recognized that deeds containing so-called "part" descriptions are void for uncertainty. *See Higginbottom v. Higginbottom*, 247 Ark. 694, 447 S.W.2d 149 (1969); *Charles v. Pierce*, 238 Ark. 22, 378 S.W.2d 213 (1964); *Darr v. Lambert*, 228 Ark. 16, 305 S.W.2d 333 (1957).

As the AGFC recognizes, a part description gives no indicators or keys as to how to locate the land. That is the situation before us. The deed conveys seven acres in a larger, ten-acre plot. However the boundaries of that seven acres are not ascertainable; it is not possible to discern which seven of the ten acres were deeded. Thus, like appellants' admittedly indefinite deed, which does not locate its three acres within the forty-acre tract, the AGFC's deed does not locate its seven acres within the ten-acre tract, and is likewise too indefinite to support an action to quiet title.

The dissent would alter the deed's language to convey "all that part" of the quarter-quarter section lying west and north of Cave Creek. But that is, in essence, rewriting the deed. Further, we disagree with the dissent's declaration that the words "that part of" constitute a term of art that would mandate a conveyance of the entire ten acres. The phrase "that part" is not a term of art but simply a common way of indicating that something less than the entire parcel is being conveyed.

Based on the foregoing, we reverse the trial court's summary-judgment order and remand the case to permit the AGFC to pursue its claim for adverse possession, should it choose to do so.

Reversed and remanded.

PITTMAN, GRIFFEN, NEAL, and BAKER, JJ., agree.

ROAF, J., dissents.

ANDREE LAYTON ROAF, Judge, dissenting. I dissent from the majority and would affirm this case. The majority has

completely ignored the most important words in the legal description at issue in this case, and has ignored appellee Arkansas Game and Fish Commission's argument to the trial court and on appeal. I agree with appellee and the trial court that this description is not a true "part" description that is void for vagueness. A "part" description provides no indication as to where a portion of land is located within a larger parcel. However, "*that* part of. . ." is a term of art in legal descriptions to designate *where* within a larger parcel the property at issue may be found. In this case, the description designates "that part" of the quarter section that lies west and north of a creek, with the remaining boundaries provided by the lines of the quarter section that the creek intersects. Since it can be determined what part of the property is being conveyed, this case is simply not governed by the line of cases relied on by the appellant and the majority. *See Charles v. Pierce*, 238 Ark. 22, 378 S.W.2d 213 (1964) (stating that it cannot be determined what part of the land appellee is claiming because no part of this acreage is definitely described). Thus, the trial court correctly relied on the line of cases, cited by the majority, in concluding that the acreage mentioned in a deed does not control the description of the granted premises, but must yield to the land described by a monument, whether natural or artificial. *See, e.g., Dierks Lumber & Coal Co. v. Tedford*, 201 Ark. 789, 146 S.W.2d 918 (1941). Here, the creek is the monument, and the description points to precisely that part of the larger area enclosed by the creek and the section lines.

MID-SOUTH ADJUSTMENT COMPANY, INC. *v.*
The ESTATE OF Shanna Nicole HARRIS, Deceased

CA 03-1085 189 S.W.3d 518

Court of Appeals of Arkansas
Divisions I, II and III
Opinion delivered June 30, 2004

Brockman, Norton & Taylor, by: *C. Mac Norton*, for appellant.

Law Offices of Gary Green, by: *Todd L. Griffin*, for appellee.

ROBERT J. GLADWIN, Judge. Appellant Mid-South Adjustment Company appeals from an order of the Ouachita County Circuit Court that disallowed appellant's claim against the proceeds of a wrongful-death settlement. We affirm.

Shanna Harris died as a result of injuries suffered in an automobile accident. Her mother, Francis McCoy, was appointed administratrix of the estate on April 14, 2000. Appellant timely filed a claim against the estate for $7,425 on behalf of two medical providers who had provided medical services to Shanna Harris just prior to her death.

The administratrix filed a wrongful-death and survivor action against the drivers of the two vehicles involved in the collision. The liability carriers for the two defendants offered the policy limits of $50,000 to settle the action. This offer was presented to and approved by the trial judge.

On April 2, 2002, without notice to appellant, the trial court entered an order for distribution of the settlement proceeds. On August 7, 2002, appellant filed a petition to re-open the estate,

contending it had not received notice regarding the wrongful-death-settlement hearing and that it should have been allowed an opportunity to participate in the distribution of the proceeds to recover for the medical services.

Appellant argues on appeal that the trial court erred in refusing to re-open the estate. In fact, the court did re-open the estate, but held that it would not set aside or reconsider the distribution previously ordered, reasoning that, under the provisions of Ark. Code Ann. § 16-62-102 (Supp. 2001), appellant had no standing to participate in the settlement proceeds.

Arkansas Code Annotated section 16-62-102(a)(1) addresses wrongful-death actions and provides, in pertinent part, that whenever the death of a person is caused by a wrongful act, neglect, or default such as would have entitled the party injured to maintain an action and recover damages in respect thereof if death had not ensued, then the person that would have been liable had death not ensued shall be liable to an action for damages, notwithstanding the death of the person. The beneficiaries of the wrongful-death action are: (1) the surviving spouse, children, father, mother, brothers, and sisters of the deceased person; (2) persons, regardless of age, standing *in loco parentis* to the deceased person; (3) persons, regardless of age, to whom the deceased stood *in loco parentis* at any time during the life of the deceased. Ark. Code Ann. § 16-62-102(d). Of particular relevance to this case is Ark. Code Ann. § 16-62-102(e), which provides that *no part* of *any recovery* referred to in this section shall be subject to the debts of the deceased person or become, in any way, a part of the assets of the estate of the deceased person. (Emphasis added.)

In support of its argument for reversal, appellant points out that part of the complaint filed in the wrongful-death action sought to recover compensatory damages for medical expenses incurred by the decedent prior to her death. Appellant contends that these amounts were sought pursuant to Ark. Code Ann. § 16-62-101(Supp. 2001), which provides that a decedent's estate may recover for the decedent's loss of life as an independent element of damages, and that these amounts were therefore part of the estate and subject to creditors' claims rather than being exempt as proceeds of a wrongful-death action.

In *Douglas v. Holbert*, 335 Ark. 305, 983 S.W.2d 392 (1998), our supreme court stated that the personal representative is clearly the party to bring a wrongful-death action on behalf of the

statutory beneficiaries, and that the other statutory beneficiaries have no standing to bring the lawsuit. The court also noted that once a settlement is obtained, the proceeds do not become assets of the decedent's estate, but that the proceeds of a wrongful-death action are for the sole benefit of the statutory beneficiaries and may not be used to pay off debts of the estate. 335 Ark. at 314, 983 S.W.2d at 396.

In its letter opinion filemarked May 12, 2003, the trial court commented, "It is noteworthy that it is uncontroverted that this is in fact a wrongful-death settlement with which we are dealing." In three other instances within this opinion, the court refers to the proceeds of the wrongful-death action or settlement. We are of the opinion that these references constitute a finding of fact that the entire amount of the proceeds was, in fact, attributable to the wrongful-death action. As such, this amount did not become a part of the estate and was exempt from the claims of the decedent's creditors.

Probate cases are reviewed *de novo* on appeal, and we do not reverse the findings of the probate judge unless those findings are clearly erroneous. *Arkansas Dep't of Human Servs. v. Keeling*, 73 Ark. App. 443, 43 S.W.3d 772 (2001). A probate court's finding of fact is clearly erroneous when, although there is evidence to support it, we are left with the definite and firm conviction that a mistake has been committed. *Id.*

In the case now before us, a wrongful-death action was filed on behalf of the statutory beneficiaries. A settlement of $50,000 was negotiated, without reference as to how it was to be apportioned among possibly competing measures of damages. The trial court noted repeatedly that the proceeds were attributable to the wrongful-death action or settlement, and we cannot say that the court was clearly erroneous in this regard. Arkansas Code Annotated section 16-62-102(e) clearly states that no part of any wrongful-death-action recovery shall be subject to the debts of the deceased. Accordingly, we affirm.

Affirmed.

STROUD, C.J., GRIFFEN, CRABTREE, and ROAF, JJ., agree.

HART, ROBBINS, BIRD, and VAUGHT, JJ., dissent.

JOHN B. ROBBINS, Judge, dissenting. Our court holds today that an administratrix, in the exercise of her fiduciary duties,

may settle a wrongful-death and survival action by allocating all of the recovery to the wrongful-death prong of the action, settling around and to the detriment of the claims of the estate's creditors, and do so without notice to the creditors of record!

I agree with the majority opinion's recitation of facts concerning the decedent's death, appointment of an administratrix, and the wrongful-death and survivor action filed by the administratrix. Although not recited in the majority opinion, it is undisputed that the estate's attorney sent a letter in May 2000 to one of the medical providers at issue, informing it that if it had any outstanding medical bill on behalf of the decedent, it should file an affidavit to claim against the estate in the probate court and send a copy to the law office representing the estate. The majority opinion reflects that a timely claim was filed by appellant on behalf of this medical provider and the local hospital. Thereafter, on August 21, 2001, the administratrix petitioned the trial court to approve a settlement of her action representing that "the Petitioner believes that it is in the best interest of the estate and the statutory beneficiaries for the settlement to be consummated." The administratrix advised the court that the settlement would require that she "execute releases of all claims and dismiss the existing wrongful death lawsuit." The administratrix further sought authorization to distribute the settlement proceeds to the statutory beneficiaries after payment of her attorney's fee, expenses, and after paying any valid debts of the estate.

The trial court granted the petition on October 4, 2001, and authorized the administratrix to execute all releases necessary to effect the settlement. However, the court directed that after payment of the attorney's fee, the net proceeds were to be held pending publication of the statutory probate notices to creditors. First publication of notice occurred on October 10, 2001. Appellant had previously filed its claims on behalf of Pine Bluff Radiologists and Jefferson Regional Medical Center on June 28, 2001. The timeliness and validity of appellant's claims are not now in dispute.

The nature of the action filed by the administratrix is acknowledged in the majority opinion as both a wrongful-death action and a survival action. This characterization is appropriate inasmuch as the administratrix was seeking both mental anguish suffered by the statutory beneficiaries and compensatory damages suffered by the decedent's estate, including funeral expenses, medical expenses, and the decedent's pain and suffering.

Where I differ from the majority is in its affirmance of the trial court's decision to approve a settlement and distribution without notice to appellant creditors that required the administratrix to release *all* claims of the estate, which obviously included the survival-action prong of the pending suit, for $50,000, all of which would be allocated to the wrongful-death prong of the action; and none whatsoever allocated to the survival prong of the action.[1] The consequence of this decision rendered the estate insolvent with no funds available for payment of the claims of the radiologist and hospital that provided emergency medical services in an effort to save the life of the decedent.

The tension between our probate laws and the wrongful death act is brought into focus by the proceedings in this case. It is without dispute that the sums recovered under Ark. Code Ann. § 16-62-102 (Supp. 2003), known as the wrongful-death act, do not become an asset of the decedent's estate and are not subject to the debts of the decedent. The provisions of this statute make the point very clear, as has the supreme court over the years since its enactment. *See, e.g., Douglas v. Holbert*, 335 Ark. 305, 983 S.W.2d 392 (1998); *Brewer v. Lacefield*, 301 Ark. 358, 784 S.W.2d 156 (1990); *Dukes v. Dukes*, 233 Ark. 850, 349 S.W.2d 339 (1961); *Missouri Pac. R.R. v.Keeton*, 209 Ark. 605, 191 S.W.2d 954 (1946). On the other hand, the personal representative of a decedent's estate has a fiduciary duty to pursue claims held by the estate for the benefit of the heirs and creditors of the estate. It is a violation of this duty for the personal representative to seek a settlement that allocated all of the recovery to the statutory beneficiaries (including the personal representative herself) for their mental anguish, and nothing to the estate for payment of medical services rendered in an effort to save the decedent's life.

This is fundamentally wrong. The creditors were not given notice that such a settlement and allocation were being made. Although the probate court may authorize settlements of such actions pursuant to Ark. Code Ann. § 28-49-104, I submit that to do so without at least requiring some form of notice to the known and identified creditors is an abuse of discretion. *See* Ark. Code

[1] The majority suggests that the trial court's references in its letter opinion that it is a wrongful-death settlement constitutes a finding of fact that the entire proceeds were attributable solely to the wrongful-death prong of the actions. If this was a finding of fact, it was clearly erroneous inasmuch as the settlement required the administratrix to release ALL claims of the estate in order to recover the settlement proceeds.

Ann. § 28-1-112(a). While correction of this conflict between our probate code and the wrongful-death act could best be made legislatively, we could alleviate some of the appearance of self-dealing and violation of a personal representative's fiduciary duty by requiring the trial court, at a minimum, to have the personal representative, who is seeking approval of a settlement of a dual action such as we have here, give notice to all interested parties, *i.e.*, all parties who will be benefited or prejudiced by such approval, so that they could be heard in the matter. The trial court erred in this case in not requiring this.

In summary, the administratrix erred when she violated her fiduciary duty to the estate by settling the estate's survival action without the estate receiving any benefit; the trial court erred in authorizing the settlement of the wrongful-death action and survival action with all proceeds being allocated to the wrongful-death action and without notice to the insolvent estate's creditors; and our court errs in approving these actions.

I respectfully dissent and am authorized to state that Judges HART, BIRD, and VAUGHT, join in this opinion.

Sarah PARKER *v.* ATLANTIC RESEARCH CORP.
Insurance Company of the State of Pennsylvania

CA 03-1362 189 S.W.3d 449

Court of Appeals of Arkansas
Division I
Opinion delivered June 30, 2004

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

Philip M. Wilson, for appellee.

ROBERT J. GLADWIN, Judge. This is an appeal from the Arkansas Workers' Compensation Commission. Appellant sought medical benefits for a gradual onset neck injury, contending that a work-related rapid repetitive motion injury caused an aggravation of her preexisting asymptomatic degenerative cervical disc disease. Appellees controverted the payment of all benefits relative to appellant's neck injury. The administrative law judge (ALJ) found in favor of appellant and awarded benefits. The Commission reversed the decision of the ALJ, finding that, as a matter of law, an injured worker with a work-related aggravation of preexisting disc abnormalities cannot meet the major cause requirement of Ark. Code Ann. § 11-9-102(4)(E)(ii) (Repl. 2002) by establishing that the disc

abnormalities were asymptomatic for at least a significant period before a work-related injury but became symptomatic when work conditions gradually aggravated the previously asymptomatic disc abnormalities. We disagree with this statement in general and with its application to the situation herein, that appellant failed to establish that the rapid repetitive motion aggravated her preexisting condition and was the major cause of her disability and her need for treatment. Accordingly, we reverse and remand for proceedings not inconsistent with this opinion.

In June of 1998, appellant began working for appellee Atlantic Research Corporation, which manufactures defense products and parts for automobile air bags. In May of 1999, appellant was transferred to a production line in the "pack out" division, where her duties involved packing parts for air bags. The Commission noted that while it was difficult to determine the exact sequence of events involved in appellant's work routine, it appeared from the testimony that appellant would pick up small parts coming down a conveyor belt, inspect the parts, and then put each part in a box. Each box contained ninety-six parts, and it took appellant approximately fifteen minutes to fill each box. Appellant's supervisor testified that the motions involved quick and fast movements of the head and neck, requiring appellant to look to one side to find an appropriate part as it came down the belt, inspect the part, and then look in the other direction to place the part into the appropriate slot in the box.

Appellant testified that in May of 1999, after she transferred to the "pack out" division, she began to experience pain in her arms, right shoulder, hands, and neck. She reported these problems to her supervisor and stated that she needed medical treatment. With the knowledge of her supervisor, appellant began seeing her family doctor for medical treatment for these problems.

Appellant saw her family doctor, Dr. John Sarnicki, on June 8, 1999. After appellees were notified, they referred appellant to their medical provider, Dr. Judson Hout. Dr. Hout referred her to Dr. Gordon Gibson, a neurologist. Eventually Dr. Gibson referred appellant to Dr. Scott Schlesinger, a neurosurgeon, who recommended conservative management of her complaints.

Following her evaluation by Dr. Schlesinger, appellant sought a second opinion. On October 11, 1999, she was evaluated by Dr. Wilbur Giles, a neurosurgeon. Dr. Giles diagnosed appellant with "C6-7 cervical radicular syndrome." Following a

myelogram-CT, Dr. Giles diagnosed "cervical stenosis and cervical spondylosis at C6-7." He noted that based on the CT, appellant had "significant findings compatible with her neck, shoulder, and arm pain and possibly could benefit from an anterior cervical diskectomy and arthrodesis at the C6-7 level using donor bone." On December 3, 1999, appellant underwent this surgical procedure.

When appellant sought medical benefits related to the treatment of her neck condition, appellees denied the compensability of her neck complaint and liability for any related workers' compensation benefits. The Commission reversed the ALJ award for benefits, and held that appellant failed to prove that the aggravation was the major cause of her disability, reasoning that because the disc abnormalities observed on the MRI, myelogram, and post-myelogram CT all preexisted the work-related aggravation, appellant could not, as a matter of law, establish the aggravation as the major cause of her disability. Appellant argues on appeal that there was no substantial basis for the Commission's decision to deny benefits.

The standard of review in workers' compensation cases is well settled. When reviewing a decision of the Arkansas 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. *Cooper Tire & Rubber Co. v. Angell*, 75 Ark. App. 325, 58 S.W.3d 396 (2001). Substantial evidence is that relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The issue is not whether this court might have reached a different result from the Commission; the Commission's decision should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Horticare Landscape Management v. McDonald,* 80 Ark. App. 45, 89 S.W.3d 375 (2002); *Wheeler Constr., supra.* When a claim is denied because a claimant failed to show entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires that we affirm if a substantial basis for the denial of relief is displayed by the Commission's opinion. *Marshall v. Madison County*, 81 Ark. App. 57, 98 S.W.3d 452 (2003).

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a preexisting noncompensable condition by a compensable injury is, itself, compensable. *Oliver v. Guardsmark,* 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000). An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996).

If the aggravation/new injury is an accidental injury, it must meet the following criteria to establish compensability: it must be (1) an independent incident; (2) work-related; (3) caused by a specific incident identifiable by a time and place of occurrence. *See* Ark. Code Ann. § 11-9-102(4)(A)(i) (Repl. 2002); *Farmland Ins. Co. v. DuBois, supra.* An injury does not have to be accidental in order to qualify as an aggravation/new injury; it must, however, fall within one of the definitions of a compensable injury as set forth in Ark. Code Ann. § 11-9-102(4)(A).

Where, as in the case before us, a rapid repetitive motion injury is argued to be an aggravation of a preexisting condition, the claimant must prove by a preponderance of the evidence that the injury: (1) arose out of and in the course of her employment; (2) caused internal or external physical harm to the body requiring medical services; (3) was caused by rapid repetitive motion; (4) was the major cause of the disability or need for treatment; (5) was established by medical evidence supported by objective findings. *See* Ark. Code Ann. § 11-9-102(4)(A) and (E) (Repl. 2002); *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998). *See also Tyson Foods, Inc. v. Griffin*, 61 Ark. App. 222, 966 S.W.2d 914 (1998) (affirming the Commission's finding that the claimant's employment activities in the form of rapid repetitive movement had aggravated his degenerative osteoarthritis in the area of his hands and wrists, and that his conditions of bilateral carpal tunnel syndrome and aggravation of his preexisting degenerative arthritis constituted the major cause of his need for ongoing medical treatment).

The Commission specifically found that appellant had satisfied the objective medical findings requirement, noting the presence of a muscle spasm for which Valium was prescribed. The record also reveals documentation of hand and finger swelling, and a trip to the emergency room occasioned by appellant being unable to move her head. In *Estridge v. Waste Management*, 343 Ark. 276, 33 S.W.3d 167 (2000), our supreme court held that muscle spasms can constitute objective medical findings to support compensability. In the case at bar, there is written documentation of the presence of a muscle spasm and the swelling found in appellant's hands and fingers. There was, therefore, substantial evidence to support the finding of the Commission that appellant had satisfied the requirement that an injury be established by medical evidence supported by objective findings. Regarding the requirement of rapid repetitive motion, the Commission considered the testimony of appellant's supervisor and concluded that if appellant inspected approximately 6.5 parts per minute (96 parts every 15 minutes), and made two neck movements per part, appellant would engage in thirteen neck movements per minute. There was substantial evidence to support the Commission's finding that the rapid repetitive motion requirement was satisfied.

In *High Capacity Products, supra*, the claimant used an air gun to assemble blocks, with a quota goal of 1,000 units per day. She would hold the parts of the unit with her left hand and work the air gun with her right hand to attach two nuts to each block, averaging attachment of one nut every fifteen seconds. Her job required three maneuvers to be repeated in succession all day: assembling the separate parts, using the air-compressed equipment to attach the parts together with nuts, and throwing the units into a box.

Citing our decision in *High Capacity Products, supra*, the Commission in the instant case found that appellant's job duties fell within the meaning of rapid repetitive motion. Considering the multiple job tasks that appellant performed at high volume with quick and fast movements and the repetitive nature of such movements over the course of a sometimes ten-to-twelve hour shift, six to seven days a week, there was substantial evidence to support the Commission's finding that appellant's job duties required rapid repetitive motion.

Even though the Commission found that appellant had satisfied her burden of proof as to objective medical findings and rapid repetitive motion, it nonetheless declined to award benefits.

The Commission reasoned that because all of the disc abnormalities that showed up on the various studies preexisted the work-related aggravation, appellant could not establish, within the meaning of Ark. Code Ann. § 11-9-102(4)(E), that a work-related aggravation injury was the major cause of a disability or need for treatment simply by establishing that the preexisting condition was asymptomatic prior to becoming inflamed by the work activity.

We first disagree with this statement because it is inaccurate as applied to this situation. Appellant did not merely establish that her preexisting condition was asymptomatic prior to becoming inflamed by work; she introduced objective medical findings, as discussed above, to substantiate her claim of an aggravation/new injury.

Secondly, we disagree with the Commission's finding that "major cause" cannot be established in a situation in which a claimant was symptom-free prior to the work-related aggravation of a preexisting condition. A claimant is required to prove that the work-related injury is the major cause of the disability or need for treatment. But for the work-related injury in this case, there would have been no disability or need for treatment. Appellant's doctor testified within a reasonable degree of medical certainty that the work-related aggravation/new injury was the major cause of appellant's disability and need for treatment.

In his deposition on February 4, 2002, Dr. Giles testified that he believed that appellant had degenerative arthritic disease in her neck prior to her employment, but that if she had no symptoms prior to the employment, as she stated, then "the only way that her employment could have hurt her from that is if her neck was used in such form on a repeated basis that she made the degenerative disk inflammatory. Then it would have become inflammatory as a result of what she was doing, although it preexisted her employment."

The Commission interpreted Dr. Giles' testimony and written opinion report to conclude that appellant's previously asymptomatic neck abnormalities became inflamed/symptomatic as a result of her job duties. The Commission further found:

> Based on the fact that the claimant's neck was asymptomatic prior to the new job duties in 1999, and in light of the temporal relationship between the start of the new job duties and the beginning of her symptoms, Dr. Giles has concluded that the

> claimant's work-related aggravation of a preexisting neck condition was the major cause of the surgical treatment that Dr. Giles performed. On the other hand, Dr. Giles has also testified that all of the disk abnormalities observed on MRI, myelogram, and post-myelogram CT, all preexisted the claimant's work-related aggravation.

The Commission also noted that the facts that formed the basis of Dr. Giles' opinion were not in dispute.

Although the Workers' Compensation Act must be strictly construed, even a strict construction of statutes requires that they be construed in their entirety, with each subsection relating to the same subject to be read in a harmonious manner. *Farmers Cooperative v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). Furthermore, construction of the Workers' Compensation Act must be done in light of the express purpose of that legislation, which is to timely pay temporary and permanent disability benefits to all legitimately injured workers who suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force. Ark. Code Ann. § 11-9-101(b) (Repl. 1996); *Farmers Cooperative, supra.*

When reviewing the Commission's interpretation and application of its rules, we give the Commission's interpretation great weight; however, if an administrative agency's interpretation of its own rules is irreconcilably contrary to the plain meaning of the regulation itself, it may be rejected by the courts. *Death & Perm. Total Disab. Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002). An administrative agency's interpretation of a statute or its own rules will not be overturned unless it is clearly wrong. *Id.*

In consideration of the above standard and the purposes of the Workers' Compensation Act, we hold the Commission was clearly wrong in its decision that the "major cause" requirement of Ark. Code Ann. § 11-9-102(4)(E) categorically cannot be established by a showing that an asymptomatic preexisting condition became symptomatic, and thus required treatment, due to a work-related aggravation of that condition. All the requirements discussed herein were satisfied by appellant, and there was no substantial basis for the denial of relief. Accordingly, we reverse and remand.

Reversed and remanded.

BIRD and GRIFFEN, JJ., agree.

Robin Denise DANSBY *v.* Lathaire Wilfred DANSBY

CA 03-741 189 S.W.3d 473

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered June 30, 2004

[Rehearing denied August 25, 2004.*]

* PITTMAN and BAKER, JJ., would grant rehearing.

Dodson & Dodson, L.L.P., by: *Richard N. Dodson*, for appellant.

Winona Griffen, for appellee.

JOHN B. ROBBINS, Judge. Appellant Robin Dansby appeals the order entered by the Miller County Circuit Court judge that changed joint custody between Robin and appellee Lathaire Dansby over their younger daughter Krysten to Lathaire's full custody. The parties married in 1984 and had Lynzi Dansby[1], born in 1985, and Krysten Dansby, born in 1997. They divorced at the end of July 1999, though the order was not entered until September 1999, but continued to live in the same household for another eight months, finally separating in the spring of 2000. Lathaire was the father of an older son in his twenties, two daughters born of his marriage to Robin, and a son conceived during the parties' marriage. The decree contemplated that the parties would have joint custody of Lynzi and Krysten. The decree specified that as concerned Krysten, the parties

[1] Lynzi turned eighteen in early 2003. Her custody/visitation is not at issue.

would alternate one-week periods of custody, from Friday evening to Friday evening. On three occasions leading up to the motion to change custody, Robin filed motions for contempt for Lathaire's failure to pay child support. Lathaire paid in full subsequent to each of these filings.

In response to the last of the three contempt motions filed by Robin, on November 27, 2002, Lathaire moved for contempt for Robin's failure to allow him his decreed joint-custody and moved to change custody based upon a change in circumstances. The cause was heard in January 2003, and the judge entered an order denying the contempt motion but granting the change of custody and allowing Robin visitation. This appeal resulted.

Appellant Robin challenges the trial judge's findings, asserting that they were clearly erroneous in two respects: (1) in concluding that there had been a material and substantial change in circumstances, and (2) in limiting Robin's visitation to alternate weekends, Wednesdays, alternate holidays, and one month in the summer. We affirm.

The standard of appellate review governing custody modifications is well settled. In child-custody cases, the primary consideration is the welfare and best interests of the child involved; all other considerations are secondary. *Eaton v. Dixon*, 69 Ark. App. 9, 9 S.W.3d 535 (2000). Custody will not be modified unless it is shown that there are changed conditions demonstrating that a modification is in the best interest of the child. *Vo v. Vo*, 78 Ark. App. 134, 79 S.W.3d 388 (2002). In cases involving child custody and related matters, we review the case de novo, but we will not reverse a trial judge's findings in this regard unless they are clearly erroneous. *Deluca v. Stapleton*, 79 Ark. App. 138, 84 S.W.3d 892 (2002). A finding 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 made. *Smith v. Parker*, 67 Ark. App. 221, 998 S.W.2d 1 (1999). Because the question of whether the trial court's findings are clearly erroneous turns largely on the credibility of the witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002).

The evidence at the hearing included the testimony of Lathaire, who testified that Robin basically let him have his younger daughter only when Robin was working her night shift at

the hospital, although this still permitted each parent one-half of Krysten's time. Lathaire was concerned that Robin was drinking, smoking, and having boyfriends spend the night with Krysten present. Lathaire said that some of Robin's boyfriends had criminal histories and that Krysten was witness to violence at Robin's house. In addition, Lathaire objected to Robin putting Krysten in a biracial situation by dating white men.

In contrast, Lathaire said that he lived in a three-bedroom house with his older son, his seventeen-year-old daughter Lynzi, and Krysten. Lathaire said he also saw his twelve-year-old son from another relationship at least once or twice a month and paid support for him. Lathaire confirmed that he had many brothers and sisters in the immediate area to help care for Krysten when he was at work as a car salesman or when he had to work at the family business, which apparently was a local bar or tavern.

Lathaire's main concern was that even though Robin always smoked, drank, and had boyfriends, he could not monitor Robin's behavior after they separated. Lathaire complained that her smoking was detrimental to Krysten's asthma, and he could not prevent her being drunk in front of their daughter, or her having boyfriends stay overnight.

Lathaire explained that his older daughter Lynzi did not have a relationship with her mother Robin because Robin berated her and they did not get along. Lathaire acknowledged that Lynzi was not a perfect child. Lynzi had undergone an abortion, but was currently on birth control. Lynzi had been suspended from school once after a fight in which she was not the original aggressor, but otherwise, she was a fairly good student.

Lathaire admitted that he was arrested once while driving in a caravan from a Razorback game back home and that the children were with him, but he explained that he did not understand the police to be trying to pull his car over, he had a minor wreck, he went to the station, and he waited with his children on a bench until posting bail. Lathaire also confessed that he had fallen behind in child support from time to time, but he thought that he had the right to do so when Robin denied his court-ordered visitation. He understood differently now. Lathaire said he had yet to have a female visitor over in Krysten's presence, and he was bothered by what he characterized as Robin's revolving door of boyfriends. Lathaire also said that Robin had kept his daughter out at a restaurant past her bedtime on a school night, and Robin was drinking.

Lynzi testified that she was a senior in high school, that she had no relationship with her mother, and that her mother did not even give her a birthday or Christmas gift. Lynzi testified that she observed her mother get drunk and smoke in front of Krysten, as well as have boyfriends spend the night while Krysten was present. Lynzi said that her mother said derogatory things about her father and his family. Lynzi said that her mother was currently dating a white man. Lynzi reportedly found marijuana in her mom's house but did not tell her about it. Lynzi helped to care for her little sister when her father had to be away, and she assisted in transporting her sister back and forth between houses. Lynzi wanted her little sister to live with her at their father's house.

Robin testified that she and Lathaire had never abided by the original decree but that they had arranged it such that they each had Krysten about half the time. In fact, they continued to live together for months until Robin moved out of the marital home. Thereafter, she said he had no problem with having 4-3 day splits during each week to accommodate her work schedule at the hospital. Robin said she had worked graveyard shift (7 p.m. - 7 a.m.) for about twelve years, and she said her mother helped with Krysten when work prevented her from being at home on those occasions when Lathaire insisted on the full-week exchanges. Robin agreed that she would go back to the seven days on, seven days off schedule if that was what Lathaire wanted. Robin agreed that Lathaire was a good father and that Krysten loved her dad and spent time with him. However, Robin believed that she had more time to spend with her daughter, and she saw no reason to depart from their practice in the past of arranging it so that Krysten would never have to be with a sitter. At the time of the hearing on this matter, Krysten was five years old.

Robin pointed out that she had to seek court intervention three times to get her child support, but Lathaire would pay prior to coming to court. As to morals, Robin reminded the court that Lathaire impregnated a woman with his now twelve-year-old son while he and Robin were still married. Robin also pointed out that she was not racist like Lathaire and that, concerning Lynzi, he was too lenient and did not discipline Lynzi, which led to the discord between Lynzi and her mother. Robin said that the specific acts that Lynzi testified about were untrue, and furthermore that Lynzi never spent any time with Robin so that Lynzi would have no way of knowing what went on in her household. Robin feared that

Krysten would befall the same behavioral problems later that Lynzi had already experienced by working her father against her mother.

Robin testified that she did not have a problem with one of Lathaire's sisters caring for Krysten because even though the aunt had apparently had a drug problem, she was good to Krysten. Robin said that she had a friend who formerly had a drug problem, but she underwent treatment and was better, similar to Lathaire's sister. Robin denied smoking in the house when Krysten was there, and she denied ever being drunk in front of her. Robin said that she did have a male overnight visitor once, but it was only because there was a winter storm and it was unsafe to leave. Robin denied any inappropriate behavior with him while Krysten was there. Robin explained that she did have Krysten out at Red Lobster on one occasion after her bedtime; Robin admitted to having one margarita. However, Robin said that this was a one-time occurrence.

Lathaire's older son Jason Dansby, age twenty, testified that he was in college and living with his father. Jason said he helped take care of Krysten when she was there, until their father got home from work at around 7:00 p.m. Jason said that only family members helped to care for Krysten when their father was at work.

Robin's mother testified that she knew Robin and Lathaire had made their own custody schedule since the divorce, accommodating Robin's work schedule. Robin's mother acknowledged that they did go back to the ordered schedule at least once, and she had to assist in keeping Krysten while her daughter worked. However, she said that Robin and Lathaire went right back to the altered schedule and that Lathaire never complained to her about it. She testified that she occasionally talked to Lathaire on the phone about the children and that they remained cordial.

The parties submitted their respective proposed findings of fact at the end of the case and thereafter the court filed its fifty-six findings of fact about what it believed to be true in the testimony. Apparently, everything negative about Robin was believed true, and everything positive about Lathaire was believed true. The most egregious bad acts found were that Robin smoked, drank, cursed, and cohabited with boyfriends in the presence of Krysten. He found that Lathaire provided a greater moral example and provided a more secure and structured life for Krysten than Robin. He found that Robin had allowed a known drug user in Krysten's presence and that Robin and a boyfriend engaged in domestic

violence in front of the children. The judge noted in his findings that Robin stated that she has no problems with Lathaire Dansby as a father and said that he is a good father. He found that they had not followed the ordered visitation due to Robin's fault, that material changes had occurred, and that Krysten's best interest would be to be placed in her father's custody. Robin was granted every-other-weekend, every Wednesday, alternate holiday, and one-month summer visitation. This appeal followed.

Before we consider the points on appeal in our de novo review, we must first make clear that one of the fifty-six findings of fact was an impermissible consideration. The trial judge stated in finding number thirty-nine that appellant, "a black woman, dates only white men." No objection was raised to the testimony on this issue at any time; nor did appellant object to this finding when it was proposed by appellee's counsel or when the trial court included it in its findings of fact and conclusions of law filed on March 21, 2003, some twelve days before the final order was entered. We do not consider an issue on appeal, even of constitutional concern, that has not been first raised to the trial court for resolution. *See Gwin v. Daniels,* 357 Ark. 623, 184 S.W.3d 28 (2004); *Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 333 (2001); *Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004). This case is similar to the recently decided *Tipton v. Aaron, supra*, wherein the parties were litigating the question of whether custody of a child should be changed, and testimony was elicited from both parties concerning the impact of the child remaining in an interracial household with his mother. No objection was raised at any time to that line of inquiry, and we held that the issue was not preserved for our review. Likewise, in the present appeal, both parties shared their personal views about Robin's choice to date men of another race, no objection was raised until appeal to our court, and we again hold that this issue as not preserved for appellate consideration.

In response to the dissenting judges' assertion that the issue of race was first advanced by Robin, we disagree. Lathaire, as the moving party, testified first and made clear that he objected to his daughter being exposed to a biracial situation. Robin raised no objection. When Robin testified, she acknowledged that Lathaire did not like the fact that she dated white men, claimed that she did not teach prejudice, affirmed that Lathaire was a good father, and asked the court to leave intact the joint-custody arrangement. At

no time did she or her counsel claim that it was legally wrong to advance concerns about biracial dating as a basis for changing custody.

Nevertheless, we take this opportunity to state that the United States Supreme Court made abundantly clear in *Palmore v. Sidoti*, 466 U.S. 429 (1984), that it violates the Equal Protection Clause of the Constitution to factor race into a custody decision. In *Palmore*, the *sole* consideration upon which custody was changed from the mother, who married a man of another race, to the father was that the child remaining in an interracial household would be detrimental to the child. The *Palmore* opinion, written by Chief Justice Burger, noted that the appeal raised important federal concerns arising from the Constitution's commitment to eradicating discrimination based upon race and that the Court was compelled to reverse the decision to change custody made only on racial considerations.

Even though no objection was raised to the inappropriate finding number thirty-nine, we do not find on our de novo review that it is of any consequence inasmuch as it neither strengthens nor weakens either party's position on the best interest of the minor child. Therefore, we proceed in our de novo review to examine the remaining fifty-five findings of fact to determine whether they support the conclusion that material changes occurred and that it was in Krysten's best interest for Lathaire to be granted custody. We hold that those findings support the trial court's decision, and we affirm.

In determining whether a change in custody is warranted, the trial judge must first decide whether there has been a material change in circumstances since the most recent custody order. *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001). The burden of proving such a change is on the party seeking the modification. *Watts v. Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986). While custody is always modifiable, in order to promote stability and continuity for the children and to discourage repeated litigation of the same issues, our courts require a more rigid standard for custody modification than for initial custody determinations. *Vo v. Vo, supra.*

Joint custody or equally divided custody of minor children is not favored in Arkansas. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). The relevant statute, Ark. Code

Ann. § 9-13-101(b)(1)(A)(ii), was amended in 2003 to specifically permit the court to consider the award of joint custody. However, the mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare is a crucial factor bearing on the propriety of joint custody. *See Hansen v. Hansen*, 11 Ark. App. 104, 666 S.W.2d 726 (1984). When the parties have fallen into such discord that they are unable to cooperate in sharing the physical care of the children, this constitutes a material change in circumstances affecting the children's best interest. *Word v. Remick, supra.* Moreover, our courts have never condoned a parent's promiscuous conduct or lifestyle when conducted in the presence of the child. *Hepp v. Hepp*, 61 Ark. App. 240, 968 S.W.2d 62 (1998).

Applying the proper standard of review to the order on appeal, we affirm. Here, the change in circumstances was that Robin's bad acts were happening in the presence of the child, where they were presumably hidden before the divorce. To her detriment, the judge believed the testimony that Robin had men in the house overnight at least once while the children were present; that marijuana was found in Robin's house by Lynzi; that Robin spoke disparagingly of Lathaire in the children's presence; that Robin was drunk and smoked in front of the asthmatic child; and that while the parties were able to work out the schedule most of the time to give each other one-half of Krysten's time, they were in disagreement now. The judge apparently was persuaded by Lathaire's explanations for not paying child support when he was frustrated, and for his arrest in the children's presence. We must defer to the credibility calls made by the trial judge. Moreover, joint custody should only stand where the parties are very agreeable. *See Word v. Remick, supra.* Given the standard of review, we affirm the change from joint custody of Krysten to Lathaire having full custody.

In contrast to the dissenting judges, we do not see this, after credibility determinations were made, to be a "close case." If we sat as the finders of fact on credibility, we might have also determined this to be a close case. However, de novo review requires that we examine the record as a whole, but it does not allow us to change what testimony was believed true or untrue as found by the trial judge. With the extensive findings of fact, clearly demonstrating that the trial judge believed Lathaire to be a better

moral, stable, and proper parent for Krysten than Robin, we are not left with a definite and firm conviction that a mistake was committed.

Robin's second point on appeal asserts that if the change of custody is affirmed, the trial court committed reversible error in granting her limited visitation with Krysten. We disagree. We review cases such as this de novo and reverse only when the trial court's findings are clearly erroneous. *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003). A finding is clearly erroneous when, despite the existence of evidence supporting it, we have the definite and firm conviction based on the entire evidence that a mistake was committed. *Id.* We are not left with such a definite and firm conviction in this case.

Robin states in her brief that she should be given "the same visitation that Mr. Dansby had for four years." She is in error. The parties had joint custody, and the trial court's order changed this to full custody in Lathaire. Consequently, it was incumbent upon the trial judge to set appropriate visitation for the non-custodial parent, Robin. The order changing custody set visitation as every other weekend, every Wednesday, and "the Standard Visitation schedule concerning holidays and all other general provisions of the Standard Visitation schedule which is attached as Exhibit 'A' in regard to all other visitation." Standard visitation provided alternating holidays and thirty days during the summer. Robin has not demonstrated clear error where she was granted visitation in conformity with the trial judge's typical practice concerning non-custodial parents.

Affirmed.

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

PITTMAN and BAKER, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. The parties to this child-custody case were divorced on September 14, 1999. Pursuant to the divorce decree, the parties were awarded joint custody of their daughter, Krysten, who was born in 1997. The decree further provided that physical custody of Krysten was to alternate between the parties every other week, and that appellee was to pay child support in the amount of $130.00 per week. In September 2003, appellant filed a motion for enforcement of the decree and

contempt seeking a child-support arrearage of $3,700.00. This was the third time that appellant was forced to resort to the court to obtain the support appellee had been ordered to pay for the benefit of his child. Appellee answered with a request for a modification of custody. After a hearing, the trial judge entered an order awarding full custody to appellee. This appeal followed.

Appellant argues that the trial court erred in basing his findings of material change of circumstance and best interest on the fact that appellant, a black woman, has dated only white men since the divorce, thereby exposing the child to what appellee, who is also black, characterized as a harmful "biracial situation." The majority, while conceding that the trial court did base its order on this factor and that this was contrary to the law, does not address the issue, holding that it was not preserved for appeal because appellant did not object below. The majority also opines, in *dicta*, that the error was of no consequence in any event. I disagree, and I dissent.

The majority errs in holding that the issue was not preserved for appeal. First, because appeals in equity cases are reviewed *de novo*, there is no requirement of contemporaneous objections to the findings, conclusions, and decree of the court to obtain review on appeal. *Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000); *Morrow v. Morrow*, 270 Ark. 31, 603 S.W.2d 431 (1980); Ark. R. Civ. P. 46. Indeed, even had the trial judge announced his erroneous application of the law in open court before the parties had left the courtroom, no objection would be required to preserve this issue for appeal. *See Jones v. Abraham, supra; compare Jones v. Abraham*, 67 Ark App. 304, 312, 999 S.W.2d 698, 703 (1999). Second, although it is true as a general rule that a party must object at trial in order to preserve an issue for appeal, an exception arises when the error is made by the trial judge himself at a time when defense counsel has no knowledge of the error and hence no opportunity to object. *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). That is precisely what occurred in the present case. The evidence regarding appellee's views regarding racially-mixed couples and households was first elicited not by the appellee, but rather *by the appellant herself for the purpose of showing that appellee was racially biased* and that this bias was harmful to the child.[1]

[1] There was no occasion for appellant to object to appellee's testimony regarding what he characterized as a "biracial situation." Granted, it was appellee who first testified that he

That this is a proper purpose there can be no doubt. In the recently-decided case of *Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004), this very court, on *de novo* review, cited a parent's lack of tolerance toward the other parent's interracial household as a factor warranting reversal of a trial court's award of custody, so as to place the child in the custody of the parent whose child-rearing philosophy promoted racial tolerance. Appellant simply had no reason to anticipate that the trial judge would turn the law on its head and view the evidence of appellee's bigotry as a factor favorable to appellee until the trial judge's final order demonstrated that he had done so.[2]

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objected to his ex-wife dating white men. However, this testimony was not prompted by questions asked by appellee's own attorney on direct examination, but was instead directly responsive to a question asked by *appellant's* attorney on *cross*-examination. This question was clearly designed to show that appellee was racially bigoted, and appellee's testimony to that effect was incontestably "elicited" by appellant. *See Turner v. State*, 59 Ark. App. 249, 254, 956 S.W.2d 870, 873 (1997).

[2] Oddly, the majority states that the preservation question in this case is "similar to the recently decided *Tipton v. Aaron*." Insofar as the purpose of an objection is to draw the trial judge's attention to an asserted error, it is difficult to imagine more dissimilar circumstances. In the present case, as discussed *supra*, there was no reason for appellant to suppose that evidence of appellee's racial intolerance, elicited by appellant's attorney for the manifestly proper purpose of showing a lack of fitness on appellee's part, would be viewed by the trial judge as a factor favorable to appellee. The error did not become apparent until the proceeding had concluded and the trial judge's error was demonstrated for the first time in his findings of fact. In contrast, the testimony in *Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004), was elicited by the appellee in that case not for the proper purpose of showing that a prospective custodian's bigotry was detrimental to the child, but instead solely and directly for the manifestly improper purpose of demonstrating that a child reared in an interracial family would be harmed by private biases, which is precisely what the United States Supreme Court expressly forbade twenty years ago in *Palmore v. Sidoti*, 466 U.S. 429 (1984). The error was so plain in *Tipton v. Aaron*, *supra*, that the trial judge himself raised the question of the propriety of considering this circumstance, yet the appellant in that case still raised no objection. It is an understatement to say that that is not the situation before us in the present case.

Oddest of all, perhaps, is that the majority strains to discern a parallel between this case and *Tipton v. Aaron* on the issue of preservation, while simultaneously ignoring the striking similarity of the facts with respect to the merits. Confronted with evidence of the father's racial intolerance in *Tipton v. Aaron*, we used that evidence to support the reversal of an award of custody to that father — and did so despite the fact that the issue had, in effect, been expressly waived at trial. In the present case, where there was no reason to object at trial, the majority ignores the question of the father's racial intolerance and states that it is of "no consequence" because "it neither strengthens nor weakens either party's position on the best interest of the minor child." The issue in both cases is identical — whether the father's

There is no question that the trial court erred in considering appellant's dating persons of another race as a factor in awarding custody to appellee. The impact on the child from remaining in a racially-mixed household is not a proper consideration in determinations of child custody. The United States Supreme Court addressed a similar situation in *Palmore v. Sidoti*, 466 U.S. 429 (1984). Chief Justice Burger, writing for the Court, said that:

> It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.
>
> The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held."

Id. at 433 (internal citations omitted).

Nor do I agree with the majority's suggestion that this error was harmless. This was a close case. Although there was evidence that appellant's behavior has not at all times been exemplary, weighing against that evidence is the established and undeniable fact that appellee has three times required appellant to resort to the court to obtain the child support that appellee had been ordered to pay. There was, in addition, appellee's racial intolerance, which the trial court not only failed to weigh against him but instead viewed with approbation. Particularly poignant, to me, is appellee's own testimony that, upon encountering the interracial couple of appellant and her boyfriend in a restaurant, his elder daughter was mortified, while Krysten "being a five-year-old kid knows no

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child-rearing philosophy promotes racial tolerance — and I respectfully submit that it cannot be grounds for changing custody in one case and of no consequence whatsoever in the next.

different." One cannot help, upon reading this, but to reflect that the elder daughter has already learned the painful and divisive lesson of racial bigotry that the child whose custody is here at issue has yet to be taught.

Although the trial judge's findings were generally favorable to appellee and unfavorable to appellant, there is no way to determine, on this record, how much his erroneous view of the law influenced his decision or, indeed, the other findings set out in his order. I do not think that we should presume that the trial court's error is indicative of bias on its part, but neither do I think that we should summarily deny appellant the opportunity to raise that issue should she desire to do so. In similar situations, where the trial court has erred as a matter of law in awarding custody, we have reversed and remanded to allow such further proceedings as might be necessary to determine the question of custody to be conducted in the trial court. *See Walker v. Torres*, 83 Ark. App. 135, 118 S.W.3d 148 (2003). I believe that we should do likewise in the case at bar.

I respectfully dissent.

KAREN R. BAKER, Judge, dissenting. In this case, the trial court ordered a child removed from the custody of its mother, specifically listing racial bias as one reason for the custody determination. That reason alone renders the ordr inherently suspect, and that fact alone demands reversal. To do otherwise not only tolerates, but gives to, racial bias which the law can neither tolerate nor allow. *See Palmore v. Sidoti*, 466 U.S. 429 (1984); *Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004).

Therefore, I dissent.

R.C. ROBERTSON *v.* Raymond LEES

CA 03-317 189 S.W.3d 463

Court of Appeals of Arkansas
Divisions IV and I
Opinion delivered June 30, 2004

Witt Law Firm, P.C., by: *Neva B. Witt*, for appellant.

Walters, Hamby & Verkamp, for appellees.

SAM BIRD, Judge. This is a case about a boundary line dispute. The trial court found that appellant, R.C. Robertson, had failed to prove a boundary by agreement or acquiescence or that he proved ownership of the disputed tract by adverse possession. The trial court also quieted title to a parcel of land in appellee, Raymond Lees. We affirm in part and reverse in part.

R.C. Robertson filed a petition seeking an injunction, alleging that he owned a parcel of land in Scott County, Arkansas, and describing the parcel; that appellee Raymond Lees owned land adjoining the north boundary of Robertson's property; that there had been a fence between Robertson's and Lees's lands that had served as the boundary between the parcels for thirty-eight years; that after conducting a survey, Lees had torn down and removed the fence; and that the court should declare the fence line to be the boundary between the parties. Lees answered, admitting the parties' ownership of their respective parcels of land but denying the other allegations of the petition. Lees also filed a counterclaim, alleging that he had obtained information from Von Robertson, a prior owner of his parcel, about the location of the boundary between Robertson's and Lees's parcels and that he had obtained a survey confirming that the old fence line was not the "true" boundary line between the two parcels. By his counterclaim, Lees also alleged that he was the owner by adverse possession of the parcel of land described in his deed,[1] and Lees sought to quiet title to the property described in his deed in him. Robertson denied the allegations in the counterclaim, specifically denying that Lees had acquired title to any part of Robertson's land by adverse possession.

The Evidence

Robertson's Case in Chief

Robertson testified that, at one time, his grandfather had owned all of the property involved, including the parcels now owned by Robertson and Lees, and that he obtained his land in 1983 under the will of his sister, Lillian "Geda" Robertson (Geda).

[1] The parcel of land described in Lees's deed is also described in Paragraph V of his counterclaim.

On his land is a house, a shed or outbuilding, and a well. Robertson testified that a clothesline and cedar-posted fence that his sister had built in 1971 or 1972 lay to the north of the outbuilding and well, and he said that the clothesline and fence were in place in 1983 when he acquired the land. He stated that he lives with his grandson in Watson, Arkansas, but that he has visited the property every year since he acquired it and that he pays to have the property maintained. Robertson testified that, in addition to the fence along the north boundary, Lees also took down twenty or thirty feet of fence on the west boundary of the property. Robertson testified that, to his knowledge, neither he nor his aunt Von Robertson ever pointed out the boundaries, but that he knew where the boundaries were located. Robertson testified that he had once been told by Reese Herren, a neighbor, that the fence was a foot or two off the actual boundary, but that Reese had later told him that the fence was exactly on the boundary line. Robertson stated that he was not claiming any property other than to the fence line, and he was claiming that the fence was on the boundary line that coincided with the description in his deed. Robertson read into the record the description of his land as it appeared in his deed.

William Kenneth Robertson, Jr. (William), Robertson's grandson, testified that appellant lived part of the time with him in Watson, Arkansas, and part of the time in the house on the disputed land. William also testified that, as a young boy, he remembered that the disputed land had a fence on the north side and that the fence was not new at that time. He also testified that in 1970 the clothesline poles were on the property now owned by his grandfather (Robertson) and that the boundary-line location claimed by Lees, as indicated by a line of steel fenceposts set by Lees, would take in the clothesline. William also testified that Lees had told him that he had had a second survey conducted and that the new line, as established by the second survey, took in most of appellant's shed. William said that his grandfather had told him to remove some of the steel fenceposts placed by Lees.

William stated that Robertson had maintained the land by having someone in the family mow it or by paying someone to mow it, including all of the area within the old fence line. William stated that Robertson was claiming from the old north fence line to the highway. He also stated that, in 1994 or 1995, Lees was paid to mow Robertson's land but denied that Lees has mowed it every year since 1993. William stated that, until this dispute arose, he did

not see any evidence of anyone claiming the land. He also stated that Robertson had stayed at the house alone overnight since acquiring it. William further testified that, when he was in college, he used the house as a get-away, commonly staying there for one or two weeks during the summer. He said he married in 1995 and that he and his wife visited there before and after they married. He stated that he knew Von Robertson but that she never showed him the boundaries and that he never knew of her talking to anyone about the boundaries. He did not recall meeting Pat Richmond, Lees's predecessor in title, until they met at court.

Edna Faye Owens, Robertson's cousin, testified that she lived north and west of Robertson's land and directly across a field from Lees. She testified that Robertson took possession of the land and started coming there occasionally after Geda died. She stated that the west and north sides of the land were fenced when Geda owned it. She recalled the fence and clothesline poles being there in 1977 when her mother passed away, and that the clothesline poles were still in the same place now. Owens stated that she helped Robertson maintain the place, mowing the yard and weed-eating around the house. She said that she always mowed to the fence on the north side. She said that Geda had a burn barrel and that it is still in the same place that it has always been. She said that the fence on the north boundary was an old fence with cedar fenceposts that had been there for thirty years. She also stated that, to her knowledge, everyone in the family considered the cedar-post fence line to be the boundary of Robertson's land. She said that when she mowed, she mowed the entire tract, not just the part that was now in dispute, because at that time it was not in dispute. Owens said that Lees told her in 2002, not 1993 or 1994, that she did not need to mow the disputed property because it belonged to him. She said that she could not say whether Lees mowed the area in dispute because she could not see that area from her house.

Owens further stated that William Robertson and his wife came to the property almost every weekend. She said they would visit with her until bedtime because the property did not have electricity or heat. She stated that Von Robertson was her great-aunt. She said that she may have been present when Lees bought the property but did not recall her Aunt Von showing Lees the boundaries.

Howard King, Robertson's son-in-law, testified that he was acquainted with the disputed property and that Robertson owns it. He stated that the boundary lines were obvious prior to Geda's

death, with a fence on the north line. He stated that some of the posts were iron and some were cedar, and that the fence had been in place since 1972, which is when he first visited Geda. He stated that he visited Geda on a regular basis from 1972 until her death but that he had only been to the property once or twice since 1985. King identified four photographs taken in the early 1980s that showed the fence as it existed when Geda was alive. He said that the clothesline also existed at the time. His wife, Charlene King, corroborated his testimony. She also stated that the clothesline posts shown in the photographs were the same ones that Geda had put up, and that they appeared to be in the same position as they were in the 1980s.

Lees's Case in Chief

Patricia Richmond, Lees's predecessor in title, testified that she owned Lees's parcel from 1991 until she sold it to Lees in 1993. She stated that Von Robertson had told her that the boundary line adjacent to Robertson's land was somewhere between the pump house and the old fence. She stated that she had looked at the land before trial at Lees's request and that it appeared to her that the clothesline was not where it used to be, and that, from looking at the photographs, the clothesline used to be closer to the pump house. Richmond testified that Edna Faye Owens told her that Geda had needed some additional land for a clothesline and that the fence line was not the boundary. She also said that the area between the two parcels was overgrown and that she did not mow down to the fence because that area was overgrown with brush. She stated that she could not recall whether there was a fence in the overgrown area. She also stated that Robertson's property was overgrown because it was not mowed.

Lees's wife, Christine Lees, testified that, when Lees purchased the property, they were told that the boundary ran near the pump house and the shed. She stated that Patricia Richmond and Von Robertson showed her where they understood the line to be. She said that Von Robertson had said that the clothesline was placed where it was for Geda's use, but that the land actually belonged to Lees. She also stated that, when they purchased the land in 1993, Robertson's land was so overgrown that one could not see Robertson's house or tell that it had a porch. She testified that they did not realize that there was a fence until they started clearing brush in 1994. She testified that her husband had obtained a survey in 2001, that the surveyors had placed pins to mark the

boundary, that Lees had put up a post so they could see the boundary, and that the boundary line angled off. She testified that they had maintained parts of the disputed tract because they were worried about a fire spreading to their property. She stated that she believed that the clothesline was originally closer to Robertson's house and that William Robertson moved it when he planted muscadine vines. She denied moving the clothesline. She admitted seeing Edna Owens and Lester Phillips mow the back of the disputed tract but denied seeing William Robertson mowing.

Sandra Jo Ferguson, Robertson's niece, testified that she was aware of the disputed boundary but that she was never present when the boundary was discussed within the family. She was aware that Patricia Richmond owned the property but not aware that Lees had purchased the property in 1993. She also testified that, during her three or four visits per year, Robertson's land was overgrown to the extent that the growth covered the porch. She stated that the property appeared unoccupied, except for one time when she saw a vehicle parked behind the house. Ferguson admitted that the property was better maintained in the last three to five years but that she did not know who was doing the work. She stated that, although she did not know the boundaries, she could generally recall the location of the fence. Ferguson testified that a barbed-wire fence was built as a barrier to keep cattle from the yard. She stated that the cedar fence posts depicted in the photographs resembled the fence posts that she recalled but added that she could not be certain. She stated that Geda Robertson's backyard extended to a fence line but that she was not certain that it was the same fence. She also testified that Geda Robertson had a small yard because she did not want to maintain a large yard. She stated that the fence was the back boundary of Geda's property but that she did not know whether the fence was located on the actual boundary line. She said that she believes that the fence was erected for convenience.

Lees testified that he had a discussion with William Robertson and told him that he was erecting a fence to keep his animals from running loose. He stated that he learned the location of the boundaries by talking to Edna Faye Owens, Von Robertson, and Patricia Richmond. He also said that he walked the boundary with William Robertson and that William agreed with him. He said that he had the line surveyed in 2001, but that it was unnecessary because he put up fence posts on the agreed line. He said that he saw Edna Owens mow the property a few times, including some of

the land claimed by him, and that he asked her not to mow the disputed area. He denied that William Robertson paid him to mow the disputed tract; he said he mowed it because he was afraid of the fire danger.

The trial court denied and dismissed Robertson's petition for an injunction. The trial court found that the evidence was insufficient to establish that Robertson owned the disputed property under theories of adverse possession, boundary by acquiescence, or boundary-line agreement. Specifically, the trial court found that neither Robertson nor his predecessors in title took steps that would put others on notice that he or his predecessors were claiming the land adversely. The trial court also noted that there was little or no testimony as to an agreement that the fence would be the boundary between the parties or as to how the fence was established. The trial court also quieted title in the land described in Lees's counterclaim in Lees. This appeal followed.

Robertson argues four points on appeal: (1) that the trial court erred in not finding that a boundary by acquiescence had been established; (2) that the trial court erred in admitting hearsay testimony concerning the location of the boundary; (3) that the trial court erred in finding that the proof was insufficient to establish Robertson's ownership by adverse possession, and(4) that the trial court erred in quieting title in Lees without the introduction of the survey and without determining where the property lay.

Standard of Review

The standards governing appellate review of an equity matter are well established. Although this court reviews equity cases *de novo* on the record, we do not reverse unless we determine that the trial court's findings of fact were clearly erroneous. *Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996). In reviewing a trial court's findings of fact, we give due deference to the trial judge's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Id.*

Arguments

Point One

Robertson first argues that the trial court erred in not finding that a boundary by acquiescence had been established. The location of a boundary line is a question of fact, and we affirm a

trial court's finding of the location of a boundary line unless the court's finding is clearly erroneous. *Rabjohn v. Ashcraft*, 252 Ark. 565, 480 S.W.2d 138 (1972); *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (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 definite conviction that a mistake was committed. *Hedger Bros. Cement & Materials v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000).

A fence, by acquiescence, may become the accepted boundary even though it is contrary to the surveyed line. *See Summers v. Dietsch,* 41 Ark. App. 52, 849 S.W.2d 3 (1993); *see also Palmer v. Nelson*, 235 Ark. 702, 361 S.W.2d 641 (1962). There are cases in which the supreme court noted that the mere existence of a fence, without evidence of mutual recognition, cannot sustain a finding of such a boundary. *See Warren v. Collier*, 262 Ark. 656, 559 S.W.2d 297 (1978); *Fish v. Bush*, 253 Ark. 27, 484 S.W.2d 525 (1972); *Carney v. Barnes*, 235 Ark. 887, 363 S.W.2d 417 (1962). As the trial court noted, there was very little testimony concerning the building of the fence. While appellant and his witnesses testified that they considered the fence line to be the boundary line, there was no testimony presented that the owners of Lees's land also considered the fence to be the boundary. This court has confirmed the importance of ascertaining the intent of the parties: "It is the agreement and acquiescence, not the fence itself, that controls. The intention of the parties and the significance that they attach to the fence rather than its location or condition, is what is to be considered." *Camp v. Liberatore*, 1 Ark. App. 300, 303, 615 S.W.2d 401, 404 (1981). Instead, Robertson relies on silence from Lees and his predecessors in title. But, Lees was not silent about the matter. He told Edna Faye Owens not to mow the disputed tract. Robertson also relies on hearsay testimony that Reese Herren gave land for the clothesline and built the fence. However, the fact that a landowner puts a fence inside his boundary line does not mean that he is acquiescing in the fence as the boundary, thereby losing title to the strip on the other side. *Carney v. Barnes*, *supra*; *Webb v. Curtis*, 235 Ark. 599, 361 S.W.2d 87 (1962). That occurs only if the neighbor takes possession and holds it for the requisite number of years. *Carney*, *supra*. Here, Herren could have given permission for Geda Robertson to erect a clothesline on his property, which is not the same thing as acquiescing in a fence as a boundary. The evidence presented by Robertson did not reflect an intent on the

part of Lees or his predecessors to recognize the fence as the boundary. Given the deference accorded the trial judge in determining the credibility of the witnesses and the weight to be given their testimony, we affirm on this point.

Point Two

In Robertson's second point, he argues that the trial court erred in admitting, through the testimony of Patricia Richmond, the hearsay statements of Von Robertson concerning the location of the boundary. Robertson objected to the testimony of Richmond, a former owner of the property, about what Von Robertson told her concerning the location of the boundary line. On appeal, we will not reverse a trial court's ruling on the admission of evidence absent an abuse of discretion. *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001). Nor will we reverse a trial court's ruling on evidentiary matters absent a showing of prejudice. *Id.* The trial court recognized that the statements Von Robertson made to Richmond were hearsay but relied on the exception found in Ark. R. Evid. 803(20). We need not decide whether the exception applies because Christine Lees gave essentially the same testimony concerning Von Robertson's statements about the location of the boundary, and Robertson made no objection to that testimony. Therefore, the admission of Richmond's testimony was not prejudicial, nor was it grounds for reversal, because it was cumulative to other evidence in the case. *Luedemann v. Wade*, 323 Ark. 161, 913 S.W.2d 773 (1996); *Shamlin v. Shuffield*, 302 Ark. 164, 787 S.W.2d 687 (1990). We affirm on this point.

Point Three

Robertson contends that the trial court erred in failing to find that he had established title by adverse possession. In order to establish title by adverse possession, Robertson had the burden of proving that he (or his predecessors in title) had been in possession of the property in question continuously for more than seven years and that the possession was visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the true owner. *Anderson v. Holliday*, 65 Ark. App. 165, 986 S.W.2d 116 (1999). Whether possession is adverse to the true owner is a question of fact. *Id.*

> The proof required as to the extent of possession and dominion may vary according to the location and character of the land. It is ordinarily sufficient that the acts of ownership are of such a nature as one would exercise over her own property and would not exercise over that of another, and that the acts amount to such dominion over the land as to which it is reasonably adapted. Whether possession is adverse to the true owner is a question of fact.

Fulkerson v. Van Buren, 60 Ark. App. 257, 259-60, 961 S.W.2d 780, 782 (1998); *see also Walker v. Hubbard*, 31 Ark. App. 43, 787 S.W.2d 251 (1990); *Hicks v. Flanagan*, 30 Ark. App. 53, 782 S.W.2d 587 (1990).

The trial court found that neither Robertson nor his predecessor took steps that would place a third party on notice that they were claiming the land adversely. Robertson testified that, although he has not lived on the land since he acquired it in 1983, he and his family maintained the land or hired someone to do so. The testimony as to Robertson's maintaining the land was disputed, with Lees's witnesses stating that Robertson allowed the land to become overgrown while Lees maintained it. Based upon our review, we cannot say the circuit court's findings are clearly against the preponderance of the evidence. Discrepancies in the evidence are matters involving credibility for the trier of fact to resolve, and we cannot find error in that regard.

Secondly, stronger evidence of adverse possession is required in cases where a family relationship exists than is necessary where no such relationship is present. *Ueltzen v. Roe*, 242 Ark. 17, 411 S.W.2d 894 (1967); *Mitchell v. Hammons*, 31 Ark. App. 180, 792 S.W.2d 333 (1990). The reason for this rule is that, as between parties with family relations, the possession of the land of one by the other is presumptively permissive or amicable, and, to make such a possession adverse, there must be some open assertion of hostile title, other than mere possession, and knowledge thereof brought home to the owner of the land. *Bellamy v. Shryock*, 211 Ark. 116, 199 S.W.2d 580 (1947). The trial court recognized and applied this higher standard of proof when it stated that it did not consider any actions of Lillian "Geda" Robertson as being hostile so as to establish adverse possession because her possession was during a time when the land was owned by heirs of Robertson's grandfather. We affirm on this point.

Point Four

Finally, Robertson contends that the trial court erred in quieting title in Lees without the introduction of the survey or without determining where the boundary line was. Robertson argues that, because appellee did not introduce a survey, there is no proof in the record from which to ascertain whether the line of iron fenceposts placed by Lees does, in fact, correspond with the true boundary line. We agree. From the descriptions in the record of the parties' respective lands, it is clear that there is no overlap. In his counterclaim, Lees alleged that he had obtained a survey that confirmed the location of the true boundary line to be in accordance with information received from Pat Richmond, his immediate predecessor in title. There was also testimony from Lees's wife, Christine, that Lees had obtained a survey, that the surveyors had placed pins to mark the boundary, and that Lees had placed a fence post so they could see the boundary. Lees himself testified that although surveyors had marked the line about a year and a half earlier, it was unnecessary because he and William Robertson had already agreed on the location of the boundary in 1993, and that the fence posts that he (Lees) put up were on the agreed boundary line. Furthermore, William testified that Lees had told him about obtaining a second survey, which resulted in another boundary line, and caused Lees to place a line of metal fenceposts another twenty feet south. There was no testimony linking the line of metal fenceposts placed by Lees with the actual boundary line as established by one or either of Lees's surveys. The trial court recognized this when he found in Paragraph 3 of his order:

> 3. The [appellee] is found to be the owner of the real property set forth in paragraph V of his Counterclaim and title to said tract is quieted and confirmed in [appellee]. *Although there was much testimony about a survey that established the exact location of the line between the party's property, no such survey was introduced into evidence. Therefore, the Court makes no finding as to the location on the ground of the property line between [appellant's] and [appellees's] tracts in relation to any buildings, fences, or other structures.* (Emphasis added.)

Simply because Robertson is not entitled to prevail on his claims of adverse possession or boundary by acquiescence or agreement with regard to the old cedar-posted fence, does not mean that appellee is entitled have title to the disputed land quieted in him, as prayed. *See Thomason v. Abbott*, 217 Ark. 281, 229 S.W.2d 660 (1950). It was appellee's burden of proof in

his quiet title action to establish his allegations as to ownership of the land in question. *Williams v. Campbell*, 254 Ark. 592, 495 S.W.2d 512 (1973). He did not meet this burden. The only evidence as to the location of the "true" boundary consisted of the testimony of Pat Richmond and Christine Lees, both of whom testified that they had relied upon what they had been told by Von Robertson. Their testimony was as follows:

Pat Richmond's Testimony:

> "As far as I understand, the south boundary of my property and the north boundary of the Robertson property was somewhere, you know, this side of the little pump house. ... The fence post with the yellow or orange survey tape in the picture is somewhere near where I would have understood the boundary to be."
>
> ". . . I'm assuming it's the past boundary because she said it was very close to the house, ..."

Christine Lees's Testimony:

> "When we bought the property, I was shown that our line related to this little well house over beside that little shed on this side of the clothesline."
>
> "[Y]our property goes past a clothesline up to the little well house there close to the shed." (quoting Von Robertson)
>
> "The disputed area is from the little well house and angles back over by the little building. This twenty, I think it's twenty feet, back here. Almost from the burn barrel back."

The best that can be said of Lees's proof is that the true boundary line between his and Robertson's land lies somewhere, at some undefined location, south of the old cedar-posted fence line and running at an undefined angle in the vicinity of the pump house. Although the trial court's order quieted title in Lees to the land described in his deed, such action was meaningless in the absence of proof of the location of the south boundary of Lees's land, which the trial court expressly, and correctly we believe, found that it could not determine from the evidence. Because Lees did not meet his burden of proving the location of the disputed boundary, the trial court clearly erred in its finding that any part of the disputed land should be quieted in him. Therefore, we reverse on this point.

Affirmed in part and reversed in part.

PITTMAN, NEAL, and VAUGHT, JJ., agree.

GRIFFEN and CRABTREE, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I would dismiss the appeal in this case for lack of finality because the circuit court's order does not state with sufficient specificity the boundary lines of the property in dispute. *Petrus v. Nature Conservancy*, 330 Ark. 722, 957 S.W.2d 688 (1997) (dismissing appeal for lack of finality where the chancellor's order failed to identify the boundaries of the property in dispute where the parties intended to rely upon a future survey to establish the property boundary). It is well-settled that an order settling a property dispute must describe the boundary line between landowners with sufficient specificity that it may be identified solely by reference to the decree. *Id.*

Here, as in *Petrus, supra*, no survey was introduced. The order here referred only to a legal description contained in Paragraph V of appellee's counter-complaint, which provided the section, township, and range, and included a boundary description with the measurements of angles and specific lengths of the boundaries of the property that was contained in appellant's counter-complaint. However, the evidence does not support that the circuit court intended to adopt this legal description as the parties' boundary, because, as recognized by the majority, the circuit court expressly indicated in Paragraph 3 of its order that it made *no* finding as to the location of the property line in this case. Moreover, even if the legal description in Paragraph V of appellee's counter-complaint is the boundary the circuit court intended to adopt, the legal description itself is not contained in the order, and thus, would be insufficient to establish the boundary because the boundary cannot be identified solely by reference to the order. *Id.* Accordingly, because the order in this case does not identify the boundary line with sufficient specificity, I would dismiss the appeal for lack of finality.

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

Frankie COBBS *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 04-31 189 S.W.3d 487

Court of Appeals of Arkansas
Division II
Opinion delivered June 30, 2004

[redacted]

[redacted]

[redacted]

Linda C. Ward, for appellant.

Gray Allen Turner, for appellee.

SAM BIRD, Judge. Appellant Frankie Cobbs brings this appeal from an order terminating her parental rights to her children, D.C. and Q.C. On February 7, 2002, Arkansas Department of Human Services (ADHS) filed a petition alleging that the children of appellant were dependent/neglected in that they were at a substantial risk of serious harm as the result of appellant's physical abuse of the youngest child, D.C. In addition, the petition alleged that appellant refused to work on a case plan designed to prevent the need for removal of the juveniles and refused to cooperate with the caseworker. The children were adjudicated dependent/neglected, and the court found that the allegations contained in the petition were true and correct and that the juveniles were in need of the services of ADHS. The court also noted that ADHS had opened a protective-services case on the family as a result of the substantiated report of physical abuse of D.C. At that time, the court noted in its adjudication order that ADHS had attempted to offer services to appellant, including parenting classes and home visits, but that appellant had failed to cooperate with ADHS. The court ordered appellant to complete parenting classes, submit to a psychological evaluation, and complete any recommended treatment.

After an April 18th review hearing, the court entered a review order stating that the juveniles continued to be in need of ADHS services and that ADHS had made reasonable efforts to provide services to achieve the case-plan goal. In the order, the court stated, "The mother has made no contact with the Department and the Department is relieved of providing services to the mother until she appears and requests services. The Department shall provide the mother with visitation if she appears and requests it." After another review hearing took place, the court entered a review order finding that the children were still in need of ADHS services and should remain in ADHS custody. The court stated that the case plan for D.C. be permanent alternate custody and the case plan for the oldest child, Q.C., be independence. The court then ordered the mother to obtain and maintain stable, appropriate housing; obtain and maintain income sufficient to support the

juveniles; complete parenting-without-violence classes; and attend family therapy as requested. The mother was held responsible for the cost of the parenting-without-violence classes.

A permanency planning hearing was entered in February 2003. The court found again that the children were in need of ADHS services and that custody had to remain in ADHS. The mother was again ordered to obtain and maintain stable, appropriate housing; obtain and maintain income sufficient to support the herein juveniles; complete parenting-without-violence classes; and attend family therapy as requested. The mother was held responsible for the cost of the parenting-without-violence classes. The goal remained reunification. Another review hearing was held on May 15, 2003[1], at which time the court found that it was in the best interests of the juveniles that the case plan be modified to termination of parental rights and adoption. The court further found that the mother had not made any significant progress on the case plan in that ADHS had had no contact with the mother since February, that appellant had lost her employment and housing, and that appellant had not completed parenting classes or anger-management classes. On June 17, 2003, ADHS filed a petition to terminate parental rights, contending that the juveniles had been adjudicated dependent/neglected and currently resided in the care and custody of ADHS pursuant to court order. Further, the juveniles had resided outside the parental home since March 4, 2002, and despite a meaningful effort on the part of ADHS to rehabilitate the home and correct the conditions that caused the removal, the conditions had not been remedied by appellant.

A hearing was held on the petition to terminate parental rights. Appellant testified that she currently resided at the Sebastian County Adult Detention Center because she was arrested for second-degree battery of her boyfriend. She testified that before being arrested, she had lived for three months in an apartment that was rented in her boyfriend's name. She stated previous addresses, including various shelters where she had lived, but she had not lived in any one of them for more than a few months. She admitted to being charged with interfering with child custody, a charge of which she was acquitted. She testified that she had a job from October 2, 2002, through February 13, 2003, when she quit after

[1] Although the hearing was held on May 15, 2003, the order from that hearing was not filed until June 18, 2003, a day after the petition for termination of parental rights was filed by ADHS.

getting into an argument with her supervisor. She stated that since she quit, she had been supporting herself with food stamps and had no other option but to move to Oklahoma to live with a relative. She admitted that during the time that she was living in Oklahoma, ADHS did not have her address. She also admitted that when she returned to Arkansas, she did not provide ADHS with an address or have contact with ADHS.

She stated that her mother had been raising her children and that her mother died New Year's Day in 2001, when the children began living with appellant. She noted that she was ordered to pay child support to her mother, but had not done so. She stated that ADHS took custody of the children after there was a true finding of physical abuse of the younger child. She stated that the court had ordered her to attend anger-management classes and parenting classes, and to obtain a stable job and stable housing. But she admitted that she had not done so. She also stated that she was not able to meet the needs of her children because she was "locked up." However, she stated that when she is released, she would get a job and a stable place to live. She stated that she had not been able to accomplish the court's orders because she had been going through a lot with her mother's death. But she stated that she was "past that," had joined a church, and was ready. She admitted that she had not had contact with ADHS for long periods of time.

She also admitted that her mother had raised the children and had custody of them before she died, and that she (appellant) had only had custody of the children for four months of their lives. She noted that D.C. was eleven years old and that Q.C. was fifteen years old. During the time that her mother had custody of her children, she visited them twice a month, on birthdays, Christmas, and graduations.

She admitted that she had not completed either the anger-management classes or the parenting classes that were ordered. She stated that the caseworker for her case had not given her a referral or told her where to obtain a psychological exam. She asked the judge not to terminate her parental rights because she stated that when she got out of jail, she would get a full-time job and housing. She stated that it was in her children's best interests for the judge to give her more time to work on her case plan.

Stacy Glass, the caseworker assigned to appellant's case, testified that in order for appellant to achieve reunification, appellant was ordered to attend parenting classes and anger-

management classes, maintain stable housing and employment, obtain a psychological evaluation, and attend family therapy with her children. Glass admitted to not referring appellant for her psychological evaluation because she could not get in contact with her. Glass stated that she did refer appellant to parenting classes and that appellant did not complete those classes. Further, Glass testified that appellant had not maintained stable employment during the course of her case. The only place that Glass knew that appellant had worked since her case was opened was at Atlantis Plastics, and it was only for five months. In addition, Glass testified that appellant had not maintained stable housing.

Glass stated that from March to June 2002, she had no contact with appellant. During that same period appellant did not have contact with her children. When appellant did call in June 2002, she left two numbers, which Glass used in an effort to contact her. Appellant could not be reached at either number. From August 2002 through December 2002, appellant did request visitation with her children. In February 2003, Glass lost contact with appellant and did not see her until the day of the hearing. Glass stated that she had learned that appellant was back in town by reading in the paper that she was in jail. Glass stated that it was her opinion that appellant did not have a relationship with her children. Glass testified that ADHS had offered the following services to appellant: parenting and anger-management classes, visitation with her children upon therapeutic recommendations, and family therapy. She stated that she/ADHS planned on referring appellant for a psychological exam if appellant had maintained contact with her.

Glass stated that reunification did not occur because of appellant's lack of stability and lack of commitment to her children. She recommended terminating her parental rights. She stated that although both children were in therapeutic foster care, she did not feel that the issues the children had to work through were severe enough to make the children unadoptable.

On cross-examination, Glass stated that appellant had completed three of the anger-management classes. She also stated that appellant might have made some visitation appointments with her children but did not visit often because the children's therapist did not recommend visits by their mother. Glass stated that on a few occasions, she would go to appellant's home to take her to visitation, but often she was either not home or too tired to go. Glass stated that appellant had not provided her children with

birthday cards, Christmas gifts, birthday gifts, child support, clothing, food, or anything else during the past year. However, appellant testified that she was not allowed to send the children anything. Appellant also stated that she was unaware that she was supposed to be paying child support and stated that during the last hearing, the court had ordered her not to do so.

At the end of the hearing, the court found that ADHS had shown by clear, cogent, and convincing evidence that it was in the children's best interests that parental rights be terminated. The court found that the children were adoptable and stated that the goal of the case plan should be adoption. It further found that because the children had lived with their grandmother since they were born, appellant had abandoned her rights to the children from the time they were born. In addition, it found that appellant had failed to comply with the case plan in that she had not maintained stable housing or a stable income, she had not completed anger-management classes or parenting classes, she had not participated in family therapy, and she had not visited on a regular basis. The court found that ADHS had provided therapeutic foster care and medical care for the children, had made referrals for appellant for anger-management and parenting classes, had provided visitation arrangements, and had made a referral for family therapy. It found that even though ADHS had provided these services, the mother had not complied. From that order terminating parental rights, appellant brings this appeal.

Our standard of review in termination-of-parental-rights cases is well-settled. In *Johnson v. Arkansas Dep't of Human Servs.*, 78 Ark. App. 112, 119, 82 S.W.3d 183, 187 (2002) the court wrote:

> When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. Parental rights, however, will not be enforced to the detriment or destruction of the health and well-being of the child. The facts warranting termination of parental rights must be proven by clear and convincing evidence, and in reviewing the trial court's evaluation of the evidence, we will not reverse unless the court's finding of clear and convincing evidence is clearly erroneous. Clear and convincing evidence is that degree of proof which will produce in the fact finder a firm conviction regarding the allegation sought

> to be established. In resolving the clearly erroneous questions, we must give due regard to the opportunity of the trial court to judge the credibility of witnesses. Additionally, we have noted that in matters involving the welfare of young children, we will give great weight to the trial judge's personal observations.
>
> An order forever terminating parental rights must be based upon clear and convincing evidence that the termination is in the best interests of the child, taking into consideration the likelihood that the child will be adopted and the potential harm caused by continuing contact with the parent. In addition to determining the best interests of the child, the court must find clear and convincing evidence that the circumstances exist that, according to the statute, justify terminating parental rights. One such set of circumstances that may support the termination of parental rights is that the child has been adjudicated by the court to be dependent-neglected and has continued out of the home for twelve (12) months, and despite a meaningful effort by the department to rehabilitate the home and correct the conditions which caused removal, those conditions have not been remedied by the parent. It is not necessary that the twelve-month period out of home be consecutive. (Citations omitted.)

Arkansas Code Annotated section 9-27-341 (Supp. 2003) states:

> (b)(1)(A) The circuit court may consider a petition to terminate parental rights if the court finds that there is an appropriate permanency placement plan for the juvenile.
>
> . . . .
>
> (3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:
>
> (A) That it is in the best interest of the juvenile, including consideration of the following factors:
>
> (i) The likelihood that the juvenile will be adopted if the termination petition is granted; and
>
> (ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by continuing contact with the parent, parents, or putative parent or parents, and

(B) Of one (1) or more of the following grounds:

(i)(*a*) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.

Appellant argues that based upon the testimony presented at the hearing on the termination of parental rights, she made an effort to complete many of the elements of her case plan. She asserts that for five months, she maintained stable housing and had a stable income. She completed all but two of the parenting classes and half of the anger-management classes. She maintains that she was not allowed to visit her children, but nonetheless inquired about visits and even visited D.C. on one occasion. She maintains that the testimony shows that she made a concerted and successful effort to comply with her case plan during a five-month period even though she was not allowed to visit her children regularly and was suffering from depression following her mother's death.

We do not find that argument convincing. At the time of the hearing, appellant, who was incarcerated, did not have stable housing or a stable job. She had not completed parenting or anger-management classes as ordered. The children had been out of her home since Feb. 7, 2002, and in ADHS custody for more than one year, giving her plenty of time to meet the requirements of the case plan.

For her second point on appeal, she contends that the court erred in finding that ADHS presented clear and convincing evidence that it made reasonable efforts to provide services to reunify the family because ADHS did not refer her for a psychological evaluation. She contends that it is unknown whether she suffers from severe emotional problems or a diagnosable mental illness because her caseworker did not refer her for a psychological evaluation. She states that it is clear from the testimony that ADHS did not make reasonable efforts to determine whether she suffered from a disability that would require special accommodations.

This argument is also not convincing. At one point early on in the case, April 18, 2002, the court found that ADHS was relieved of providing services to appellant until she appeared

and requested services. ADHS continued to try to offer services. She complains that a psychological evaluation was not ordered and that was in error. However, the record is replete with testimony from Glass that had she been able to maintain contact with appellant, Glass was more than willing to make a referral. However, appellant failed to maintain contact with ADHS and ADHS was at a loss as to where to find her. She cannot now complain of the lack of referral when she failed to stay in contact with ADHS so that it could provide services.

For her third point on appeal, she contends that the court erred in granting ADHS's petition to terminate parental rights because the evidence presented was not sufficient to support a finding by clear and convincing evidence that an appropriate permanency plan existed that the children are likely to be adopted. She states that because the children had many emotional problems and were eleven and fifteen years old at the time of the final hearing, they were not likely to be adopted. She points to several letters from certain counseling services that state that Q.C. had mood swings, depression, anxiety, verbal aggression, difficulty with male relationships, and disrespect to authority in a school setting. In addition, she states that a report from Rivendell Behavioral Health Services found D.C. to be bi-polar and to have oppositional defiant behavior. She argues that these documents support her argument that her children could not be adopted. However, these documents are not abstracted. To the contrary, the record contains Glass's testimony that, although the children had issues to work through, not only did she believe that they could be adopted, but she believed that there was a possibility that they could be adopted together.

Although we conclude that the trial court's order terminating Cobbs's parental rights should be affirmed, we decline to do so "summarily" as ADHS urges us to do. In its responsive brief, ADHS argues that this court should summarily affirm because Cobbs failed to abstract the testimony from any hearings other than the termination hearing. ADHS argues that an abstract of all proceedings in parental-termination cases, including those in the underlying dependency-neglect action, should be made a part of the record on appeal because the evidence adduced at those proceedings could be considered by the trial court at the termination hearing, citing *Wade v. Arkansas Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999). ADHS also points to Ark. Code

Ann. § 9-27-341(b)(3)(B)(ix)(d)(2) as authority for the proposition that the appellant was required to include the entire record of all proceedings in the dependency-neglect action that led to the parental-termination case in her record on appeal.

■ We do not agree with ADHS's interpretation of either *Wade*, *supra*, or of § 9-27-341(b)(3)(B)(ix)(d)(2). In *Wade*, an appellant contended that, in her appeal of the termination of her parental rights to her three children, the supreme court should not consider ADHS's supplemental record that contained documents and statements presented to the trial court in hearings relating to the earlier dependency-neglect case involving her children. The supreme court disagreed, noting that it had already decided, in granting ADHS's motion to supplement the record, that the information in the supplemental record was "relevant to the instant appeal in that the proceedings and orders pertaining to the termination of parental rights were in fact a continuation of the original dependency-neglect case." *Wade*, 337 Ark. at 361, 990 S.W.2d at 514. We interpret this language in *Wade* to mean that either party to an appeal from a parental-termination order *may* include in the record on appeal the record of the underlying dependency-neglect case. Nothing in *Wade* suggests that the appellant in an appeal from a parental-termination order is *required* to include, in the designated appeal record, all or any part of the record of the underlying dependency-neglect proceeding.

■ Arkansas Code Annotated section 9-27-341(b)(3)(B)(ix)(d)(2) requires that, in cases where the parent was represented by counsel, "the trial court shall take judicial notice and incorporate by reference into the record all pleadings and testimony in the case incurred before the termination of parental rights hearing." This statute clearly requires that the pleadings and testimony from hearings prior to the termination hearing are to be incorporated by reference into the *trial* record. There is no language in the statute that can be interpreted to mean that those proceedings must also be designated as a part of the appeal record. Such an interpretation of the statute would be inconsistent with Rules 3(e) and 6(b) of the Arkansas Rules of Appellate Procedure — Civil. Under Rule 3(e), an appellant may designate in his or her notice of appeal only "specific portions" of oral testimony or proceedings as a part of the record on appeal. Rule 6(b) provides that an appellant "shall order from the reporter a transcript of such parts of the proceedings as he has designated in the notice of appeal

. . . ." Rule 6(b) clearly permits the appellant in civil cases to determine, at his own risk, what parts of the record in the trial court he considers necessary for the prosecution of his appeal, subject to the right of the appellee to designate additional parts of the record to be included in the appeal record, "if he deems a transcript of other parts of the proceedings to be necessary."

ADHS also argues that Rule 4-2(a)(5) of the Rules of the Supreme Court requires an appellant to bring up such material parts of the trial court record as are necessary to an understanding of all the questions presented on appeal. It appears that ADHS misreads the rule. Rule 4-2(a)(5) merely provides, in part, that an appellant should *abstract* "only such material parts of the testimony of the witnesses and colloquies between the court and counsel and other parties as are necessary to an understanding of all questions presented to the court for decision." Rule 4(a)(5) does not purport to deal in any way with the question of what portions of the trial court record an appellant is required to designate as his appeal record.

Finally, ADHS argues that, although Ark. R. App. P. 6(b) permits it to supplement the appeal record designated by appellant, there was no record in this case for it to supplement. We disagree. In her notice of appeal, appellant designated "the record, proceedings, and evidence from the September 19, 2003 termination hearing to be contained in the record on appeal." From the abstract, it is obvious that the record designated included the testimony and other proceedings at the termination hearing. Under Rule 6(b), ADHS was free, within the time specified, to designate such additional parts of the record as it considered necessary, including the record of previous testimony and proceedings in the dependency-neglect case.

Affirmed.

VAUGHT and CRABTREE, JJ., agree.

Joe STRACK *v.* CAPITAL SERVICES GROUP, INC.

CA 03-916 189 S.W.3d 484

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 30, 2004

[Rehearing denied August 25, 2004.*]

[redacted]

[redacted]

[redacted]

* HART and ROAF, JJ., would grant rehearing.

Rose Law Firm, by: *Tim Boe*, *John D. Coulter*, and *Robyn P. Allmendinger*, for appellant.

Hopkins & Allison, by: *Gregory M. Hopkins*, *William P. Allison*, and *Stewart Headlee*, for appellee.

WENDELL L. GRIFFEN, Judge. Appellant appeals from an order granting appellee's motion for summary judgment. Because the order did not dispose of all of the claims pled in the lawsuit, it is not a final, appealable order, and we therefore dismiss the appeal.

Appellant is the former owner of a five-percent interest in appellee Capital Services Group (CSG). Following his ouster from the company in November 2001, appellant received the first of several quarterly distribution checks, as provided by the company's Members Agreement. Appellant disputed the amount of the check and raised other questions concerning CSG's calculation of its distributable income, but he ultimately offered to settle the total amount he would be owed on quarterly distributions for $40,000, less amounts already received. CSG accepted the settlement, and appellant deposited the settlement check.

Thereafter, appellant informed CSG that he would continue to assert claims against it, prompting CSG to seek a declaratory judgment that it had no further liability to appellant. Appellant answered and counterclaimed that the settlement was tainted by fraud and was not an effective release of his claims. He also sought monetary damages for: 1) insurance fraud, based on an allegation that CSG was participating in an illegal commission-sharing scheme; 2) securities fraud, based on an allegation that, in repurchasing his interest after the ouster, CSG failed to disclose material information; 3) civil conspiracy in connection with the alleged insurance scheme.

CSG filed a motion for summary judgment, arguing that appellant's claims were barred by the settlement. A hearing was held, during which appellant's causes of action for insurance fraud, securities fraud, and civil conspiracy were not discussed. Following the hearing, the trial judge issued a letter ruling, stating that he did

not find "any evidence that [CSG] breached any duty to [appellant] or misrepresented any fact to induce [appellant] to enter into the settlement agreement." The judge further stated that "since there is insufficient evidence to support a claim for fraud or breach of fiduciary duty the settlement agreement is valid and enforceable." The letter ruling did not mention the insurance fraud, securities fraud, or conspiracy counts. In the summary-judgment order entered April 23, 2003, the judge incorporated the letter ruling and found that CSG had "no further liability or obligation to [appellant] and that [appellant] holds no further valid claims against [CSG]." Appellant appeals from that order.

The question of whether an order is final and subject to appeal is a jurisdictional question, which we will raise on our own even if the parties do not. *Epting v. Precision Paint & Glass Co.*, 353 Ark. 84, 110 S.W.3d 747 (2003). When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the trial court may direct entry of a final judgment as to one or more but fewer than all of the claims only upon an express determination, supported by specific factual findings, that there is no just reason for delay, and upon an express direction for the entry of judgment. Ark. R. Civ. P. 54(b)(1) (2004). In the event the court so finds, it shall execute a Rule 54(b) certificate and set forth the factual findings upon which the determination to enter judgment as final is based. *See id.*

In the case at bar, the court's order disposed of appellant's claim that the settlement should be set aside for fraud, but it did not dispose of or otherwise resolve appellant's claims for insurance fraud, securities fraud, and civil conspiracy. Further, the order did not contain a Rule 54(b) certificate designating it as a final order. Therefore, the order is not an appealable order. *See, e.g., Hambay v. Williams*, 335 Ark. 352, 980 S.W.2d 263 (1998); *Capital Life & Accident Co. v. Phelps*, 72 Ark. App. 464, 37 S.W.3d 692 (2001). Although the order contains broad language that CSG has no further liability to appellant and that appellant has no further claims against CSG, when that language is read in the context of the court's letter ruling, which we may consider along with the language of the order, *see Guest v. San Pedro*, 70 Ark. App. 389, 19 S.W.3d 62 (2000), it is clear that the trial court's ruling was limited to the question of whether the settlement was valid and did not address appellant's damage claims for insurance fraud, securities

fraud, and civil conspiracy. We therefore dismiss the appeal without prejudice.

Dismissed.

PITTMAN, NEAL, and BAKER, JJ., agree.

HART and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I would reach the merits of this case because the trial judge's order resolved all of Strack's claims against CSG. The language of the order could not be clearer. It reads:

> Pursuant to the Arkansas Declaratory Judgment Act, codified in Ark. Code Ann. §§ 16-111-101 et. seq, Plaintiff [CSG] is entitled to Declaratory Judgment in its favor and against Defendant Joe I. Strack establishing that *Plaintiff has no further liability or obligation to Defendant Strack and that Strack holds no further valid claims against CSG.*
>
> **ACCORDINGLY, IT IS HEREBY CONSIDERED, ORDERED, ADJUDGED AND DECREED** that Plaintiff Capital Services Group, LLC *has no . . . further liability or obligation to Defendant Joe I. Strack.*
>
> **IT IS FURTHER HEREBY CONSIDERED, ORDERED, ADJUDGED AND DECREED** that Defendant Joe I. Strack *holds no further valid claims against Plaintiff Capital Services Group, LLC.*

(Emphasis added in italics.) Three times, the court either states that CSG has no further liability to Strack or that Strack has no further claims against CSG. The only logical interpretation of that language is that Strack's claims against CSG have been dismissed in their entirety and the issues in the case have been fully resolved, thus leaving us with a final, appealable order.

As a general rule, judgments are construed like any other instrument; the determinative factor is the intention of the court, as gathered from the judgment itself and the record. *See Fox v. Fox*, 68 Ark. App. 281, 7 S.W.3d 339 (1999). Further, when interpreting instruments, our courts have recognized that words used in the instrument are to be taken and understood in their plain and ordinary meaning. *See Phi Kappa Tau Housing Corp. v. Wengert*, 350

Ark. 335, 86 S.W.3d 856 (2002). It is plain to me that the court's intention was to dismiss all of Strack's claims against CSG, which would include the claims for insurance fraud, securities fraud, and civil conspiracy. However, the majority ignores the plain language of the order, disregards the trial court's express intention, and instead holds that the order is not final, simply because it does not mention the claims for insurance fraud, securities fraud, and civil conspiracy. The majority has thus elevated form over substance, a practice that our courts have routinely criticized and refused to countenance. *See Southern Farm Bureau Cas. Ins. Co. v. Brinker*, 350 Ark. 15, 84 S.W.3d 846 (2002); *Glover v. Woodhaven Homes, Inc.*, 346 Ark. 397, 57 S.W.3d 211 (2001); *Tapp v. Fowler*, 291 Ark. 309, 724 S.W.2d 176 (1987).

Because I believe it is quite clear that the trial court intended to and in fact did dismiss all pending claims in the lawsuit, I respectfully dissent from the majority's dismissal of this appeal. I am authorized to state that Judge Hart joins in this dissent.

ARKANSAS DEPARTMENT OF HUMAN SERVICES *v.* Floyd CAMPBELL

CA 03-1162 189 S.W.3d 495

Court of Appeals of Arkansas
Division I
Opinion delivered June 30, 2004

Gray Allen Turner, for appellant.

No response.

WENDELL L. GRIFFEN, Judge. This is a one-brief appeal from an order of the Bradley County Circuit Court that reversed and set aside an order of the Office of Appeals and Hearings (OAH) of the Arkansas Department of Human Services (ADHS) requiring appellee Floyd Campbell to be listed on the Child Maltreatment Central Registry. ADHS appeals, raising procedural questions concerning judicial review in the circuit court under the Administrative Procedures Act (APA). We hold that OAH lacked authority to reopen its earlier determination that appellee should not be listed in the registry and affirm the circuit court's reversal of the OAH order placing appellee's name on the registry.

The facts are largely undisputed. On December 19, 1999, a report was made to the child-abuse hotline regarding alleged physical abuse toward a child by appellee. ADHS made a finding of child maltreatment against appellee and placed appellee's name on the child maltreatment central registry. Appellee requested a hearing before OAH to determine whether his name should remain on the central registry. At the hearing on June 13, 2000, ADHS sought a continuance of the hearing because a criminal investigation against appellee was pending but had not been concluded. The request for a continuance was denied, and ADHS advised the hearing officer that it would not proceed or present evidence but that, if appellee was charged and convicted, it would ask for reconsideration and for appellee's name to be listed in the registry. The hearing officer proceeded to hear evidence presented by appellee and, on July 14, 2000, issued a final order finding that ADHS failed to prove by a preponderance of the evidence that

appellee physically abused the minor child.[1] The hearing officer ordered ADHS to remove appellee's name from the registry.

Appellee was eventually charged and convicted of first-degree domestic battery based on the same conduct.[2] On November 16, 2001, ADHS filed a motion pursuant to Arkansas Rule of Civil Procedure 60 seeking to have OAH reconsider the prior order in light of appellee's having been convicted of domestic battery. Appellee was served with the motion by certificate of service. On January 22, 2002, after appellee failed to respond, the hearing officer entered a substituted order granting the motion for reconsideration and finding that ADHS had met its burden of proving that appellee had abused the minor child.

On February 15, 2003, appellee filed a petition for review in circuit court. The petition alleged that the ADHS decision was based on unlawful procedure, was in violation of statutory provisions, was contrary to law, and was not supported by lawful evidence. The petition contained a certificate of service indicating that a copy was served on the ADHS attorney and on the hearing officer. On March 4, 2002, ADHS responded with a motion to dismiss for insufficiency of process, alleging that the APA, in Ark. Code Ann. § 25-15-212 (2002), requires that service of the petition comply with the Arkansas Rules of Civil Procedure. ADHS specifically argued that Rule 4(d)(7) requires service to be on the director of a state agency, and that appellee failed to perfect service because he served the hearing officer and ADHS attorney instead of the ADHS director. Appellee responded to the motion by asserting that Ark. R. Civ. P. 5 applied, authorizing service on ADHS's attorney. The trial court entered an order on October 10, 2002, indicating that, unless appellee properly served ADHS within thirty days, ADHS's motion to dismiss would be granted. An affidavit of proof of service was filed that same day by appellee's attorney, stating that service on ADHS's director was made on October 2, 2002.

At the hearing before the circuit court, no additional evidence was submitted. The trial court entered an order on June 10, 2003, finding that ADHS's petition for modification of the final order entered in July 2000 was barred by *res judicata* and noting the

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[1] The hearing officer later entered an amended and substituted order on July 25, 2000.

[2] Appellee was fined $10,000. This court affirmed the conviction in *Campbell v. State*, No. CACR02-574 (Ark. App. Mar. 12, 2003).

eighteen-month lapse between the entry of the July 2000 order and the substituted order entered in January 2002. This appeal followed.

ADHS raises three points on appeal: because the circuit court lacked jurisdiction to consider appellee's petition for judicial review, the findings of the administrative law judge (ALJ) should be affirmed; because appellee failed to argue issues of *res judicata* before the ALJ, those issues should not have been considered by the circuit court; and because appellee was convicted by a jury of felony domestic battery against a child, his name should be included on the child maltreatment registry. We do not address ADHS's arguments because we find another issue dispositive of this appeal.

■ On appeal from the circuit court, our review of administrative decisions is directed to the decision of the administrative agency, rather than the decision of the circuit court. *Vallaroutto v. Alcoholic Bev. Control Bd.*, 81 Ark. App. 318, 101 S.W.3d 836 (2003). We review the case only to ascertain whether there is substantial evidence to support the agency's decision or whether the decision runs afoul of one of the other criteria set out in Ark. Code Ann. § 25-15-212(h) (2002). Where the agency's failure to follow its own procedural rules is urged on appeal, the applicable question on review is "whether the [agency's] decision is based upon unlawful procedure." *Stueart v. Arkansas State Police Comm'n*, 329 Ark. 46, 50-51, 945 S.W.2d 377, 379 (1997). "It has become axiomatic that an agency is bound by its own regulations." *Id.* Thus, the decision of an administrative agency may be reversed if the substantial rights of the petitioner have been prejudiced because the administrative findings from which appeal is taken were made upon unlawful procedure. *City of Benton v. Arkansas Soil & Water Conservation Comm'n*, 345 Ark. 249, 45 S.W.3d 805 (2001); *Stueart, supra.*

■ ■ Here, ADHS filed a motion for reconsideration under Ark. R. Civ. P. 60. The Arkansas Supreme Court has held that the rules of civil procedure do not apply to administrative proceedings. *Wright v. Arkansas State Plant Bd.*, 311 Ark. 125, 842 S.W.2d 42 (1992); *Whitlock v. G.P.W. Nursing Home, Inc.*, 283 Ark. 158, 672 S.W.2d 48 (1984). As such, we reverse the OAH decision because there was no authority for OAH to reconsider the case via a Rule 60 motion for reconsideration. Further, Rule 60 itself, assuming *arguendo* that it does apply, provides for a ninety-day

limitation on setting aside judgments unless there is newly discovered evidence that could not be discovered in time to file a motion for a new trial, misprisions of the clerk, or fraud or misrepresentations, among others. *See* Ark. R. Civ. P. 60(c). ADHS does not allege fraud, misrepresentations, or misprisions, so the only possible basis for reconsideration would have been newly discovered evidence. The only "newly discovered" evidence relied upon by ADHS was the fact that appellee was convicted in October 2001. However, that conviction was based upon the same conduct originally presented to OAH during the July 2000 hearing. Therefore, we do not consider this to be newly discovered evidence. This was beyond the ten-day period for filing a motion for a new trial. Finally, Rule 60(c) also has a one-year time limit running from the earlier of the order being filed or the discovery of the new evidence. ADHS filed its motion within one month of appellee's conviction. However, the motion was filed more than one year from the July 2000 order sought to be modified. Therefore, ADHS's motion was untimely, and OAH abused its discretion by acting without authority in reconsidering its earlier order removing appellee from the registry.

In view of the foregoing factors, we hold that the January 22, 2002 substituted order by the hearing officer, which granted ADHS's motion for reconsideration and directed that appellee be listed on the registry was void. *Childress v. McManus*, 282 Ark. 255, 668 S.W.2d 9 (1984); *Mayberry v. Flowers*, 69 Ark. App. 307, 12 S.W.3d 652 (2000); *see also West v. Belin*, 314 Ark. 40, 858 S.W.2d 97 (1993). Thus, the decision of the agency is reversed.

Affirmed.

GLADWIN and BIRD, JJ., agree.

Keith WREN *v.*
DEQUEEN SAND & GRAVEL COMPANY, *et al.*

CA 03-1278 189 S.W.3d 522

Court of Appeals of Arkansas
Division IV
Opinion delivered June 30, 2004

Appellant, *pro se.*

No response.

TERRY CRABTREE, Judge. The appellant, Keith Wren, appeals from a decision of the Arkansas Workers' Compensation Commission which denied his claim to an attorney's lien. Appellant contends on appeal that the Commission's ruling was in error. We agree and reverse and remand.

The facts necessary to an understanding of our decision are straightforward. On May 23, 2001, Kevin Wargo sustained an injury while working for DeQueen Sand & Gravel Company. The employer accepted Wargo's claim as compensable, and he was paid all appropriate benefits until he reached the end of his healing period on August 5, 2002. On February 9, 2002, before his healing period had ended, Wargo engaged the services of appellant to handle his anticipated claim for permanent disability benefits. Wargo and appellant entered into a written agreement setting out appellant's fee.

On May 2, 2002, Wargo phoned appellant's office to say that he was to have a CT scan and that he would call when he "gets released." On May 15, 2002, Wargo again phoned the office, leaving a message that he was about to undergo a functional

evaluation and that he would call when he was released. Then on July 30, 2002, Wargo contacted appellant's office and advised that he was moving and that he wanted to withdraw his claim because he did not want "to fool with it." The next day appellant and Wargo spoke on the phone. Appellant wrote Wargo a letter confirming their conversation that Wargo did not want to take any steps to settle the workers' compensation claim and that he wished appellant to close his file. In actuality, however, on July 29 Wargo had hired attorney Charles Padgham to represent him in the matter, and on that date Padgham filed with the Commission an AR-C form on Wargo's behalf. By letter of August 26, 2002, appellant notified Padgham, the employer's claims representative, and the Commission that he no longer represented Wargo but that he intended to retain a lien pursuant to the fee agreement he had negotiated with Wargo.

Wargo's claim was settled by joint petition, which was approved by the Commission on January 31, 2003. The settlement provided that Wargo was to receive a lump-sum payment of $10,250 and that the employer would be responsible for the payment of any outstanding medical expenses. The Commission approved an agreed-upon attorney's fee in the amount of $1,425.[1]

A hearing was later held on the issue of appellant's entitlement to a lien. In his opinion denying appellant's claim to a lien, the administrative law judge observed that, under Ark. Code Ann. § 11-9-715(a)(1)(B)(ii) (Repl. 2002), fees in workers' compensation cases are allowed only on the amount of benefits controverted and awarded, and he reasoned that appellant was not entitled to assert a lien since Wargo's claim for benefits had not been controverted during the period of appellant's representation. The law judge also concluded that the attorney's fee statute in workers' compensation law took precedence over the attorney-lien statute. When appellant appealed, the Commission affirmed and adopted the law judge's decision.

■ ■ The sole issue before us is whether appellant is entitled to assert an attorney's lien. We hold that he is. A client has

[1] Rule 19 of the Rules of the Arkansas Workers' Compensation Commission provides that, in all joint petitions where the claimant is represented by an attorney, the amount of agreed-upon attorney's fees shall be set out in the petition. The rule further provides that the Commission shall not approve fees that are in excess of the limits set out in Ark. Code Ann. § 11-9-715.

the right to discharge his attorney at any time. *Crockett & Brown v. Courson,* 312 Ark. 363, 849 S.W.2d 938 (1993); *Henry, Walden & Davis v. Goodman,* 294 Ark. 25, 741 S.W.2d 233 (1987). However, with the passage of Act 293 of 1989, the legislature declared in unmistakable terms that the intent of the attorney-lien law is to allow an attorney to obtain a lien for services based on his or her agreement with the client and to provide for compensation in case of settlement or compromise without the consent of the attorney. Ark. Code Ann. § 16-22-301 (Repl. 1999). Under the lien statute, Ark. Code Ann. § 16-22-304 (Supp. 2003), the lien established in favor of the attorney attaches to the proceeds of any settlement, verdict, report, decision, judgment or final order in his client's favor. The statute further provides that the lien cannot be defeated and impaired by any subsequent negotiation or compromise by any parties litigant. Ark. Code Ann. § 16-22-304(a)(2). Notably, the statute specifically states that the lien shall apply to proceedings before the Workers' Compensation Commission. Ark. Code Ann. § 16-22-304(c)(1). The current status of the law is that an attorney is to be compensated based upon the fee agreement when he or she is dismissed without cause. *McDermott v. McDermott,* 336 Ark. 557, 986 S.W.2d 557 (1999). Attorneys who are discharged with cause retain a lien, but the amount of compensation is determined on a quantum-meruit basis. *Id; see also Crockett & Brown v. Courson, supra.*

In the case at bar, the Commission determined that appellant was unable to assert a lien because Wargo's claim for benefits had not been controverted at the time of appellant's representation. Arkansas Code Annotated section 11-9-715(a)(1)(B)(ii) does provide that fees are allowed only on the amount of compensation for indemnity benefits controverted and awarded. However, we find the Commission's reliance on this provision to defeat the lien untenable. In *Seward v. The Bud Avants Co.,* 65 Ark. App. 88, 985 S.W.2d 332 (1999), we observed that fees in workers' compensation cases are not capable of determination until benefits are no longer being paid. Here, appellant was discharged before the litigation had run its course. Mr. Wargo had not reached the end of his healing period; he was being paid all appropriate benefits; and, the question of his entitlement to permanent disability benefits, and how much, was not yet ripe for determination. Ultimately, the Commission concluded that a fee was warranted as shown by its approval of the fee in the joint-petition order. With these considerations in mind, and given the

legislature's clear expression of its intent with regard to the attorney's-lien law, we are not persuaded that the initial lack of controversion forecloses the assertion of a lien.

We reverse and remand for proceedings consistent with this opinion.

Reversed and remanded.

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

Leon B. CRAWFORD *v.*
SINGLE SOURCE TRANSPORTATION;
Fidelity & Casualty Insurance Company

CA 03-1325 189 S.W.3d 507

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered June 30, 2004

Joseph P. Graham, P.A., by: *Joseph P. Graham*, for appellant.

Huckabay, Munson, Rowlett & Moore, P.A., by: *Melissa Ross*, for appellees.

TERRY CRABTREE, Judge. The Workers' Compensation Commission reversed the decision of an Administrative Law Judge and found that the appellant, Leon Crawford, suffered a noncompensable idiopathic injury to his knee on February 13, 2002. On appeal, appellant claims that substantial evidence does not support the Commission's denial of benefits. We reverse and remand.

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). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999). We readily acknowledge that it is the function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *Wal-Mart Stores, Inc. v. Stotts*, 74 Ark. App. 428, 58 S.W.3d 853 (2001).

The appellee, Single Source Transportation, began employing appellant as a cement-truck driver on March 10, 1988. On February 13, 2002, appellant drove a load of cement for appellee to Kickapoo, Louisiana. Upon arriving at the destination, appellant stepped out of his truck, down two steep steps, and onto an oil field. As his foot reached the ground, appellant's knee "gave" or buckled. As a result, appellant fell to the ground and began to feel pain in his knee. Appellant testified that "I opened the door, and there are two steps and then the ground. I grabbed hold of the steering wheel, and I stepped out on the last step and put my left

foot on the ground, and it just gave way with me." At the time of his injury, appellant was almost sixty years old.

After falling, appellant got up and proceeded to engage the truck's air lines to release the cement. In order to accomplish this, appellant held onto the truck while maneuvering the air lines and hose. Appellant finished the process and returned to appellee's plant. Appellant's knee swelled and continued to hurt on his return trip. Ultimately, appellant drove to his home hoping that his knee would recover. The next day, appellant went to work, but at the end of the day with his knee still hurting, appellant notified appellee of his injury. Appellant went home, and appellee sent a company car to transport him to Southern Clinic for medical attention. After his examination at the clinic, appellant was taken off work for three weeks and referred to Dr. Frank Hamlin, an orthopedic physician in Texarkana.

Appellant presented to Dr. Hamlin one week after the fall, and Dr. Hamlin noted in his medical report:

> I first saw [appellant] on 2-20-02 with chief complaint of pain and swelling of his left knee. He had an episode getting out of his truck on 2-13-02, at which time his knee buckled on him. As it did, he did have a twisting, flexion injury to his knee. He said immediately after that he could hardly walk. His knee became swollen almost immediately and it caused him to limp severely. . . He said previous to that, he had been having some soreness over the medial side of his knee when he would repeatedly use his clutch in his truck. He evidently drives a large 18 wheeler. He said he has never had any acute episodes like this before. When I saw him he said his knee was not nearly as swollen as it was initially. When I saw him, he said he was placed on some Mobic by his family physician. We x-rayed him the first day I saw him and he did have some degenerative changes with some medial joint space narrowing. Other than that, the x-rays were not remarkable. . . *MRI was ordered and did show a tear of the posterior horn of the medial meniscus and possible medical collateral ligament strain.*

(Emphasis added.)

On March 14, 2002, Dr. Hamlin admitted appellant to St. Michael Health Care Center for orthroscopic knee surgery and a partial medial meniscectomy. The operative report reflects a preoperative diagnosis of internal derangement of the left knee and possible osteoarthritis of the left knee. The postoperative diagnosis

reported a tear of the posterior horn of the medial meniscus of the left knee and osteoarthritis of the femoral intracondylar notch and of the medial femoral condyle. Following the orthroscopic procedure, appellant underwent injections in his left knee. Dr. Hamlin released appellant to work on May 4, 2002.

At the hearing below, appellant sought temporary-total disability benefits in addition to medical benefits for his specific-incident knee injury. We note that appellant did not claim benefits caused by a gradual-onset injury from repeated use of the clutch on appellee's cement truck. After hearing testimony from appellant and one of appellee's employees, the ALJ found that appellant suffered an unexplained compensable fall and awarded him temporary-total disability benefits as well as medical benefits. The Commission reversed the ALJ and found that appellant suffered a noncompensable idiopathic fall. We agree with appellant's argument that his injury was neither idiopathic or unexplained but rather that he sustained a specific-incident injury.

As the claimant, appellant had the burden of proving his compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(I) (Repl. 2002). A compensable injury is one arising out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(I) (Repl. 2002). Arkansas Code Annotated section 11-9-102(4)(D) provides that a compensable injury must be established by medical evidence supported by objective findings. Objective findings are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16); *Carman v. Haworth, Inc.*, 74 Ark. App. 55, 45 S.W.3d 408 (2001). In order to prove a compensable injury the claimant must prove, among other things, a causal relationship between his employment and the injury. *Wal-Mart Stores, Inc. v. Westbrook*, 77 Ark. App. 167, 72 S.W.3d 889 (2002).

The Commission found that appellant suffered a noncompensable idiopathic injury. We hold that this finding is not supported by substantial evidence. An idiopathic injury is one whose cause is personal in nature, or peculiar to the individual. *See Kuhn v. Majestic Hotel*, 324 Ark. 21, 918 S.W.2d 158 (1996); *Little Rock Convention & Visitors Bur. v. Pack*, 60 Ark. App. 82, 959 S.W.2d 415 (1997); *Moore v. Darling Store Fixtures*, 22 Ark. App. 21, 732 S.W.2d 496 (1987). Injuries sustained due to an unexplained cause are different from injuries where the cause is idiopathic. *ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d

212 (1998). Where a claimant suffers an unexplained injury at work, it is generally compensable. *Little Rock Convention & Visitors Bur., supra.* Because an idiopathic injury is not related to employment, it is generally not compensable unless conditions related to the employment contribute to the risk. *Id.* Employment conditions can contribute to the risk or aggravate the injury by, for example, placing the employee in a position which increases the dangerous effect of a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle. *Id.*

Here, we believe that appellant's employment conditions contributed to his injury and thus cannot consider it to be a noncompensable idiopathic injury. In the course of his employment, appellant drove appellee's cement truck to Louisiana. In order for appellant to enter or exit the driver's compartment of the truck, he had to negotiate two steep steps. Vicky Dangerfield, who is employed by appellee in its accounting department, testified that the "bottom step is a pretty good distance off the ground. It is very hard for me to get into the truck. I went on one trip, and I required assistance." At the time of the incident, appellant attempted to exit the truck by descending the steps to an oil field. As appellant made his final stride to the ground below, his knee "gave," and as a result, he twisted it and suffered an injury.

We cannot say that the injury appellant suffered was simply personal in nature as it was caused while he attempted to exit his employer's vehicle from an elevated position. As a result, appellant's employment conditions contributed to his accident. Furthermore, we cannot say that appellant's injury was unexplainable as his testimony fully informs us as to the circumstances surrounding his fall.

■ We reverse the decision of the Commission and remand for it to determine the extent of the injury suffered by appellant as a result of his fall, any disability resulting therefrom, and the amount of compensation to which he is entitled.

Reversed and remanded.

HART, GRIFFEN, and ROAF, JJ., agree.

VAUGHT, J., concurs.

BIRD, J., dissents.

LARRY D. VAUGHT, Judge, concurring. I concur in the decision to reverse and remand this case, but write sepa-

rately because I believe that the Commission correctly found that the injury was idiopathic in nature. However, I believe the Commission erroneously concluded that appellant's work did not contribute to a risk of fall or increase the effect of the fall.

The injury was not unexplained because the appellant's testimony and the medical evidence indicated that he suffered from osteoarthritis and the tear of the posterior horn of the medial meniscus was a "large degenerative tear." Therefore, there is substantial evidence that the injury was personal to the appellant and idiopathic. However, in *ERC Contractor Yard & Sales v. Robertson,* 335 Ark. 63, 977 S.W.2d 212 (1998), the supreme court held that a claimant who suffered an idiopathic fall was nonetheless entitled to compensation where the employment contributed to the injury by placing the employee in a position that increased the dangerous effect of the fall. In ERC the claimant was on scaffolding twelve to fifteen feet above the ground; in the case at bar the appellant was descending from a truck step that was described as "pretty high" and required a female employee to have assistance when getting out of the vehicle.

While the increase in dangerous effect is not as pronounced in this case as in ERC, the difference is only of degree and not of substance. I would hold that the Commission's conclusion that there is no credible evidence that the appellant's work either contributed to the risk of fall or increased the effect of the fall is not supported by substantial evidence.

SAM BIRD, Judge, dissenting. The majority recites the well-settled standards of review for workers' compensation cases, but its decision in the present case ignores those standards. I do not see how we can remand this case without simply ignoring the Commission's credibility determinations and holding that no reasonable mind could reach the Commission's conclusions.

When appellant reached his destination at a Louisiana oil field pad, he opened the door of the truck, he took two steps down, he put his left foot on the ground, and his knee gave way. He testified that the last step was "fairly high" off the ground and that the ground upon which he was stepping was very unlevel. He said that he did not know if he stepped out onto anything on the ground, that he did not hit his knee on anything or step on anything, did not feel a pop, and that he did not twist his knee. He acknowledged that he filled out a report (Form AR-N) stating that

when he climbed down and his foot touched the ground, his knee gave in, causing pain and swelling.

Appellant testified that before February 13 he had been having trouble with his knee; he had been using over-the-counter medicines for pain and liniment when his knee swelled. He said that he had been having trouble with the clutch on his truck that he had been driving for five or six years, and that the clutch kept his knee irritated.

Vicky Daingerfield, an employee for Single Source who handled the company's payroll, billing, and workers' compensation claims, testified that when Crawford reported his injury, he said that he climbed out of his truck and that his knee gave out when his left foot hit the ground. Daingerfield said that Crawford's report did not mention that his knee hit anything, did not mention that he tripped, and did not mention that he twisted or popped his knee.

Daingerfield testified that she was familiar with the looks of the cement trucks and that their bottom step is a pretty good distance off the ground. She said that she went on one trip and that it was very hard for her to get into the truck, and that she required assistance.

Appellant apparently abandons any assertion of a relationship between his injury and the difficult clutch in an attempt to bring his claim within *ERC Contr. Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998). That leaves only the question of whether appellant's injury arose out of his employment or whether the injury was idiopathic. In reversing the ALJ's finding that the claim was compensable, the Commission found that appellant's injury was idiopathic, noting:

> (1) That the evidence was undisputed that appellant's knee simply gave way when he stepped onto the ground;
>
> (2) That there was inconsistency between appellant's "somewhat vague" hearing testimony about an uneven grade where he stepped out on the ground, and the lack of a contemporaneous report that any condition on the ground caused his knee to give way.
>
> (3) That appellant testified that he had experienced pain and swelling in the knee prior to the incident in question;
>
> (4) That medical reports indicated that appellant had significant osteoarthritis in his knee;

(5) That Dr. Hamlin's surgical report indicated that the tear of the posterior horn of the medial meniscus was a "large *degenerative* tear";

(6) That there was a "lack of any credible evidence indicating that the claimant's job duties caused or contributed to his fall when his knee gave way."

The Commission concluded:

(1) Absent any persuasive evidence of some affirmative employment contribution to offset the prima facie showing of a personal origin in the claimant's knee giving way, the preponderance of the evidence establishes that the claimant experienced an idiopathic fall, and not an unexplained or work-related fall.

(2) Because of insufficient credible evidence to establish that appellant's work either contributed to a risk of fall or increased the effect of the fall, the record fails to establish that appellee is responsible for appellant's idiopathic fall.

Viewing the evidence in the light most favorable to the Commission, I do not see how we can say that there is no substantial evidence to support the Commission's conclusion. The Commission found appellant's testimony not to be credible; therefore, we are required to accept the Commission's conclusion that claimant's injury had nothing to do with the condition of the ground where he stepped out of his truck. That leaves only the question of whether appellant experienced an "unexplained" or an idiopathic injury. The Commission found that the explanation for the injury was that appellant had a pre-existing problem with his knee, and that his knee just gave way when he stepped on the ground. Therefore, I believe that the Commission's conclusion displays a substantial basis for the denial of this claim.

Unlike ERC, *supra*, where the claimant fell some twelve or fifteen feet, here there is no evidence of how high the last step on appellant's truck was from the ground. We only know that the steps on Single Sources' cement trucks are "a pretty good distance" from the ground and are high enough that a female employee once needed assistance in getting into one of them. We do not know the meaning of "a pretty good distance" to the female employee, and we do not know whether the truck she needed assistance getting into was the truck from which Garrett was exiting when his knee gave way. Unless we are going to say

that the unknown height of the last step on all Single Source's cement trucks is unreasonably dangerous as a matter of law, I do not see how we can reverse the Commission in this case.

Furthermore, the question before us is not whether the evidence would have supported findings contrary to those of the Workers' Compensation Commission; rather, the decision of the Commission must be affirmed if reasonable minds might have reached the same conclusion. *Caffey v. Sanyo Mf'g Corp.*, 85 Ark. App. 342, 154 S.W.3d 274 (2004). The majority, stating its own belief that employment conditions contributed to appellant's injury, points to no evidence supporting its narration that appellant had to negotiate two "steep" steps to descend "to an oil field." Nor does evidence recited by the majority support its assertion that appellant's testimony "fully informs us as to the circumstances surrounding his fall." In my view, the majority in this case, acting as fact finder and presenting a version of events unsupported by the evidence, ignores our role as the reviewing court.

I respectfully dissent.

Michael CAMPEA *v.* STATE of Arkansas

CA CR 03-1033 189 S.W.3d 459

Court of Appeals of Arkansas
Division III and IV
Opinion delivered June 30, 2004

William R. Simpson, Jr., Public Defender, *Lance Sullenberger*, Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender.

Mike Beebe, Att'y Gen., by: *David R. Raupp*, Senior Asst. Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Michael Campea appeals his sentences, as an habitual offender, for breaking and entering and attempted theft of property convictions. For reversal, Campea argues that the trial court imposed an illegal sentence. We find that the trial court did not impose an illegal sentence, and because Campea failed to object during sentencing, his arguments are thus not preserved for review.

Campea pled guilty to breaking and entering, a Class D felony, and attempted theft of property with a value of $2,500, a Class C felony. Campea was also an habitual offender with more

than one, but less than four prior felonies. The Pulaski County Circuit Court accepted his plea, and a jury was impaneled to hear evidence for sentencing. Campea admitted that he had committed the new offenses while on parole. After hearing the evidence, the jury sentenced Campea as an habitual offender with two prior convictions to 12 years' imprisonment for the breaking and entering offense, and to 20 years' imprisonment for the attempted theft of property offense. The trial judge ran these sentences concurrently. The judge also ran the two sentences consecutive to the twenty-year sentence Campea received for the parole violation, stating that by statute the new sentences had to be run consecutive to the parole violation statute. Campea did not object to these sentences in the trial court.

Campea asserts on appeal that the trial court imposed an illegal sentence when it found that, as a matter of statute, it must run his sentences for the new convictions consecutive to the sentence for the parole violation. It is well settled that a challenge to an illegal sentence may be raised for the first time on appeal. *Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992). Further, the issue of an illegal sentence is an issue of subject matter jurisdiction, which this court can raise *sua sponte*. *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003).

> A sentence is void or illegal when the trial court lacks the authority to impose it. Sentencing in Arkansas is entirely a matter of statute . . . We have consistently held that sentencing shall not be other than in accordance with the statute in effect at the time of the commission of a crime. Where the law does not authorize the particular sentence pronounced by the trial court, that sentence is unauthorized and illegal, and the case must be reversed and remanded.

State v. Fountain, 350 Ark. 437, 440, 88 S.W.3d 411, 413 (2002) (citations omitted).

Arkansas Code Annotated section 16-93-107(e)(1) (1987) provides in pertinent part:

> When a convicted felon, while on parole, is convicted of another felony, the felon shall be committed to the Department of Correction to serve the remainder of his original sentence, including any portion suspended, with credit for good-time allowances. Upon

> conviction for the subsequent felony, the court *shall require the sentences for the subsequent felony to be served consecutively with the sentence for the previous felony.*

(Emphasis added.) Section 16-93-607 defines "felonies" as "those crimes classified as Class Y, Class A, or Class B by the laws of this state." Here, Ark. Code Ann. § 16-93-607 did not authorize the trial court to run Campea's sentences consecutively because he was not subsequently convicted of a Class Y, Class A, or Class B felony. Instead Campea was convicted of a Class C and D felony. Therefore, section 16-93-607 was inapplicable in this case.

Campea also argues that pursuant to Ark. Code Ann. § 5-4-403, the trial court had discretion to run the sentences consecutively or concurrently. Arkansas Code Annotated § 5-4-403(b) states in pertinent part:

> When a sentence of imprisonment is imposed on a defendant who has previously been sentenced to imprisonment, whether by a court of this state, a court of another state, or a federal court, the subsequent sentence *shall run concurrently with any undischarged portion of the previous sentence,* unless, upon recommendation of the jury or the court's own motion, the court imposing the subsequent sentence orders it to run consecutively with the previous sentence.

(Emphasis added.)

While section 5-4-403 mandates that subsequent sentences be served concurrently, it permits the court on its own motion to run the sentences consecutively. Ark. Code Ann. § 5-4-403(b). Therefore, because section 5-4-403(b) authorizes the trial court to impose a consecutive sentence, Campea's sentence is not illegal. To the extent that Campea argues that his sentence is improper because the trial judge failed to exercise his discretion under Ark. Code Ann. § 5-4-403(b), the failure to exercise discretion in this regard does not render the sentence illegal. Thus, this argument is not preserved for review because it was not raised to the trial court. *Mixon v. State*, 330 Ark. 171, 954 S.W.2d 214 (1997).

Finally, Campea argues that there is a conflict between sections 5-4-403 and 16-93-607 that deserves resolution. Campea did not object to his sentence below and any argument regarding his sentence, other than an illegal-sentence argument, *Bangs v.*

State, 310 Ark. 235, 835 S.W.2d 294 (1992), is not preserved for appellate review. Accordingly, his sentence is affirmed.

Affirmed.

PITTMAN, HART, NEAL, and BAKER, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I would hold that appellant was sentenced illegally because he was sentenced pursuant to a statute that in no way authorized the punishment imposed by the trial judge. Thus, I would hold that appellant's illegal-sentence argument was preserved for appeal and would remand for resentencing under the correct statutory authority.

An illegal sentence is not only one that is illegal on its face, but it is also illegal if the circuit court lacked statutory authority to impose it. *Mayes v. State*, 351 Ark. 26, 89 S.W.3d 926 (2002); *Blanks v. State*, 300 Ark. 398, 779 S.W.2d 168 (1989); *Brown v. State*, 82 Ark. App. 61, 110 S.W.3d 293 (2003). The trial judge here unquestionably had no authority to sentence appellant under Arkansas Code Annotated § 16-93-607 (1987) because that statute expressly applies *only* to Class Y, A, or B felonies, but appellant was convicted only of Class C and D felonies.

The statute under which appellant should have been sentenced, Arkansas Code Annotated § 5-4-403(b) (Supp. 2003), authorized the trial judge to exercise his discretion in determining whether appellant's sentences were to run consecutively or concurrently to appellant's sentence for a parole violation. However, because appellant committed the offenses while on parole, the trial judge erroneously believed that under Arkansas Code Annotated § 16-93-607, he was required to run appellant's sentences consecutively to appellant's sentence for the parole violation. The trial judge stated from the bench: "I did make an entry of the fact that this, by statute, has to be consecutive to the parole violation." Based upon this misunderstanding, the trial judge sentenced appellant pursuant to the wrong statute. The majority apparently recognizes that the trial court was without authority to act under § 16-93-607, but glosses over the trial court's error by stating that § 16-93-607 was "inapplicable in this case."

The majority then holds that because the appellant's sentence was otherwise authorized under § 5-4-403, it was not illegal. However, this is not a case in which a defendant merely received

the same sentence that he could have otherwise received under another statute. The trial judge's initial error here is compounded because, in relying upon the wrong statute, he also failed to exercise discretion in sentencing. *See, e.g., Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980) (reversing and remanding where the trial judge did not exercise his discretion to run sentences concurrently); *see also Wing v. State,* 14 Ark. App. 190, 686 S.W.2d 452 (1985). We have no way to know whether the trial judge would have imposed a concurrent sentence or a consecutive sentence if he had correctly sentenced appellant pursuant to § 5-4-403, but we do know that the judge did not realize that he had such discretion and, therefore, failed to exercise *any* discretion. If, upon remand, the trial judge were to order appellant to serve the same sentence under the correct statute, at least he will have properly exercised his discretion and appellant will serve the sentence for the right reason.

I respectfully dissent.

Rolinda KIGHT *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 03-1273 189 S.W.3d 498

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 30, 2004

[Rehearing denied August 25, 2004.*]

* PITTMAN and GRIFFEN, JJ., would grant rehearing.

Atkinson Law Firm, by: *Rita B. Atkinson*, for appellant.

Gray Allen Turner, for appellee.

Jenifer Hill Kendrick, Attorney Ad Litem.

ANDREE LAYTON ROAF, Judge. Appellant Rolinda Kight appeals from the Faulkner County Circuit Court's order terminating her parental rights to her two minor children, A.W. and L.M. For reversal, Kight argues that the trial court erred in terminating her parental rights because she had corrected the reasons causing removal of her children. We agree, and reverse and remand.

DHS became involved with Kight after receiving information from a caller to its hotline that Kight could not supervise A.W., her six-month-old son, because she was getting high on crack and marijuana. This report came in September 2001 and DHS began its investigation, which revealed that Kight tested positive for cocaine and marijuana. A.W. was not removed from Kight's custody at that time; instead, DHS developed a "safety plan" whereby Kight was to undergo drug treatment and submit to random drug tests. Kight was encouraged to participate in parenting classes and instructed to follow a case plan. On May 30, 2002, DHS filed a dependency neglect petition alleging that A.W. was neglected and that it was in his best interest to be removed from the home. The trial court granted a 72-hour hold on A.W. on July

8, 2002, "due to [Kight] testing positive for cocaine and THC," and on July 16, 2002, the court entered an order adjudicating A.W. dependent/neglected and removing him from the home with the goal being reunification with his mother. During the pendency of A.W.'s case, DHS discovered that Kight was pregnant with another child.

Kight was admitted to the Freedom House drug treatment center on July 12, 2002. Kight completed a thirty-day treatment program at the Freedom House and was released on August 12, 2002. The trial court held a review hearing on August 13, 2002. At the hearing, Kight took a drug test, and the result was negative. She was ordered to find and maintain stable employment and housing. Kight subsequently found housing in the Conway Housing Authority, but lost her job due to the dependency/neglected status of A.W. Kight's August 28 and September 17 drug test results were also negative.

On January 2, 2003, Kight gave birth to her daughter L.M. Both Kight and L.M. tested positive for cocaine at that time. L.M. could not be bottle-fed for five days, but other than that proved to be a healthy baby. DHS filed a petition for emergency custody of L.M., and the court entered its emergency order on January 10, 2003. On January 14, 2003, L.M. was adjudicated dependent/neglected, with the goal being reunification with her mother. Kight was ordered to undergo long-term residential drug treatment and submit to random drug tests. The court ordered visitation to take place at the drug treatment facility. Kight entered Chance Sobriety residential drug treatment. CASA recommended a sixty to ninety day treatment, however, Kight underwent treatment for six months.

At the March 18, 2003 review hearing, Ben Perkins testified that since arriving at Chance, Kight had not tested positive for drugs and had maintained stable employment. Kight had been cooperative and as a result received weekend passes. There was one incident where Kight "fraternized" with a male patient, but after being told that the conduct was impermissible, Kight stopped. The court stated that Kight's supervised vitiations with her children could be increased if all parties came to an agreement. The court expressed concern about Kight's plans to marry Raymond Morgan, L.M.'s father, due to his failure to complete drug counseling, his continued drug use, and criminal background. Kight testified that she and Morgan had intended to marry, but that the plans were uncertain due to Morgan's "situation." The court

stated that unless Morgan stopped using drugs he would not have anything to do with the children. DHS prepared its petition to terminate Kight's parental rights on the same day, and it was filed April 24, 2003.

At the July 15, 2003 permanency planning/termination hearing, Perkins again testified. He stated that Kight had successfully completed the six-month program; that he was not recommending any more treatment; and that Kight had been given increased responsibilities due to her success in the program, for example conducting drug screens, sitting at the front desk, and answering the phones. Kight passed all drug tests while at Chance. Perkins was questioned about Kight's continued relationship with Morgan, and he stated that Chance keeps close tabs on the patients and from what he knew Kight was not initiating contact with Morgan. Perkins opined that Kight's contact with Morgan had not affected her responsibilities around the house and also stated that if she used the tools that she had learned in treatment, there was no reason she could not succeed.

The CASA volunteer, Jennifer Jones, testified and recommended termination of Kight's parental rights, although she was only assigned to the case in January and had personally visited Kight one time. Jones did state that Kight interacted well with her children during the one visit she attended. Jones said, "It was very difficult to make my recommendation because I see her making progress, but there's those couple of things, the visitation and the men that concern me." Apparently, Kight missed seven visits with her children; four were her fault and the other three were not. Jones admitted that she only had a few telephone conversations with Kight.

The children's foster mother, Tina Hefter, testified that she had been present during all visitations, but had not observed any improvement. She commented on the fact that during visits with the children, Morgan would sometime show up and Kight would sit on Morgan's lap during the entire visit. Hefter said that during one visit, Morgan told Kight that she would feel better if she smoked some "weed." Hefter testified that she was interested in adopting both children.

Laura Rogers, Kight's DHS case worker, testified that initially Kight was not cooperative, but that after A.W. was taken into custody Kight "did very well," citing Kight's enrollment in the Freedom House drug center and her efforts at obtaining housing. Rogers stated that she was prepared to send A.W. home, but for

Kight's positive drug test at the January hearing. Rogers stated that Kight had stopped smoking around A.W., but thought that she smoked around him later because when she picked A.W. up from visits he smelled of smoke. Rogers admitted that Kight had completed part of the case plan by entering a rehabilitation facility and finding housing, and further admitted that Kight lost her stable housing because she enrolled at Chance and was unable to find work because she was so far along in her pregnancy. Rogers also admitted that A.W. became upset during visits with his mom because he was confused, and although he had some medical problems, they were problems common to all children. Finally, she stated that before A.W. was taken, "he was stable when he was at home with his mother. She was his primary caregiver. She was providing for [A.W.] and she was working." Despite this testimony, Rogers stated that she did not think Kight should have her children back.

Kight testified that she wanted her children back. She stated that she missed the four visits with her children because she overslept, explaining that she got little sleep because in addition to working forty hours per week, she also works at the Chance Sobriety house. She had checked on an apartment at Millwood Landing, an income based apartment complex for permanent housing, but stated that residents must have their children live with them. Kight had been drug free before she enrolled in Chance and has continued to be drug free. Kight denied wanting to maintain a relationship with Morgan, stating that she quit taking her weekend passes because she could not afford a hotel and she did not want to stay at Morgan's house. Kight also denied smoking around A.W. and stated that none of the doctors instructed her to stop smoking. She testified that when A.W. was taken from her she became depressed and the one positive drug test was merely a relapse; that she had been clean for seven months prior to that; that she was depressed without her child; and that she had not intended to get high.

From the bench, the court ruled that Kight's parental rights should be terminated. The trial judge commented that Kight's commitment to breaking her "ties" with her past was shallow. She also stated that but for federal law mandating a permanency plan within one year, "I could give mama another six months or another year." The court opined that it would love to say "let's wait another six months and see if you can break that tie, but I'm just not sure that you understand . . . along with the fact that we've

had this case already in this court for 18 months on one child and a year on the other, I cannot take that chance." The judge continued,

> I don't want to close until I say this: Ma'am, what you have done about going into rehab and staying there for six months has probably saved your life. I cannot commend you enough for that. That decision that I've made here today is certainly appealable and you talk to Mrs. Atkinson about that and she will explain that to you. The Department has asked for the right to put these children up for adoption and I have given them that. But, if there is an appeal filed, none of that will happen until after the Supreme Court looks at my decision and looks at the whole case and makes a decision.

The written order states that Kight's parental rights to A.W. were terminated due to the fact that the conditions causing removal have not been remedied and A.W. had been out of the home for more than twelve months. As to L.M., the order states that parental rights are being terminated due to little likelihood that reunification will result and that termination is in the child's best interest.

■■ This court reviews termination of parental rights cases *de novo*. *Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W. 3d 286 (2001). Grounds for termination of parental rights must be proven by clear and convincing evidence. *M.T. v. Arkansas Dep't of Human Servs.*, 58 Ark. App. 302, 305, 952 S.W.2d 177, 179 (1997). When the burden of proving a disputed fact is by "clear and convincing evidence," the question on appeal is whether the trial court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses. *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. *Id.* Termination of parental rights is an extreme remedy and in derogation of the natural rights of parents, but parental rights will not be enforced to the detriment or destruction of the health and well being of the child. *M.T.*, *supra.*

We are left with a firm conviction that a mistake has been made. Beginning with A.W., the record shows that he was removed from the home due to Kight's drug use. The order adjudicating him dependent/neglected ordered Kight to enter

drug treatment and submit to random drug testing. Kight followed the court's directive and enrolled in the Freedom House. Her drug tests were negative from July 2002 through December 2002, with one positive test in January 2003. Following this test, Kight enrolled in Chance Sobriety. While CASA originally recommended a ninety-day stay, Kight actually completed six months of residential drug counseling. Perkins's testimony regarding Kight's improvement is persuasive, particularly his testimony that she has been drug free throughout the entire program, even though she was given unsupervised weekend passes; that she has been given responsibilities in the house, including overseeing drug testing of other patients; and his belief that Kight will be successful once she reenters society.

Likewise, there was testimony that A.W. was stable with his mother and that she was his primary caregiver. In fact, Rogers stated that A.W. was doing well in Kight's care, although she was abusing drugs. Moreover, when Rogers first became involved in this case, she did not remove A.W. from the home, despite knowing that Kight had tested positive for drugs. Thus, the reason for A.W.'s removal was not that Kight was an unfit parent or unable to care for her child, but that she was abusing drugs, which she has corrected. Rogers stated that although uncooperative at first, once A.W. was removed from the home, Kight became serious about getting A.W. back, was doing well, had housing, and that she [Rogers] was prepared to return A.W. to the home. A.W. would have been in his mother's care but for a one-time relapse in January. Notwithstanding this one time relapse, Kight has maintained full time employment while at Chance and has been clean and sober for over six months. This is exactly what DHS asked her to do. DHS has not demonstrated by clear and convincing evidence that terminating Kight's parental rights to A.W. was in his best interest.

The fact that a mistake has been made in this case is also evident by the trial court's remarks at the close of the case. First, the trial judge was confused about how long the court had actually been involved in this case. The trial judge mistakenly believed that A.W. had been removed from the home for over eighteen months. The trial court also stated that L.M. had been removed from the home for one year, when she was just removed in January 2003 and was only seven months old at the time of the termination hearing. We cannot ignore the fact that the trial court's decision

was partially motivated by a false belief that A.W. had been removed from the home for almost two years, and that L.M. had been out of the home for one year.

The trial judge was obviously convinced that Kight had made significant progress as indicated by her comments at the conclusion of the trial. It appears, however, that the trial court's decision was made, in part, on a speculative belief that Kight would be involved with another man who abused drugs. This belief is entirely speculative and does not meet that clear and convincing standard of proof. Further, Perkins testified that, even though Morgan had visited Kight at Chance, her involvement with him had not interfered with her responsibilities at the house. Thus, despite Morgan's continued contact with Kight, she was able to remain focused on her goal of sobriety. The evidence also shows that Kight was given weekend passes, some of which were spent at Morgan's home. However, she was able to pass every drug test administered to her upon her return to Chance, including those weekends she spent in Morgan's company. These facts demonstrate that Kight was committed to remaining clean and sober, and that she would be able to maintain her sobriety if her children were returned to her custody.

As to L.M., we are likewise left with a firm conviction that a mistake has been made. L.M. was never taken home, and the sole reason for her removal was due to Kight's one time drug relapse. This court does not condone Kight's drug use, especially while pregnant, but we note that L.M. was described as a healthy baby and has suffered no major medical complications. This court has also held that a one-time lapse does not support a termination of parental rights. *See Trout v. Arkansas Dep't of Human Serv.*, 84 Ark. App. 446, 146 S.W.3d 895 (2004), in which this court reversed a termination order, citing numerous improvements made by Trout despite one minor "setback," which occurred during the case. Kight has corrected the problem that caused L.M.'s removal, and the trial court's decision is clearly erroneous. L.M. had only been out of the home for seven months. During those seven months, Kight was working diligently at a residential drug program, at which she proved to be successful. Kight was not given the opportunity to prove that reunification was a worthwhile goal when L.M. was taken from her in January, the same month she entered residential drug rehab, and upon her

release, her parental rights were terminated. The purpose of terminating parental rights is to provide permanency in a minor child's life where return to the home is contrary to the child's health, safety, or well-being and it appears from the evidence that the return to the home cannot be accomplished in a reasonable time, as viewed from the juvenile's perspective. Ark. Code Ann. § 9-27-341 (Supp. 2003); *M.T., supra.* Here, Kight was not given a reasonable time to demonstrate that L.M. could be safely returned to her home.

Accordingly, we hold that the trial court's decision terminating Rolinda Kight's parental rights regarding A.W. and L.M. is clearly erroneous. We reverse and remand this case with instructions to the trial court to continue reunification services.

Reversed and Remanded.

HART, NEAL, and BAKER, JJ., agree.

GRIFFEN and PITTMAN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I would affirm the circuit court's termination of appellant's parental rights with regard to both of her children. The majority's rationale is that the circuit court erred in terminating appellant's parental rights because she had corrected the condition that caused the removal of her children. It is true that the children were initially removed from appellant's home due to her drug usage. However, in determining that it is in the children's best interests to be returned to appellant's care because she is sober, the majority adopts a narrow view of the best interests of the children. The majority ignores the trial court's additional finding that subsequent events demonstrated that the return of the children to appellant was contrary to their health and safety. That is, the circuit court recognized that factors in addition to appellant's newly-found sobriety were relevant in determining the best interests of her children.

The statute governing the termination of parental rights, Arkansas Code Annotated § 9-27-341 (Supp. 2003), provides in relevant part:

> [b](3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:
>
> (A) That it is in the best interest of the juvenile, including consideration of the following factors:

(i) The likelihood that the juvenile will be adopted if the termination petition is granted; and

(ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by continuing contact with the parent, parents, or putative parent or parents; and

(B) Of one (1) or more of the following grounds:

(i)(a) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.

. . .

(vii)(a) That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juvenile to the custody of the parent 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 that prevent return of the juvenile to the custody of the parent.

At the conclusion of the termination hearing, the court orally stated its justification for termination, *inter alia*, as follows:

> Your commitment to breaking your ties with your past is very shallow to the point that I am afraid for these children. I would love to be able to say let's wait another six months and see if you can break that tie, but I'm just not sure that you understand. And I'm not sure that there won't be another man that will come along with some other enticement and you won't make the bad choice again. Because of that doubt along with the fact that we've had this case already in this court for eighteen months on one child and a year on the other,[1] I cannot take that chance. Termination of parental rights will be granted.

[1] The court was mistaken as to the length of time that L.M.'s case had been open because she was only seven months old at the time of the termination hearing.

The court subsequently entered separate termination orders for each child. With regard to A.W., the court found that it would be contrary to his best interests to return him to appellant's custody, that he had been adjudicated to be dependent-neglected and had been out of the home for twelve months, and that the conditions that caused his removal had not been remedied by his mother. With regard to L.M., the court found that it would be contrary to her best interest to be returned to appellant's custody, and that there was little likelihood that services to the family would result in reunification.

I do not believe the circuit court's findings were clearly erroneous. First, even though the circuit judge was mistaken as to the amount of time the children had been out of the home, this does not warrant reversal, because the judge still acted properly under § 9-27-341 in ordering termination. At the time of the termination hearing, A.W. had been out of appellant's home for more than twelve months, as required by § 9-27-341(b)(3)(B)(i)(a). Because of the length of time that A.W. had been out of the home, the court was required by Arkansas Code Annotated § 9-27-338 (Supp. 2003) to determine a permanency goal that was in A.W.'s best interests. While the court obviously could have taken more time with L.M., whose case had only been open for seven months, it was not required to do so because its determination that termination was proper with respect to appellee's rights to L.M. was based on § 9-27-341(b)(3)(A) and § 9-27-341(b)(B)(vii)(a), which do not mandate that the child be out of the home for a specified period of time.

Second, I do not agree with the majority's conclusion that appellant had worked "diligently" at the drug rehabilitation program for seven months. The case was opened in September 2001. Appellant had just graduated from her six-month program on the same day that the termination hearing was held in July 2003. It is true that appellant passed all of her drug tests while in treatment. However, the greater weight of the evidence was consistent that, until March 2003, only three months prior to the termination hearing, appellant did not take her drug problem seriously.

For example, she lied to the court about her drug abuse. In the May 2002 hearing, appellant testified that she had used drugs only one time, when appellee first opened its case on her. However, immediately following the same hearing, appellant tested positive for marijuana. Further, she continued to use drugs even after A.W. was removed from her custody. Prior to L.M.'s birth,

appellant testified that she would never use drugs while she was pregnant. However, she used cocaine when she was pregnant with L.M., which required L.M. to remain hospitalized for an extended stay after she was born. Moreover, one week after L.M. was born and removed from appellant's custody, appellant again tested positive for cocaine.

In addition, as late as March 17, 2003, only three months prior to the termination hearing, appellant told her DHS caseworker that she did not want to complete a six-month program because she and Raymond Morgan, L.M.'s father, wanted to be married and he could not support two households while she was in rehabilitation. According to appellant, Morgan was a drug user whom she met shortly after he was released from jail for selling crack. After her first attempt at drug rehabilitation, she lived with Morgan. She stated she was engaged to Morgan before L.M. was conceived.

At the review hearing held on March 18, 2003, appellant testified that Morgan was still using drugs and had caused her to lose her apartment. She stated that Morgan was "bad" for her and that she would no longer see him. Yet, later in the same week, she used her weekend pass to visit him. Appellant's CASA caseworker testified that on July 2, 2003, less than two weeks before the termination hearing, appellant stated that she was going to wait until after the termination hearing to decide whether to marry Morgan. The foster mother testified that nine days before the termination hearing, and in the presence of the children, Morgan encouraged appellant to "go smoke some weed." At the termination hearing, Morgan was described by his parole officer as a parole absconder with an active felony warrant.

Ben Perkins, appellant's drug counselor, testified that he had confidence appellant would stay clean and sober. However, he also opined that appellant's desire to continue her relationship with Morgan showed poor judgment. Perkins further stated that if appellant maintained a relationship with Morgan, she was in jeopardy of backsliding into drug use, and that her possibility of failure was high if she continued her relationship with Morgan.

Thus, appellant's casual attitude about sobriety, her association with Morgan during her recovery period, and her insistence on determining whether to marry him pending the outcome of the termination hearing, demonstrates that her efforts to engage in behavior that will support her sobriety has been anything but

diligent. While the majority is to be commended for its hope that appellant will remain drug-free, I join the circuit judge in concluding that there is no reason to subject her children to the vagaries of her life with a known drug-dealer. The trial court was well within its authority to consider those factors in deciding the best interests of the children.

Third, while appellant's relationship with Morgan may not have interfered with her responsibilities at Chance Sobriety, more importantly, this relationship did interfere with her relationship with her children. Appellant either never truly understood or never cared about the effect that her continued relationship with Morgan had on her attempts to remain sober, which, in turn, affected her relationship with her children. During her six-month stay at Chance Sobriety, appellant shared her one-hour weekly visits with her children and Morgan. According to the foster mother, during some of the visits appellant sat on Morgan's lap and seemed more interested in Morgan than in bonding with her children.

In short, appellant did not make it a priority to establish a relationship with her children. During appellant's six-month stay at Chance Sobriety, she missed several visits with her children. She missed three visitations because her privileges had been suspended, because she broke the drug treatment facility's rules, one of which was a rule forbidding fraternization with a male patient. She also missed four visitations due to other factors, such as oversleeping. Thus, appellant missed almost two months' visitation with her children during a six-month stay — nearly one-third of her allowed visitation. The CASA volunteer concluded that appellant's behavior demonstrated a lack of conviction for the goal of reuniting with her children.

Fourth, it is obvious that the circuit court assessed appellant's lack of credibility, based on her previous conduct in lying to the court regarding her drug usage and her relationship with Morgan, when judging her statements that she intended to remain drug-free, that she understood why she needed drug treatment, and that she would not continue her relationship with Morgan. Contrary to the majority's assertion, it did not require speculation for the court to determine that appellant intended to continue a relationship with Morgan. The trial court did not conjure or surmise that appellant was considering marriage to him less than two weeks prior to the termination hearing. Appellant testified to that effect. I see no reason why the trial court should not have considered the

effect of that intention when it determined whether denying the petition to terminate parental rights was in the best interest of two small children.

Finally, while appellant is to be commended for remaining sober for six months, this "eleventh-hour" effort, alone, is not a sufficient ground to preclude termination. Arkansas Code Annotated section 9-27-338(a)(4)(E)(iii) (Supp. 2003) provides that a parent's cooperation in following the court's order in the months or weeks immediately preceding the permanency hearing are insufficient grounds for retaining reunification as the permanency plan. The majority is mistaken when it asserts that appellant had been sober for over six months. Appellant completed the six-month rehabilitation program on the day of the termination hearing. She had only been sober for six months as of the day of the hearing. Further, she only began demonstrating sincerity about remaining sober during the three months immediately before the termination hearing. Except for weekend passes, she had resided at the rehabilitation facility. Thus, the record does not demonstrate whether she will remain sober in the real world. In any event, despite appellant's recent sobriety, the circuit court found ample reasons demonstrating why it was not in the children's best interests to be returned to her care.

In the final analysis, we make the grave decision to terminate parental rights because our legislature intends that judges make the "best-interest" determination based on what the record shows is likely to happen to helpless children, not what we hope will happen to parents. I hope appellant remains sober. I hope she either finds a drug-free companion or that Raymond Morgan drastically improves his behavior. However, like the trial court, I am more concerned about the harm likely to befall two dependent children from appellant's misjudgments than I am convinced the trial court was wrong or am concerned about the implications if the trial court was wrong. If the trial court was wrong about appellant (a view I do not endorse), the children are likely to be safe, nevertheless. If the majority is wrong, the children are likely to be endangered in ways that cannot be remedied by apologies.

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

Miranda WALRACK *v.* Stacy A. EDGE

CA 03-1159 190 S.W.3d 281

Court of Appeals of Arkansas
Division IV
Opinion delivered September 1, 2004

Tripcony Law Firm, by: *James L. Tripcony*, for appellant.

Hughes & Hughes, P.A., by: *Thomas M. Hughes*, for appellee.

JOHN F. STROUD, Chief Judge. Appellant, Miranda Walrack, and appellee, Stacy Edge, were divorced in May 2001. The parties were granted joint custody of their minor son, Cody, born

April 4, 1997, with Miranda receiving primary physical custody. In March 2002, Miranda, who had remarried, filed a motion requesting permission for her to relocate from Hazen, Arkansas, to Marion, Illinois, with Cody, a distance of approximately 300 miles. Stacy responded with a petition to change custody of Cody solely to him. A hearing was held on Miranda's motion on May 27, 2003, and by order filed June 12, 2003, the trial judge denied Miranda's motion to relocate with Cody, finding that Miranda had not satisfactorily demonstrated "a real advantage for her or the minor child to relocate . . . , that the relocation would be harmful or injurious to the child and it would be in the best interest of the child" to remain in Arkansas. After the trial judge announced his decision denying Miranda's motion, Stacy withdrew his petition for change of custody, but the order stated that if Miranda were successful in appealing the trial court's decision, the trial court would then conduct proceedings "to determine whether the request to relocate and the granting of such request constitutes a material change of circumstances sufficient to reconsider the issue of modifying primary custody and placing same with [Stacy] based on the best interests of the parties' minor child."

On June 5, 2003, the Arkansas Supreme Court handed down its decision in *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), which specifically addressed the issue of a custodial parent's right to relocate to another state with the children, holding that there is a presumption in favor of relocation for custodial parents and that it is the noncustodial parent's burden to rebut that presumption. On June 23, 2003, Miranda petitioned the trial court to reconsider its decision in light of the supreme court's *Hollandsworth* decision; on July 15, 2003, the trial court denied her request without a hearing, finding that Stacy had overcome the presumption in favor of relocation, specifically because Stacy had "significant visitation beyond standard visitation [and that] evidences that [Stacy] had a stronger bond than most; that all of [Cody's] family resides in Hazen, Arkansas, including a grandfather who is almost like a father to [Cody]; and that [Cody] has no other family in Illinois." The trial judge also stated that he had given "considerable weight to the short duration of [Miranda's] current marriage" and determined that there must be a "longer history of relationship" before allowing Cody to relocate from an area in which other family members lived to an area where no family members other than his mother resided.

Miranda now appeals to this court, arguing that the trial court erred in finding that Stacy overcame the presumption in

favor of allowing a custodial parent to relocate with the child. We hold that the trial court was clearly erroneous in denying Miranda's request to relocate to Illinois; therefore, we reverse and remand.

In *Hollandsworth v. Knyzewski*, *supra*, our supreme court set forth the standard of review to be used in custodial-parent-relocation cases:

> This court has traditionally reviewed matters that sounded in equity *de novo* on the record with respect to fact questions and legal questions. We have stated repeatedly that we would not reverse a finding by a trial court in an equity case unless it was clearly erroneous. We have further stated that a finding of fact by a trial court sitting in an equity case is clearly erroneous when, despite supporting evidence in the record, the appellate court viewing all of the evidence is left with a definite and firm conviction that a mistake has been committed. These common-law principles continue to pertain after the adoption of Amendment 80 to the Arkansas Constitution, which became effective July 1, 2001.

353 Ark. at 475, 109 S.W.3d at 656-57 (internal citations omitted).

At the May 27, 2003 hearing, Miranda testified that she had been married for over one year to Michael Walrack and that they had a twenty-one-month-old child, Alex, who was Cody's half-brother. She stated that she lived in Hazen, Arkansas, with her parents and worked at Wal-Mart in Bryant, while her husband resided in Marion, Illinois, the town in which he grew up, and worked in Carbondale, Illinois. She said that her husband's mother and stepfather lived in Marion as well, but that Cody did not have any family in that area. She testified that because of this arrangement, she normally only got to see her husband on the weekends, and that on average, she only got to spend about ten hours per week with him because of his work schedule.

Miranda said that she had recently been promoted to Management Trainee with Wal-Mart, which required her to work forty-eight hours per week and had doubled her salary to $30,000. One of the stipulations of being in the management program was that she would have to relocate, and she had been told by her supervisor that it would be to southern Illinois, northwestern Kentucky, or southeast Missouri, which were all in the vicinity of Marion, Illinois. She stated that once she completed her training, her salary would be $32,500.

Miranda described the house that she and her husband owned in Marion, which had three bedrooms, two bathrooms, and

a fenced-in yard. She said that in her parents' home in Hazen, neither child had his own room, and that she shared a bedroom with her younger son while Cody slept with her father.

Miranda stated that the school in which Cody would be enrolled was four blocks from their home, and she believed that it would be a better school than the one in Hazen. She also said that she had been admitted to John A. Logan College for the fall semester, and she intended to take classes there and then transfer her hours to Southern Illinois University. However, she said that she could not take classes at Logan College from Arkansas because she had to be an Illinois resident. She said that tuition at the colleges in Arkansas was more expensive than it was in Illinois, and if she went to college in Arkansas, she would have to pay for 100% of it, whereas if she went to college in Illinois, she could go to school on grants due to her husband's status as a Persian Gulf veteran.

Miranda said that the only reason she was still in Hazen was because of the court-ordered restrictions, and she opined that allowing her to move with Cody to Illinois would improve life for not only Cody but her entire family. She said that allowing the move would give Cody a set schedule and would give him some sense of normalcy, which was not present in his life right now. She also noted that Cody's half-brother adored him and that Cody needed to be in a family unit.

Miranda told the court that she wanted Stacy to be a part of Cody's life, that she had no desire to frustrate his visitation, and that she would be willing to help with the travel expenses for visitation. The only change she wanted to make in the visitation schedule was for Stacy to have Cody six weeks at a time in the summer instead of in two-week intervals, so that Cody would not have to travel as much. Miranda assured the court that she would follow all substituted visitation orders if she were allowed to move to Illinois, and she would make sure that Stacy got to see his son. She stated that she believed that Stacy was opposing her request to move out of spite because he had wanted full custody of Cody during the original divorce proceedings, and it was her belief that he was just trying to control her. She also said that it was her opinion that Stacy did not utilize his time with his son as well as he should; however, she said that she would never downgrade him or talk bad about him because he was Cody's father.

Miranda said that for the last two years or so, her time with Cody had been weekend trips to Illinois and evenings after work.

She said that her husband usually saw Cody one weekend per month when she took him to Illinois, and that they had also spent Christmas vacation in Illinois. She acknowledged that none of her family had been to Illinois yet and that her parents initially did not want Cody to move to Illinois, but that now they wanted him to move. She said that she had never kept Cody from being with his family, but that she did not want to leave him in Arkansas and move to Illinois to be with her husband and other son and just visit Cody, because she did not feel like she should have to choose between her children. She said that Cody and her father were "inseparable," and that her father would find ways to visit in Illinois as often as he could. She said that other than her parents, Stacy's mother and brother, and a few aunts and uncles lived in Prairie County; and that other than her husband's family and her, Cody would have no other relatives in Illinois.

Michael Walrack, Miranda's husband, testified he lived in Marion, Illinois, and that his mother, step-father, and grandparents lived about thirty-five minutes away. He said that he worked two jobs, with his primary job being at Lowe's and a part-time job at Auto Zone to help with the legal bills. He said that he and Miranda had talked about moving to Hazen, but that he could not find comparable employment making the amount of money he made in Illinois. Because of his and Miranda's living arrangements, he had missed much of Alex's first and second years, which he said he regretted. He stated that when Cody was in Illinois, he had his own room, which was decorated in a tractor theme. He said that he usually saw Cody every two weeks, but that sometimes Cody wanted to stay with his grandparents.

Clifford James, Miranda's father, testified that Miranda and Cody had been living with him for about one year, and that Miranda was Cody's primary care giver when she was not working. He said that Cody and his brother were "crazy" about each other, and that Cody seemed to enjoy being a big brother. Mr. James said that he and Cody were very close and that he was protective of him, but that he had no reservation about Michael Walrack being around Cody, and he thought he would be a good influence on Cody. He said that he supported Miranda's desire to move to Illinois because it would be best for Cody. He admitted that he would not get to see Cody as much, but said that would be okay because he was looking out for Cody's interests, not his. He noted that Cody was not doing well in the present arrangement,

and that he would rather give up his relationship with Cody than see him living in his current situation.

Ruth James, Miranda's mother, testified that Miranda usually gave the children their baths, and that she helped Cody with his homework every night. She described Miranda as a loving and caring mother. She said that she supported Miranda's request to relocate even though she would miss Cody, because it was in Cody's best interest to be with his mother and his little brother. She also stated that she believed that Cody would be better off in a school system other than Hazen. Mrs. James noted that she would be able to visit Cody, and that grandparents had to "back off."

Patricia Stricker, a psychotherapist, testified that she had counseled Cody for six sessions. She said that during those sessions, Cody talked about his mother, his baby brother, Mr. Mike, and his grandparents, but that he talked very little about his father. She said that Cody would not answer questions when his father's name was brought up, and she found that unusual.

Stacy did not testify or call any witnesses on his behalf. The trial judge, ruling from the bench, stated that his understanding of the law was that he must first determine whether the relocation of the child would be harmful or injurious to the child, and then there were other factors to be considered. He found that nothing material had changed since the divorce, that separating Cody from his grandfather, father, and all of his family members would be harmful, and he denied Miranda's request to relocate on that basis, adding that he did not believe that it was in Cody's best interest to move to Illinois. Miranda petitioned the trial court to reconsider its ruling in light of the supreme court's decision in *Hollandsworth;* the trial court denied that request without holding a hearing, finding that Stacy had overcome the presumption in favor of relocation set forth in *Hollandsworth.* Miranda now brings this appeal.

On appeal, Miranda contends that *Hollandsworth v. Knyzewski, supra,* is directly on point. We agree. *Hollandsworth* clearly and specifically holds that there is "a presumption in favor of relocation for custodial parents with primary custody. The non-custodial parent should have the burden to rebut the relocation presumption. The custodial parent no longer has the responsibility to prove a real advantage to herself or himself and to the children in relocating." 353 Ark. at 476, 109 S.W.3d at 657. The court

noted that conflicts inevitably arise when the noncustodial parent objects to the custodial parent's relocation with the children. However, citing *Cooper v. Cooper*, 99 N.J. 42, 491 A.2d 606 (1984), the court also noted that nothing prevented a noncustodial parent from leaving the state to seek a different lifestyle after a divorce, although such actions might be disruptive to the noncustodial parent's relationship with his or her children, and stated that the custodial parent had the same right to seek a better lifestyle for herself or himself and the children as did the noncustodial parent.

Our supreme court goes on to discuss several other states' views toward custodial-parent relocation in the *Hollandsworth* decision, as well as older Arkansas case law regarding custodial-parent relocation. In *Ising v. Ward*, 231 Ark. 767, 332 S.W.2d 495 (1960), the supreme court reversed the denial of a custodial mother's request to move with her child from Fort Smith to Oklahoma. In that case, the court recognized a custodial parent's right to ordinarily relocate to another state with the child. The *Hollandsworth* court, quoting *Walter v. Holman*, 245 Ark. 173, 178, 431 S.W.2d 468, 471 (1968), stated that it was "a matter of common knowledge that at least one parent must necessarily forfeit some individual rights to the constant companionship of minor children when a divorce decree is granted." 353 Ark. at 485, 109 S.W.3d at 663. The court held that it had historically recognized the custodial parent's right to relocate with his or her children, and it was adhering to that determination.

The *Hollandsworth* court set forth the following factors to be considered in determining the best interest of the child in the matter of a request for relocation: (1) the reason for the relocation; (2) the educational, health, and leisure opportunities available in the location in which the custodial parent and children will relocate; (3) visitation and communication schedule for the non-custodial parent; (4) the effect of the move on the extended family relationships in the location in which the custodial parent and children will relocate, as well as Arkansas; (5) the preference of the child, including the age, maturity, and the reasons given by the child as to his or her preference. *See also Blivin v. Weber*, 354 Ark. 483, 126 S.W.3d 351 (2003); *Durham v. Durham*, 82 Ark. App. 562, 120 S.W.3d 129 (2003).

Upon applying the law set forth in *Hollandsworth*, we hold that the trial judge clearly erred in denying Miranda's petition to relocate with Cody to Illinois. Miranda's reasons for wanting to

relocate to Illinois were valid; all of the testimony regarding schools indicated that the Illinois school was better than the Hazen school; and Miranda testified that she would be willing to work to ensure that Stacy received his visitation with Cody, even offering to help pay for the travel expenses. Although Cody's extended family lived in Arkansas, his maternal grandparents, the extended family to whom he was closest, testified that they believed that it was in Cody's best interest to allow Miranda to move to Illinois and that they could visit him. Cody did not testify, so the fifth factor is not applicable to this case.

We further hold that the trial judge's ruling that Stacy had rebutted the presumption in favor of allowing Miranda to relocate was also clearly erroneous. Stacy presented no evidence on his behalf in the hearing, and there was absolutely no evidence before the trial court to rebut the presumption in favor of relocation. The trial judge noted that he gave considerable weight to the short duration of Miranda's current marriage and determined that a "longer history of relationship [was] needed in order to determine its likelihood of success or failure before authorizing relocation of the minor child from an area in which other family members reside to an area in which no family members other than his mother reside." However, this is not a proper factor for consideration under *Hollandsworth,* and in fact, the marriage in *Hollandsworth* was of much shorter duration that the one in the present case. These cases will almost always arise soon after a remarriage due to the strong and logical desire of a newlywed to reside with his or her new spouse.

We also note that the order denying Miranda's request to relocate provided that Stacy withdrew his petition for change of custody on the basis that if Miranda was successful on appeal, she would not be allowed to relocate outside of Hazen until the trial court considered whether the granting of her request to relocate constituted a material change of circumstances sufficient to reconsider the issue of the primary physical custody of Cody. However, *Hollandsworth* also answers the question of whether the grant of Miranda's request to relocate constitutes a material change of circumstances sufficient to allow the trial court to reconsider a change of Cody's primary custody to Stacy by specifically holding that the "relocation of a primary custodian and his or her children alone is not a material change in circumstance." 353 Ark. at 476,

109 S.W.3d at 657. Therefore, we reverse and remand for entry of an order allowing Miranda to immediately move to Illinois with Cody.

Reversed and remanded.

NEAL and CRABTREE, JJ., agree.

ARKANSAS ELECTRIC COOPERATIVE and Arkansas Rural Electric/Sit. *v.* John W. RAMSEY (Deceased); Leigh Ramsey

CA 03-1442 190 S.W.3d 287

Court of Appeals of Arkansas
Division IV
Opinion delivered September 1, 2004

Supplemental Opinion on Denial of Rehearing November 3, 2004.

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

Hilburn, Calhoon, Harper, Pruniski & Calhoon, L.T.D., by: *David M. Fuqua* and *Patrick L. Spivey*, for appellee.

OLLY NEAL, Judge. John Ramsey worked for appellant Arkansas Electric Cooperative. While cutting a tree on May 22, 2001, Ramsey sustained severe injuries that ultimately led to his death. His wife, appellee Leigh Ramsey, sought benefits. The administrative law judge (ALJ) determined that (1) Ramsey's accident occurred in the course and scope of his employment, (2) Ramsey failed to prove by a preponderance of the evidence that Ark. Code Ann. § 11-9-102(4)(B)(iv) (Repl. 2002) is unconstitutional, (3) Ramsey's survivors failed to prove that they were denied due process in the manner in which the drug screen was conducted, and (4) Ramsey's injury and death were substantially occasioned by the presence of illegal drugs in his system. Ramsey's wife appealed to the full Commission.

The Commission reversed the ALJ's finding that Ramsey's accident and death were substantially occasioned by the use of illegal drugs detected in his urine specimen. This appeal followed.

On appeal, appellant argues that the Commission's finding that appellee is entitled to benefits is not supported by substantial evidence. Appellee cross-appeals, arguing that there is no substantial evidence to support the Commission's conclusion that use of routine hospital drug screens taken for purposes of treatment did not violate the due process rights of Ramsey's survivors. We affirm.

In reviewing a decision of the Workers' Compensation Commission, this court views the evidence and all reasonable inferences in the light most favorable to the findings of the Commission. *Magnet Cove Sch. Dist. v. Barnett*, 81 Ark. App. 11, 97 S.W.3d 909 (2003). These findings will be affirmed if supported by substantial evidence. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*; *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). If reasonable minds could reach the result found by the Commission, we must affirm the decision. *Wal-Mart Stores, Inc. v. Brown*, 73 Ark. App. 174, 40 S.W.3d 835 (2001). In making our review, we recognize that it is the function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *See Williams v. L & W Janitorial*, 85 Ark. App. 1, 145 S.W.3d 383 (2004). Furthermore, the Commission has the duty of weighing medical evidence. *See id.*

Arkansas Code Annotated section 11-9-102(4)(B)(iv)(a) (Repl. 2002) provides that an injury is not compensable if it is the result of an accident that is substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. "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." Ark. Code Ann. § 11-9-102(4)(B)(iv)(b) (Repl. 2002). Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Woodall v. Hunnicut Constr.*, 340 Ark. 377, 12 S.W.3d 630 (2000).

1. Direct Appeal

Ramsey's wife, Leigh Anne Ramsey, testified that she had been married to Ramsey since October of 1995 and that they had one child. She explained that she and Ramsey were separated at the time of the accident and were going through a divorce.[1] She noted that during the separation, Ramsey still cared for her and their child, and that prior to his accident, she and Ramsey had reconciled. Leigh Anne testified that, after the reconciliation, Ramsey had moved back into the family home. Leigh Anne testified that she knew about Ramsey's drug use and that his drug use was one of the issues in their marriage. On the morning of the accident, however, Leigh Anne noted that Ramsey did not appear intoxicated or impaired.

Eric McGinty testified that he worked with Ramsey on the day of his death. He testified that he was on Ramsey's crew on the day of the accident and that Ramsey was his supervisor. He explained that there were generally three men in the crew, but that one of the men was on vacation. McGinty testified that Ramsey was "totally safety conscious." He noted that he had never seen Ramsey do drugs in the two months that he had worked for him. He further testified that he had observed people he knew to be impaired after taking drugs like marijuana or methamphetamine, but that Ramsey did not appear to be impaired. McGinty testified that the tree was in a "tight spot" and that he and the other

[1] The divorce action was dismissed due to John's death.

crewman had passed on it the week before because it was too difficult for them to cut. He stated that the plan was to go back and take the tree down. He testified:

> I remember this tree being situated, you had a power line running in between the back of the houses, and it fed all the houses down this strip. You have a storage building on one side of the tree, you got a service wire around the other side of the tree, the side of the service wire, you've got a fence and I believe it was a little mobile home, or a recreational home. And on the other side of the tree, you had the mobile home of the resident. We only had a few feet to play with, to drop the tree in. The employer expected us to remove trees without damaging the property of the customers.
>
> * * *
>
> Sam was on vacation and I was the only other person that was present. John and I were working together. The work proceeded by him going up in a bucket truck and starting to trim the low-lying limb around the tree to take the tree out without causing too much damage to the property or the property owner's trees in the area. After that, I believe he called William Ammons that he knew was in the shop and asked if he could borrow one of his guys. I'm talking about William Ammons, Jr. He is another crew foreman. I believe he made the phone call around 10:45. John and I had worked together from the time of arrival at the scene until this point. My function during this period of time was to make sure that John was not doing anything unsafe and if something did happen I was there to assist him in any medical or mechanical needs that was necessary.

McGinty testified that he did not observe John doing anything unsafe during that period of time; Ramsey had his harness on and his lanyard attached. He testified that Ramsey came down, and they went to pick up another crewman, Craig Willis. He noted that the drive was thirty minutes, that they rode together, and that Ramsey did no drugs. They picked Craig up, went back to the location, and "topped out" a section of the tree. They then broke for lunch. McGinty testified that Ramsey excused himself during lunch to make a phone call. He did not observe Ramsey using any drugs during that break and did not find Ramsey to be impaired in any way. He testified:

> We loaded back up in a truck and drove out to the line where we were working, the same one as in the morning, and proceeded to

> top out the rest of the tree. When I say, "top out the rest of the tree," we rig the ropes again like I've described. It was the same basic plan. The ropes would break the fall and then let it down. It worked according to plan. John did all that rigging and he done the cutting.
>
> Next, he came down out of the bucket truck, and from what I remember, he went and got a drink of water because it was a pretty warm day that day. When he climbed back in the bucket truck, I asked him if he wanted a rope to put in the last stob that we were going to fall, and he said no and me and Craig asked him again if he wanted a rope to put in the top of the stob that we were going to fall; he said, "No, I got it. It is going to fall where I need it to."

Next, McGinty testified that Ramsey got back in the bucket to make his cut. He stated:

> After he made his notch cut, he began cutting on the back side of the tree, his falling cut. And at that time — up until the tree started rotating around towards his position, the tree was going the exact way we planned on falling it. There was lean in the tree that would have aided in the falling of the tree. The lean was somewhere around probably 15 degrees off the tree. It was in the direction that the tree was intended to fall. In my experience of tree cutting, it is generally beneficial if the tree is leaning in the direction you want it to fall.
>
> He started his back cut and proceeded to cut the tree and was working his meat, which allows you to fall the tree in the area you want. Meat on a tree is the wood part on the inside of the tree. . . . And apparently, he missed just a few splinters of meat on his side. . . . John reacted by saying a cuss word, dropped his chainsaw in the bucket, and proceeded to try to push the tree off the boom truck to keep it from hitting him. . . .
>
> He put his hands on the tree and was proceeding to try to push it off enough to keep it from falling on his boom. And, apparently, when that was not going to succeed, right before it hit the boom, I seen him grasp the sides of the bucket and prepare for impact. I observed the tree hit the boom; I believe it compressed the hydraulics. . . . John left up in the air. You know, it knocked the boom all the way down to the ground, left John in the air; when the log rolled off, the boom came back up, slapped John up about 45 feet in the

> air. When he came down, he hit his head on the bucket truck and bounced to the ground. . . . I do not believe he was conscious when he hit the truck. When he was on the ground, he was not conscious. He was not able to speak to me. I tried to regain contact to him while he was on the ground[.]

William Ammons, Sr., also testified at the hearing. He testified that he had known Ramsey for six years and that he had seen Ramsey twice on the day of the accident. He testified that he took lunch with him and that he was with Ramsey the entire time, except for when Ramsey went to use the phone. Ammons, Sr., testified that Ramsey did not use drugs in his presence and that he did not appear to have been impaired when he came back from using the phone.

William Ammons, Jr., testified that he also saw Ramsey on the day of the accident when he came by to get one of his men, Craig Willis. Ammons, Jr., stated that John did not appear to be acting unusual and that he had never seen Ramsey use drugs. He testified:

> As far as being friends with John Ramsey, I was pretty much with him 24/7. Not only did we work together when I was a crew person, but we also socialized. Me and my wife would socialize with him and his family. I never saw him do drugs. I did not know he did drugs. But I was with him 24/7.

Thereafter, appellants put on the evidence of pharmacologist/toxicologist Doctor Kim Edward Light. Dr. Light testified that he reviewed Ramsey's medical records for appellants and that as far as his opinion:

> I can't say he was under the influence of THC within the past seven hours. I believe he was under the influence of methamphetamine within the past seven hours. Within use of seven hours, I would expect the same kind of results on Mr. Ramsey as I described previously as the general effects that you would see with someone that has ingested methamphetamines.

Dr. Light testified on cross that "I'm not in a position to express an opinion as to whether or not the reactions specific to John Ramsey himself and his actions at the time would evidence impairment or being affected by the drug."

Larry Harp, manager of safety and loss control at Arkansas Electric Cooperative, testified that he received a call that Ramsey

had been involved in an accident and that he went to the site to investigate. He found that at the time of the accident the harness was not buckled into the lanyard or the ring on the bucket truck. He testified, "[Ramsey] was wearing the harness and the lanyard was attached to the harness, but the other end of the harness was not snapped into — the strap that holds it to the aerial lift [device]."

Richard Hink testified that he supervised Ramsey's crew and that the use of a rope is a "judgment call, pretty well, because there's nothing that — every job we do is different. So it's a judgment call." He testified that had he done the cut, he would have "most definitely used a rope."

Following its review of the evidence, the Commission determined that:

> There is no evidence before the Commission that the claimant was impaired at this point. McGinty testified, "apparently, he missed just a few splinters of meat on his side . . . . I observed the tree lean, then stop, then kind of rotate back towards John and the bucket truck." Ramsey had the presence of mind to try to push the falling tree away from him, but of course the 1,100 pound section fell against the boom, catapulting the claimant out and causing injury leading to the claimant's death.
>
> Richard Hink, the claimant's boss, arrived at the scene shortly afterward. Mr. Hink agreed that the crew should have used ropes in felling the tree, but he also testified, "it's a judgment call." In hindsight it is apparent that the claimant probably used poor judgment in not attaching ropes before cutting down this heavy tree on May 21, 2001. However, there is nothing before the Commission indicating that amphetamine, methamphetamine, or marijuana (THC) caused this poor judgment. We note Mr. Hink's credible testimony after looking at pictures, "the cut is not so bad a cut, I mean, it would have worked fine how it was. The main problem with what John did, and that happens all the time, is the tree was cut plum off and just turned loose free, standing up."
>
> We can find no indication on the date of the injury that illegal drugs were in any way the cause of the fatal accident. None of the hospital records show a causal connection between the claimant's

alleged drug use and the accidental injury. This issue arose after a urine sample detected methamphetamine and marijuana. Nevertheless, not one of the expert toxicologists could state when the claimant had ingested these drugs. None of the claimant's co-workers, out of four witnesses, saw the claimant use drugs or otherwise exhibit signs of impairment. Even Dr. Light, the respondents' expert witness, conceded that he was not in a position to personally opine whether illegal drug use caused the fatal injury. Any conclusion that the claimant's arguable deviation from routine safety precautions was substantially occasioned by the presence of illegal drugs in his urine specimen appears to be based on speculation and conjecture, which can never be permitted to supply the place of proof.

The Full Commission recognizes that the presence of illegal drugs in the claimant's physical specimen created a statutory rebuttable presumption that the accident on May 21, 2001 was substantially occasioned by the use of illegal drugs. The burden shifts to the claimant to prove, by a preponderance of the evidence, that the illegal drugs did not substantially occasion the accident. Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. Woodall v. Hunnicutt Construction, 340 Ark. 377, 12 S.W.3d 630 (2000). Based on the record before us, the Full Commission finds that the claimant has proven by a preponderance of the evidence that the illegal drugs did not substantially occasion the accident, thus rebutting the presumption. Much emphasis has been placed on the fact that the claimant had apparently not re-attached a safety lanyard when he got back into the bucket and resumed his employment services on the afternoon in question. It has been suggested that the claimant might still be alive if he had attached the lanyard. Whether or not that is true, we cannot find from the evidence that use of a lanyard would have prevented an accident after the 1000-plus pound tree fell on the boom truck. The claimant still would have been injured, perhaps seriously. The Full Commission notes the case of ERC Contractor Yard & Sales v. Robertson, 335 Ark. 63, 977 S.W.2d 212 (1998). In that case, the Supreme Court held that substantial evidence supported the Commission's finding that the claimant's accident was not substantially occasioned by the claimant's use of alcohol. The Commission in Robertson had relied on credible witness testimony, which we do in the present case.

> The Full Commission reverses the decision of the administrative law judge. Pursuant to Ark. Code Ann. § 11-9-102(4)(B)(iv)(d), we find that the claimant proved by a preponderance of the evidence that illegal drugs did not substantially occasion the accident on May 21, 2001. Our finding in this regard effectively renders moot the claimant's arguments relating to constitutionality, admissibility of the drug screen, and chain of custody.

As substantial evidence supports the Commission's decision, we affirm.

2. Cross-appeal

Appellee cross-appeals, arguing that substantial evidence did not support the Commission's decision that use of routine hospital drug screens taken for purposes of treatment did not violate the due process rights of Ramsey's survivors. Because we affirm appellee's award of benefits, we do not reach her cross-appeal.

Affirmed.

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

SUPPLEMENTAL DISSENTING OPINION ON DENIAL OF REHEARING NOVEMBER 3, 2004

SAM BIRD, Judge, dissenting. Petitioners have asked this court to rehear this case for three reasons: (1) the finding that Ramsey rebutted the presumption that his accident and death were substantially occasioned by his use of drugs is not supported by substantial evidence; (2) Arkansas Code Annotated section 11-9-102(4) creates a presumption that must be rebutted by the claimant, with the burden of proof being on the claimant rather than the employer; (3) this court failed to recognize that the evidence of Ramsey's not hooking his safety harness and not using ropes was evidence of poor judgment, impaired by the drugs in his system. I would grant the petition on the first two points.

In this case, both this court and the Commission noted that the presence of illegal drugs created a rebuttable presumption under Arkansas Code Annotated 11-9-102(4)(B)(iv)(a) (Repl. 2002) that Ramsey's accident and death was substantially occasioned by use of the illegal drugs. I believe, however, that the

following excerpt from the Commission's decision shows that it incorrectly applied the statutory presumption:

> We can find no other indication on the date of the injury that illegal drugs were in any way the cause of the fatal accident. None of the hospital records show a causal connection between the claimant's alleged drug use and the accidental injury. This issue arose after a urine sample detected methamphetamine and marijuana. Nevertheless, not one of the expert toxicologists could state when the claimant had ingested these drugs. None of the claimant's co-workers, out of four witnesses, saw the claimant use drugs or otherwise.

Petitioners' first argument is that substantial evidence does not support the finding that Ramsey rebutted the statutory presumption that the accident and death were substantially occasioned by the use of the illegal drugs. After noting that a urine sample revealing the presence of illegal drugs gave rise to the statutory presumption, the Commission pointed to the inability of expert toxicologists to state when the claimant had ingested these drugs. The Commission did not, however, discuss Dr. Light's testimony that he believed that Ramsey "was under the influence of methamphetamine within the past seven hours." The Commission may not disregard the testimony of any witness. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004). I would reverse and remand to the Commission for consideration of all the evidence as to whether Ramsey rebutted the presumption that the presence of illegal drugs in his system substantially occasioned the accident that led to his death.

I would also remand on the basis of petitioners' second argument, that the Commission did not assign to the claimant the burden of rebutting the presumption. Under Arkansas Code Annotated 11-9-102(4)(B)(iv)(d), an employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the illegal drugs did not substantially occasion the injury or accident. The burden of proof of a compensable injury shall be on an employee. Ark. Code Ann. § 11-9-102(4)(E). After noting that the presence of illegal drugs created a rebuttable presumption that Ramsey's accident was substantially occasioned by the use of illegal drugs, the Commission then inexplicably found that there was "*no other indication* on the date of injury *that illegal drugs were in any way the cause of the fatal accident.*" Rather than beginning its analysis with the presumption that the illegal drugs

caused the accident, and then examining the evidence to determine whether Ramsey had rebutted it, the Commission found that the presumption had been rebutted because there was no *other indication* that illegal drugs caused the fatal accident. The effect of the Commission's decision is to shift to the employer the burden of proving that the illegal drugs substantially occasioned the employee's injury, contrary to the purpose of the rebuttable presumption.

I would grant the petition for rehearing, and would reverse and remand this case to the Commission for its consideration of Dr. Light's testimony and for a correct analysis of the rebuttable presumption that the presence of the illegal drugs caused the fatal accident.

Jimmy LINTON *v.*
ARKANSAS DEPARTMENT of CORRECTIONS
and Public Employee Claims Division

CA 03-1195 190 S.W.3d 275

Court of Appeals of Arkansas
Division II
Opinion delivered September 1, 2004

R. Theodore Stricker, for appellant.

Richard S. Smith, for appellees.

ANDREE LAYTON ROAF, Judge. Appellant Jimmy Linton appeals the Workers' Compensation Commission's ("Commission") decision affirming and adopting the Administrative Law Judge's ("ALJ") findings and denying him compensation on the basis that he failed to prove by a preponderance of the evidence that he sustained an injury in the course of and arising out of his employment with appellee Arkansas Department of Correction ("ADC"). On appeal, Linton argues that the Commission erred in denying him compensation where his injury falls within an exception to the "going and coming rule," because he was on a special errand for his employer, he was paid for his travel time, and he was a law- enforcement officer. We affirm.

Linton had been employed by the ADC as a correctional officer since 1988. On January 6, 2000, he was told by his supervisor, Joe Porchia, to attend a required staff meeting at 6:30 a.m. the next morning, January 7, which was Linton's day off. Linton was being promoted to the position of captain, and this announcement was to be made at the meeting. Linton testified that he was requested to dress in his uniform. While driving from his

home to his normal place of employment at the Mississippi County Work Release Center on the morning of January 7 to attend the meeting, Linton was involved in a one-vehicle accident at approximately 6:00 a.m. and sustained serious injuries. Linton is now paralyzed from the waist down and is confined to a wheelchair. Linton filed a claim for workers' compensation benefits, which was controverted by the ADC. The ADC argued that Linton was not performing employment services within the meaning of the law at the time of the accident.

At the hearing, Linton testified that his normal work hours were 5:45 a.m. until 6:00 p.m. when he worked the day shift. He stated that he was on call at all times. Linton further testified that he understood that if he was called in on a day off to attend a meeting, such as on January 7, 2000, he would be paid from the time he left home until he arrived back home. He elaborated that if the meeting lasted for one hour, he would put down two hours on his time sheet so that he would be compensated for his travel time. Linton verified that he did not specify this as travel time and that he was not reimbursed for travel. He stated that this was the policy and that his supervisor, Mr. Porchia, had advised him to add the extra hour to the time sheet. Linton testified that he considered himself to be a law-enforcement officer and stated that he was certified as such in 1978, although he admitted that he was not currently certified.

Walter Todd and Kennett Bassett, retired employees of the ADC, testified that they were paid for their travel time when they attended a meeting on their day off and that they were told by their supervisors to include their travel time on their time sheets. Todd, who had been in charge of time sheets, testified that this was the written policy in the ADC manual.

Porchia testified that Linton was told to be at the staff meeting at 6:30 a.m. on January 7, 2000, for the purpose of announcing his promotion to captain, which would not take effect until the following Monday, January 10. According to Porchia, Linton was a correctional officer and not a law-enforcement officer. Porchia testified that Linton was not authorized to stop speeders on his way to work or to investigate accidents. Although the correctional officers could occasionally be called in the event of a natural disaster, Porchia stated that this was only to supervise a team of inmates providing assistance.

Porchia also testified that employees are not paid for travel time when they come to meetings on their day off and that he was

not aware employees were adding an extra hour to their time sheet on these occasions. The ADC's policy manual was introduced into evidence, which showed that travel during normal working hours on regularly scheduled working days is work time, as well as travel performed on non-work days during the same hours. However, employees are not compensated for their travel outside their normal working hours on non-work days. Porchia testified that although Linton had often worked from 5:45 a.m. until 6:00 p.m. when on the day shift, on the Wednesday and Thursday before the accident, his schedule had changed to eight-hour shifts, from 7:00 a.m. until 4:00 or 4:30 p.m. Porchia stated that these were the hours for an administrative position and that this would have been Linton's new schedule as captain.

Following the evidence, the ALJ found that Linton had failed to prove by a preponderance of the evidence that he sustained a compensable injury in the course of and arising out of his employment with the ADC. The Commission affirmed and adopted the findings of the ALJ, and Linton now appeals from this decision.

Linton argues on appeal that his claim is compensable and arose out of and in the course of his employment because it falls within the following exceptions to the "going and coming rule:" (1) he was on a special errand for his employer; (2) he was paid for his travel time; (3) he was a law-enforcement officer.

■■ 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. *Searcy Indus. Laundry, Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003). This court must affirm the decision of the Commission if it is supported by substantial evidence. *Id.* Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion of the Commission. *Id.* The issue on appeal is not whether the appellate court might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, the appellate court must affirm its decision. *Minnesota Mining & Mfg. v. Baker,*

337 Ark. 94, 989 S.W.2d 151 (1999). Where 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).

A "compensable injury" is defined as an accidental injury causing internal or external physical harm to the body arising out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A) (Supp. 2003). Act 796 of 1993 redefined the term "compensable injury" to exclude an injury that was inflicted upon the employee at a time when employment services were not being performed. *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W.2d 956 (1997); Ark. Code Ann. § 11-9-102(4)(B)(iii) (Supp. 2003). The same test is used to determine whether an employee was acting within the course of employment at the time of the injury as is used when determining whether an employee was performing employment services. *Privett v. Excel Specialty Prods.*, 76 Ark. App. 527, 69 S.W.3d 445 (2002). The test is whether the injury occurred within the time and space boundaries of the employment while the employee was carrying out the employer's purpose or advancing the employer's interests directly or indirectly. *Id.*

An employee is generally not said to be acting within the course of employment when he is traveling to or from the workplace, and thus, the "going and coming rule" ordinarily precludes compensation for injuries sustained while an employee is going to or returning from his place of employment. *Campbell v. Randal Tyler Ford Mercury, Inc.*, 70 Ark. App. 35, 13 S.W.3d 916 (2000); *City of Sherwood v. Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982). The reason for this general rule is that all persons, including employees, are subject to the recognized hazards of travel to and from work in a vehicle. *City of Sherwood, supra.* However, there are exceptions to the "going and coming rule" where the journey itself is part of the employment service, such as traveling men on a business trip and employees who must travel from job site to job site. *Campbell, supra.* The court in *Campbell* also noted that whether

an employer requires an employee to do something has been dispositive of whether that activity constituted employment services. *Id.*

Linton first argues that he was within the course of his employment while driving to his meeting on his day off because he was performing a "special errand" for his employer by attending the required meeting. The "special errand" exception has previously been recognized by our appellate courts in *Brooks v. Wage*, 242 Ark. 486, 414 S.W.2d 100 (1967), and *Lepard v. West Memphis Machine & Welding*, 51 Ark. App. 53, 908 S.W.2d 666 (1995). Linton also cites the decision in *Frank Lyon Co. v. Oats*, 225 Ark. 682, 284 S.W.2d 637 (1955), as support for his argument. In that case, the claimant was awarded compensation for his injuries sustained in an automobile accident that occurred when the claimant was returning from an out-of-town sales meeting required by his employer. *Id.* However, that case awarded compensation based on the fact that the claimant was a traveling salesman and did not discuss the "special errand" exception.

As is argued by the ADC, it is not clear that the "special errand" exception is still valid after the passage of Act 796 of 1993, which revised the definition of a "compensable injury" and required that the workers' compensation statutes now be strictly construed. For example, in *Hightower v. Newark Public School System*, 57 Ark. App. 159, 943 S.W.2d 608 (1997), in which the claimant was a teacher who was injured when she slipped on ice in the employer's parking lot, the claimant was denied benefits on the basis that "merely walking to and from one's car, even on the employer's premises," does not qualify as performing employment services. *Id.* at 164. The court stated that the premises exception to the "going and coming rule" would have applied in that situation under prior law, but that since the 1993 amendment to the workers' compensation statutes, this exception has been eliminated. *Id.*

There are no Arkansas cases expressly applying the "special errand" exception to injuries sustained after 1993, although in *Fisher v. Poole Truck Line*, 57 Ark. App. 268, 944 S.W.2d 853 (1997), the claimant was awarded benefits for injuries sustained in a car accident while returning to his employer's premises after retaking a required urine test. This case can be distinguished from *Fisher*, as the claimant in that case had reported to work in order to obtain a work assignment when he was informed that he

had to retake the urine test before receiving the assignment. After retaking the test, the claimant was delivering the results to his employer when he was involved in the car accident. In this case, Linton was driving to work at his normal place of employment when he was involved in the accident. There was testimony that ADC employees were often required to attend these staff meetings, and Linton was not performing any sort of special errand or other service for his employer other than reporting to the meeting.

Linton argues that because he was required to attend the staff meeting and because his attendance at the meeting benefitted his employer, he was performing employment services at the time of his accident. However, it is essential to every employer that its employees come to work, and merely traveling to and from the workplace is not an activity covered under our workers' compensation statutes. Linton also contends that traveling to the meeting on his day off distinguishes this situation from other cases in which compensation was denied and asserts that this extra day of travel increased the "quantity" if not the "quality" of the risk. Linton does not cite to any controlling authority for this proposition, and we do not find this argument to be persuasive. Although he cites cases from other jurisdictions that have awarded benefits to employees who were performing some employment service on their day off, it appears that none of these jurisdictions have a similar statutory requirement that employment services are being performed at the time of the injury. *See Allen v. Board of Selectmen of Weymouth*, 15 Mass. App. Ct. 1009, 448 N.E.2d 782 (1983); *Indiana Toll Road Comm. v. Bartusch*, 135 Ind. App. 123, 184 N.E.2d 34 (1962); *Benjamin H. Sanborn Co. v. Industrial Comm.*, 405 Ill. 50, 89 N.E.2d 804 (1950). It is also not clear that these jurisdictions require strict construction of their workers' compensation statutes, as in this state.

In addition, none of these cases involve the same situation as in the present case, where an employee is driving to a meeting held at his normal place of employment on his day off. In fact, in *McDaniel v. Bus Terminal Restaurant Management Corp.*, 271 S.C. 299, 247 S.E.2d 321 (1978), the claimant was denied compensation under facts very similar to this case. The claimant was attending a required meeting at her normal place of employment, and she was involved in a car accident on the way home from the meeting. *Id.* The court held that the claimant was not on a "special

errand" for her employer and that her injuries did not arise out of or in the course of her employment. *Id.* In sum, the Commission did not err in denying compensation to Linton on this basis.

Linton next argues that he was to be paid for his travel time to and from the meeting, bringing his activities within the course of his employment. While the payment of compensation is not necessarily conclusive to the issue of whether employment services are being performed, it is a factor to be considered. *See Olsten Kimberly Quality Care v. Pettey, supra.* However, in this case, there was substantial evidence from which the Commission could conclude that Linton was not being paid for his travel time to and from the January 7 meeting. Linton's supervisor, Porchia, testified that the employees were not compensated for travel time, and the ADC policy manual introduced into evidence stated that employees were only compensated for travel on their days off when the travel occurred during their normal hours of employment. Although Linton had worked from 5:45 a.m. until 6:00 p.m. on previous occasions, Porchia testified that on the Wednesday and Thursday before the accident, Linton was assigned to the administrative shift, from 7:00 a.m. until 4:00 or 4:30 p.m., and that this was to be Linton's new shift in his position of captain. The meeting on January 7 started at 6:30 a.m., and Linton's accident occurred just after 6:00 a.m. Thus, there was substantial evidence to support the ALJ's finding, which was adopted by the Commission, that Linton was not traveling during his normal work hours at the time of the accident. Although Linton and two other retired employees testified that they were normally compensated for travel time by putting an extra hour on their time sheet, it was for the Commission to resolve this conflicting evidence and to weigh the credibility of the witnesses. *Searcy Indus. Laundry, Inc. v. Ferren, supra.*

In his final argument, Linton contends that his status as a law-enforcement officer excepts his activities from the "going and coming" rule and brings him within the course of his employment. As support for his argument, Linton cites *City of Sherwood v. Lowe, supra,* in which a police officer, on his way to work while wearing his uniform and riding his personal motorcycle equipped with police blue lights, was killed in a car accident and awarded compensation. In that case, the court found that there was an exception to the "going and coming" rule for police officers, who

are on duty twenty-four hours a day and may at any moment be called into service. *Id.* The court stated that the City of Sherwood derived a benefit from the claimant's presence on city streets in his uniform and operating a police-equipped vehicle. *Id.*

The present case is clearly distinguishable. Not only was Linton in his personal vehicle at the time of the accident, Porchia testified that Linton was not considered to be a law-enforcement officer and that, as a correctional officer, Linton did not have authority to stop speeders or investigate accidents. While Linton was on duty at all times, this was only in the event he was called in by the ADC because of some problem at the correctional facility. Although Linton testified that he had previously been certified as a law-enforcement officer, he admitted that he had not kept up his certification. Thus, the law-enforcement exception to the "going and coming" rule does not apply in this case, and the Commission's decision denying Linton compensation on the basis that he did not prove that he sustained a compensable injury in the course of and arising out of his employment is supported by substantial evidence. We affirm.

Affirmed.

VAUGHT and BAKER, JJ., agree.

Frankie COBBS *v.*
ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 04-31 190 S.W.3d 274

Court of Appeals of Arkansas
En Banc
Opinion delivered September 1, 2004

Linda Ward, for appellant.

Gray Turner, Office of Chief Counsel, for appellee.

PER CURIAM. Motion of Linda Ward for attorney's fees is granted. Attorney's fee approved in the amount of $1,200.00. *See Walters v. Dep't of Human Servs.*, 83 Ark. App. 85, 118 S.W.3d 134.

ANDREE LAYTON ROAF, Judge, concurring. I concur that this motion for attorney's fees should be granted, in keeping with *Walters v. Dep't of Human Servs.*, 83 Ark. App. 85, 118 S.W.3d 134 (2003). I write only to address an issue that has arisen since our decision in *Walters*. Indigent parents are entitled to appointed counsel "at all stages of the proceedings in parental termination cases," *see* Ark. Code Ann. § 9-27-316(h)(1) (Supp. 2003); *Brown v. Arkansas Dep't of Human Servs.*, 330 Ark. 497, 954 S.W.2d 270 (1997). However, unlike with respect to indigent criminal appellants, this court to date has not been appropriated any funds by the General Assembly for payment of attorney's fees for appeals in parental-termination cases.

Although the volume of appeals from parental termination does not begin to approach the number of criminal appeals filed in this court, we have experienced an increase in such appeals since our decision in *Walters*. This has resulted in a grossly disparate method of awarding compensation to attorneys who represent indigent criminal appellants, all of whom are paid approximately the same modest flat fee, regardless of the complexity of the case, from funds appropriated to this court. This disparity in the treatment of counsel appointed by this court should be rectified at the earliest opportunity by this court and the General Assembly.

GRIFFIN, J., joins.

Dorothy Dixon HATCHETT, et al. *v.*
Clifford TERRY, et al.

CA 03-847 190 S.W.3d 302

Court of Appeals of Arkansas
Division IV
Opinion delivered September 8, 2004

[redacted]

Herby Branscum, Jr., for appellants.

John C. Aldworth, for appellees.

JOHN F. STROUD, Chief Judge. This appeal raises questions concerning the effect that a sale of real property under escrow contracts would have on a subsequent mortgage covering the same land. The trial court quieted title in the purchasers under the escrow contracts, which were also contracts of sale, and the mortgage holder appeals. We find no error and affirm.

In 1982, appellant Dorothy Dixon Hatchett[1] conveyed some 204 acres located in Van Buren County to Earl Collister and Mary Collister. She took a mortgage on the property. The Collisters planned to resell the property by escrow contracts. In 1987, the original mortgage was released and another mortgage was executed to appellant. The 1987 mortgage did not declare that it was either an extension of, or a replacement for, the 1982 mortgage. In

[1] Dorothy Hatchett later conveyed her interest in the property to the Dorothy Dixon Hatchett Revocable Trust. We refer to appellant as including both Dorothy Hatchett and Linda Bly as trustee of the Dorothy Dixon Hatchett Revocable Trust.

1990, the Collisters executed still another mortgage to appellant. By 1994, the notes purportedly secured by the 1987 and 1990 mortgages were in default and appellant instituted foreclosure proceedings against the Collisters.[2] Appellant obtained a foreclosure decree in February 1995. The decree provided that no determination about a sale would be made for thirty days to allow time for Mary Collister to account for the sales contracts that were then outstanding. Collister then filed for bankruptcy protection without providing the accounting. Ultimately, Collister received a personal discharge, and appellant was allowed to pursue her claims *in rem* against the property. None of the appellees were made a party to the foreclosure suit despite their escrow contracts being of record at the time the 1987 and 1990 mortgages were recorded.

Appellees Clifford and Bonnie Terry, Billie and Barbara Stroud, John Napier, Randy and Jill Terrell, Roland and Betty Baugh, and Ailene Hagee purchased land from the Collisters under escrow contracts between 1982 and 1986. They received their deeds a few years later.[3] Appellees Clifford and Bonnie Terry filed the present action seeking to quiet title under their warranty deed and escrow contract because they paid off their contract and obtained a deed prior to the release of the 1982 mortgage and thereby became exempt from any sale under the foreclosure decree in appellant's suit against Collister. An amendment to the complaint added the other appellees. Appellant answered, denying the allegations of the complaint and denying the existence of the escrow agreements between Collister and appellees. Appellant also filed a motion to dismiss, alleging that appellees failed to join Collister as a necessary party and suggesting that appellees intervene in the pending foreclosure suit. The trial court denied appellant's motion to dismiss, finding that Collister was not a necessary party. Appellant filed a counterclaim seeking to have title to the property quieted in her, alleging that appellees knew of the mortgage to appellant at the time they purchased their properties.

Mary Collister testified that she and her late husband Earl were in the business of selling property when they purchased 204

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[2] Earl Collister died prior to the entry of the foreclosure decree.

[3] The Terrys recorded their deed on May 30, 1990. The Strouds recorded a deed to one tract on August 3, 1992, and a deed to a second tract on June 6, 1988. John Napier recorded his deed on August 2, 1993. The Terrells recorded their deed on May 14, 1985. The Baughs recorded their deed on February 27, 1992. Ailene Hagee recorded her deed on April 2, 1993.

acres from appellant in 1982 and gave her a mortgage as part of the transaction. She testified that she and her husband sold property on escrow contracts. She testified that it was her understanding that, when the land under the escrow contracts was paid for, the purchasers would receive a release from appellant. Collister admitted that there were second and third mortgages to appellant but did not know how many contracts had been entered into at that time or whether her purchasers knew of the mortgages to appellant. She admitted that the mortgages were not paid and that appellant had filed a foreclosure action against her. She stated that she filed for bankruptcy and received a personal discharge. Collister also stated that, at the time of the foreclosure action in 1994, twenty-eight acres had been released but only $11,000 had been paid on the note to appellant. She stated that her bankruptcy listed any potential claims against her but was uncertain whether this included possible claims by appellees. She also admitted that the accounting provided for in the foreclosure decree was never given.

She stated that the escrow sales were handled by Clinton Real Estate and its agents Les Frith, Jerel Brown, and David Tomlinson, and that she did not know how much money she received for the escrow sales to appellees. She also stated that each escrow agreement reflected an outstanding lien on the property and that the purchasers knew that there was a lien on the property. Collister stated that she did not know whether appellees had received deeds to the properties. She admitted that she had no documentation stating that appellant would release the property. Collister also admitted that she had never told appellant about the escrow contracts or the specific properties that had been sold. She also stated that her husband was the active party in the escrow transactions.

Jerel Brown testified that he purchased Clinton Real Estate in 1984 and was aware of the transaction between appellant and Mary Collister whereby appellant sold the property to the Collisters and the Collisters then marketed smaller parcels of the property. Brown testified that there was an outstanding mortgage to appellant and that it stated in the note that there would be releases if parcels needed to be released. He testified that the note also provided that appellant would honor third-party contracts. Brown stated that he sold the property to the Terrys, the Strouds, and to John Napier. He was also aware of the transaction with Ailene Hagee. He also stated that, when he purchased the business in 1984, he did not want to be the escrow agent and that David

Tomlinson became the escrow agent. Brown stated that he told the appellees that, when they paid off their property, the lien to appellant would be released. He testified that appellant requested that the escrow agreements be recorded. He stated that appellees knew that there was an outstanding mortgage when they purchased the property. He testified that the 1982 mortgage was released and that another mortgage was given by the Collisters but that he was unaware of the details of that transaction. He also stated that he did not make any sales after 1987. Brown testified that he relied on a provision in the note from the Collisters to appellant providing that appellant would release property upon being paid $500 per acre. He testified that appellant told him that she realized she would have to honor some third-party contracts as provided by the 1982 note. He also stated that appellant prepared her own releases.

Several of the appellees testified about entering into the escrow contracts and receiving their deeds. They testified that the mortgage was indicated as a lien on the land but that it was to be paid off and released when they paid off their escrow contracts. They also indicated that they were not notified of either Collister's bankruptcy or the foreclosure sale. All testified that they paid off their escrow contracts and received deeds to their properties, which were properly recorded. They also all indicated that no one told them who would be responsible for obtaining the releases from appellant.

David Tomlinson, a former owner of Clinton Title Company, testified that he administered some of appellees' escrow contracts. He testified that, when the contracts were paid off, he delivered the deeds to appellees that had been held in escrow. He admitted that, when the deeds were recorded, he did not check to see if the liens had been paid off. He also described the 1982 mortgage as being released prior to the 1987 mortgage being recorded. He also testified that, at the time the 1982 mortgage was released, appellees' escrow contracts were on record but that the 1987 and 1990 mortgages covered the same tracts and created a cloud on the title. Tomlinson opined that appellees had an equitable interest in the property by virtue of the escrow contracts. He stated that he received funds from appellees under the escrow contracts and remitted those funds to Mrs. Collister's account. He was aware of the outstanding mortgage and that the proceeds were supposed to pay that mortgage. He also stated that it was Mrs. Collister's responsibility to pay that obligation. He testified that

appellant was aware of these escrow contracts and that, if she was not receiving payment, she would have discussed the matter with him. Tomlinson admitted that appellant, as a lienholder, never instructed him to do anything and never told him that she was not receiving her payments. He also admitted that appellant was not a party to the escrow agreements.

Linda Bly, appellant's niece and the trustee of the Dorothy Dixon Hatchett Revocable Trust, testified that the trust is the owner of the 204-acre tract. She also stated that appellant was an attorney, a realtor, and an abstractor but that she never actively practiced law. She stated that appellant closed her business in approximately 1987 because of failing health and that there had been a steady decline in her health since 1990. She also stated that appellant's memory was unreliable. She stated further that she discussed the case with appellant and that appellant told her that she never intended to give anyone anything without being paid for it. She stated that appellant said that there was no intention to release the lien without being paid.

The trial court issued a letter opinion in which it noted that appellees' interests in their properties were filed of record before the foreclosure and thereby protected by Ark. Code Ann. § 14-15-404 (Repl. 1998). The court also noted that, when the 1982 mortgage was released, the lands owned by appellees had already been conveyed to them and the Collisters could only mortgage that property in which they had an interest. The court ruled that the foreclosure sale should go forward, except with respect to the lands conveyed to appellees, and that titles to those lands were quieted in the respective appellees. A decree was entered in accordance with the letter opinion on April 8, 2003. The decree consolidated appellant's foreclosure suit with appellees' quiet-title action. An amended decree was entered on April 22, 2003, correcting some of the property descriptions. Notice of appeal was timely filed on April 29, 2003.

Appellant raises four points for reversal: that the trial court erred in finding that the escrow contracts between Collister and appellees took precedence over appellant's mortgage, which had been foreclosed upon, without finding that appellant had committed fraud in obtaining the foreclosure decree; that the trial court erred in finding that appellant had a responsibility to make appellees parties to the original foreclosure action because appellant was seeking a foreclosure in the present action; that the trial court erred

in finding that Collister was not a necessary party to the present action and that appellees had a right to elect their remedy against appellant; and that the trial court erred in finding that appellees' escrow agreements to purchase property took precedence over an existing mortgage from Collister to appellant.

In reviewing a circuit court's exercise of its equity jurisdiction, we consider the evidence *de novo*, but we will not reverse a trial judge's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Ward v. Davis*, 298 Ark. 48, 765 S.W.2d 4 (1989). We give due deference to the superior position of the trial judge to view and judge the credibility of the witnesses. *Arkansas Presbytery v. Hudson*, 344 Ark. 332, 40 S.W.3d 301 (2001). A finding is clearly erroneous when, even though there is evidence to support it, the appellate court is left with the definite and firm conviction that a mistake has been made. *Bendinger v. Marshalltown Trowell Co.*, 338 Ark. 410, 994 S.W.2d 468 (1999).

Appellant first argues that the trial court erred in finding that the escrow contracts between Collister and appellees took precedence over appellant's mortgage, which had been foreclosed upon, without finding that appellant had committed fraud in obtaining the foreclosure decree. In other words, appellant is arguing that appellees must show fraud in order to set aside the foreclosure decree. We do not believe that rule has any application in the present case because appellees are not attempting to set aside the foreclosure decree. The 1995 foreclosure decree was not a final decree because it did not order a sale of the property. Rather, Collister was allowed time to account for any outstanding escrow contracts. *See Scherz v. Mundaca Inv. Corp.*, 318 Ark. 595, 886 S.W.2d 631 (1994) (holding that a foreclosure order that orders a sale of the property and places that order into execution without further judicial action is a final order). Appellees did not allege that appellant committed any fraud; rather, appellees allege that their escrow contracts had intervened between the time of the release of the 1982 mortgage and the recording of the 1987 and 1990 mortgages. The supreme court has specifically held that the purchaser of land subject to a mortgage is a necessary party to a suit seeking foreclosure of that mortgage. *First State Bank v. Cook*, 192 Ark. 213, 90 S.W.2d 510 (1936); *Clark v. Lesser*, 106 Ark. 207, 153 S.W. 112 (1913). Here, appellees purchased their lands subject to the 1982 mortgage. Their interests

were of record at the time of the 1994 foreclosure action. Because they were not named parties, appellees' interests in their lands were unaffected by the foreclosure decree. *Cook, supra*; *see also Maloy v. Stuttgart Mem'l Hosp.*, 316 Ark. 447, 872 S.W.2d 401 (1994) (holding that the general rule is that a non-party is not bound by a judgment). We affirm on this point.

In her second point, appellant argues that the trial court erred in finding that appellant had a responsibility to make appellees parties to the original foreclosure action because appellant was seeking a foreclosure in the present action. Without question, appellees claim an interest in the 204 acres covered by appellant's mortgage and complete relief for appellant regarding the mortgaged property cannot be accomplished without their joinder. As noted above, a purchaser of land subject to a mortgage is a necessary party to a suit seeking foreclosure of that mortgage. *First State Bank v. Cook, supra*; *Clark v. Lesser, supra.* Further, as noted in the fourth point, when Collister executed the escrow agreements and deeds, she lost the ability to grant a valid mortgage on the same property covered by the escrow agreements. The fact that appellant sought foreclosure in the present action is irrelevant because there was no mortgage covering appellees' lands for appellant to foreclose. We also do not see the prejudice to appellant from this ruling because the trial court consolidated the foreclosure case with the present case and provided that the foreclosure sale could proceed with respect to the remaining land covered by the 1987 and 1990 mortgages. We affirm on this point.

Appellant next argues that the trial court erred in finding that Collister was not a necessary party to the present action and that appellees had a right to elect their remedy against appellant. Both sides suggest that the other should have made Collister a party, but neither side wanted to take responsibility for bringing Collister into this action because of Collister's having filed for bankruptcy relief and obtaining a discharge. Appellant argues that her rights against Collister were decided in the bankruptcy. This same argument also answers appellant's argument because any breach of warranty on Collister's part occurred when Collister attempted to grant the second and third mortgages, which occurred prior to her filing bankruptcy. Collister testified that her bankruptcy petition listed potential claims against her but was uncertain if appellees' claims were included. Under the

bankruptcy code, 11 U.S.C. §§ 524, 727 (2000), any potential cause of action for breach of warranty against Collister for conduct occurring prior to the filing of the bankruptcy petition and listed in that petition was extinguished upon her discharge. *See Johnson v. Home State Bank,* 501 U.S. 78 (1991). Thus, making Collister a party to this action would not accomplish anything because her personal liability had been discharged in bankruptcy. We affirm on this point.

For her fourth point, appellant argues that the trial court erred in finding that appellees' escrow agreements to purchase property took precedence over an existing mortgage from Collister to appellant. The real issue is the effect of appellees' escrow contracts when the 1982 mortgage was released and the 1987 and 1990 mortgages were recorded. Placing a deed in escrow that is accompanied by a contract of sale, both of which are recorded, withdraws the land from the market and renders the grantor powerless to encumber the land so far as the vendee is concerned. *Scott v. Stone,* 72 Kan. 545, 84 P. 117 (1906)[4]; 28 AM. JUR. 2D *Escrow* § 43 (2000). *See also Roach v. A.D. Malone Mercantile Co.*, 135 Ark. 69, 204 S.W. 971 (1918); *Fine v. Lasater,* 110 Ark. 425, 161 S.W. 1147 (1913). That is the situation here. Collister had no power to mortgage the lands to appellant that had been conveyed to the appellees. *See Fine, supra; Potlatch Corp. v. Triplett,* 70 Ark. App. 205, 16 S.W.3d 279 (2000). This is true even though no title passes until the condition — the payment for the land — has been performed, and not the date the escrow agreement was signed. *Arkansas Supply, Inc. v. Young,* 265 Ark. 281, 580 S.W.2d 174 (1979); *Mansfield Lumber Co. v. Gravette,* 177 Ark. 31, 5 S.W.2d 726 (1928); *White v. Cordes,* 14 Ark. App. 104, 685 S.W.2d 524 (1985). Appellees had all recorded their deeds prior to the 1994 foreclosure case, and none of the appellees were made parties to the foreclosure suit. This is also true due to the gap between the release of the 1982 mortgage and the execution of the 1987 mortgage.[5] Because they were not named parties, appellees' inter-

[4] This case is styled *Scott v. Sloan* in the Pacific Reporter.

[5] The 1982 mortgage was released on February 15, 1987, and the 1987 mortgage was executed on November 15, 1987. The release was recorded on November 23, 1987, at 11:30 a.m., and the 1987 mortgage was recorded on November 23, 1987, at 11:40 a.m.

ests in their lands were unaffected by the foreclosure decree. *First State Bank v. Cook, supra.* We affirm on this point.

Affirmed.

NEAL and CRABTREE, JJ., agree.

CRACKER BARREL and Fidelity & Guaranty Insurance Company
v. Sherry L. (Shepherd) LASSITER

CA 04-161 190 S.W.3d 911

Court of Appeals of Arkansas
Division III
Opinion delivered September 8, 2004

Barber, McCaskill, Jones & Hale, P.A., by: *Wendy S. Wood*, for appellant.

Cullen & Co., PLLC, by: *Tim Cullen*, for appellee.

JOSEPHINE LINKER HART, Judge. Appellants, Cracker Barrel and Fidelity & Guaranty Insurance Company, appeal from the award of temporary-total-disability benefits to appellee, Sherry L. (Shepherd) Lassiter. On appeal, appellants argue that the Commission erred in calculating appellee's average weekly wage, resulting in an erroneous rate of compensation. We affirm.

Appellee was injured on November 9, 1999, while working for appellant Cracker Barrel. Before the administrative law judge (ALJ), appellee argued that appellants underpaid the amount of compensation she should have received. The ALJ calculated appellee's average weekly wage and agreed with appellee. The ALJ first noted appellee's testimony that she began her employment with Cracker Barrel in August of 1998, starting as a server, and working in other positions before being promoted to shift leader

on November 1, 1999. As a shift leader, she earned $10.04 an hour, plus overtime, which was more than she earned in her other capacities. In calculating appellee's average weekly wage, the ALJ multiplied this wage rate by the average of 38.7 hours worked each week during the year preceding her injury, to arrive at a base wage of $388.54. The ALJ next considered that she worked 142 hours of overtime during the preceding year, which provided another $41.13 each week to her average weekly wage, making her average weekly wage $430 for the purposes of determining her compensation. The ALJ's order was adopted by the Commission.

On appeal, appellants assert that because the Commission erred in calculating appellee's average weekly wage, its computation of appellee's compensation was not supported by substantial evidence. For the purpose of calculating compensation, our statutes provide as follows:

> (a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.
>
> (2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.
>
> (b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.
>
> (c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

Ark. Code Ann. § 11-9-518 (Repl. 2002). On an appeal from a determination of an employee's average weekly wage, we affirm the

Commission's findings if supported by substantial evidence. *See Magnet Cove Sch. Dist. v. Barnett*, 81 Ark. App. 11, 14, 97 S.W.3d 909, 911 (2003).

In asserting that the Commission's calculation was not supported by substantial evidence, appellants argue that the Commission should have considered Ark. Code Ann. § 11-9-518(a)(2), which applies to the determination of the average weekly wage for injured employees working on a "piece basis." A piece-rate worker, however, is one whose pay is based on the quantity of work done. *See Taylor v. Lubritech*, 75 Ark. App. 68, 70, 54 S.W.3d 132, 134 (2001) (holding that a truck driver paid by the mile was a piece-rate worker). In our view, appellee was paid an hourly wage, not on a piece basis, and consequently, that portion of the statute has no applicability here.

Appellants further contend that Ark. Code Ann. § 11-9-518(a)(1) does not apply here in calculating appellee's compensation. As noted above, that subsection provides that compensation is "computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment." Appellants argue that because appellee was never guaranteed 40 hours of work each week, this subsection does not apply, as there was no contract of hire in force at the time of the accident reflecting that she was a full-time employee. This subsection, however, does not require that an employee must work 40 hours each week for the purposes of calculating compensation, only that it be computed on no less than a full-time workweek in the employment. *See Metro Temps. v. Boyd*, 314 Ark. 479, 482, 863 S.W.2d 316, 317-18 (1993) (noting the application of Ark. Code Ann. § 11-9-518(a) to part-time employees). We note that the Commission did not calculate appellee's compensation based on 40 hours worked each week but instead used an average week of 38.7 hours.

Finally, appellants contend that even if Ark. Code Ann. § 11-9-518(a)(1) applies, the Commission erred in using the $10.04 hourly wage in determining appellee's average weekly wage. Appellants note that for the 52 weeks preceding her injury, as well as for the pay period beginning October 30, 1999, and ending on November 5, 1999, and the pay period beginning November 6, 1999, and ending on November 12, 1999, appellee

worked in various capacities at various wage rates. Appellants argue that the Commission should have considered this evidence in determining appellee's average weekly wage, as it indicates that appellee's "contract of hire" was for employment in various capacities at various wages. Appellants additionally assert that appellee's wage should have been determined through the application of Ark. Code Ann. § 11-9-518(c), which provides that "[i]f, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned."

Appellee testified that on November 1, 1999, she was promoted to shift leader, earning $10.04 an hour, plus overtime, and that she was working as a shift leader at the time of her accident on November 9, 1999. Further, she testified that after November 1, she worked as a shift leader "other than what I was scheduled to do prior to that. . .," and "[w]ith the exception of maybe an odd occurrence once or twice a month, I always worked shift leader after I started doing shift leader in November. . . ." She also stated that she "worked anywhere from 60 to 70 or 75 hours a week every week." Other evidence established that from October 30, 1999, to November 5, 1999, she worked 16.25 hours at various lower wages and 31.26 hours as a shift leader; that she worked 17.83 hours at lower wages and 44.44 hours as a shift leader from November 6, 1999, through November 12, 1999; and that for the week ending November 19, 1999, she worked 35.63 hours as a shift leader.

To summarize, prior to her accident, she was hired as a shift leader for $10.04 hour and was working in this capacity at the time of her accident. And other than working some hours that were previously scheduled and the odd occurrence once or twice a month, appellee was earning $10.04 an hour, sometimes working well in excess of 40 hours a week in that position. Accordingly, we conclude that there was substantial evidence to support the Commission's calculation of appellee's average weekly wage using the $10.04 hourly wage, as the evidence shows that, at the time of and after her accident, she was working numerous hours at this wage, establishing that this was the wage earned by her under the contract of hire in force at the time of the accident.

Affirmed.

PITTMAN and ROBBINS, JJ., agree.

Judy WEATHERLY *v.* James WEATHERLY

CA 03-897 190 S.W.3d 274

Court of Appeals of Arkansas
Division III
Opinion delivered September 8, 2004

Gregory E. Bryant, for appellant.

Deborah Pipkins, for appellee.

JOSEPHINE LINKER HART, Judge. In this appeal, appellant Judy Weatherly questions the division of both marital and nonmarital property and debts in a divorce decree. Specifically, she challenges the trial court's award of a ring to appellee, the court's offset of improvements to appellant's nonmarital property against marital property, and the court's refusal to divide her medical bills between the parties. We reverse and remand the court's award of the ring and affirm in all other respects.

Appellant and appellee James Weatherly were married on October 24, 1998, and separated on October 27, 2001. Appellant filed for a divorce and sought a division of the personal property and debts accumulated during the marriage. In response, appellee admitted that there were personal property rights and debt obligations to be adjudicated. He also argued entitlement to a benefit based on the expenditure of marital funds that were spent on the residence appellant owned prior to the marriage.

At trial, appellant testified that, before the marriage, appellee purchased a wedding ring. She stated that she and appellee went to

the jewelry store, and while she may have gone into the store with him, she waited outside while appellee discussed the purchase of the ring with the store owner. When appellee came out of the store, he placed the ring on her finger. She told him she could not accept it because she was not expecting it. He then said it was a friendship ring, though he later told other people that it was an engagement ring. She testified: "[W]e joked about it, that if we got married that I could keep it." Appellant testified that there was an oral agreement, made shortly after she was given the ring, that it would go to appellee's daughter Jamie Blankenship upon appellant's death but that she was never told that the ring was to be Jamie's. She noted that the ring was sized for her hand and was too small for Jamie. She also asserted that she had not taken the ring off from the time he gave it to her except to add a ring guard. According to appellant, the parties never discussed what would happen with the ring if they divorced. Appellant admitted telling Jamie that she would devise the ring to her.

Appellant also testified that she made payments with marital funds on furniture purchased both before and after the marriage. She stated that the parties lived in her residence during the marriage, with mortgage payments being made from her separate account. She also stated that appellee was in the logging business and purchased a skidder during the marriage for $20,000, along with various tools and equipment valued at $800. She further asserted that, prior to the marriage, she purchased a lawn mower valued at $2,800 and a tiller valued at $670. Other lawn equipment was purchased during the marriage.

Appellant also said that appellee purchased with the proceeds from an accident settlement a 2000 Toyota truck costing approximately $30,000. She stated that in 1999 she paid off her truck with marital funds. She asserted that, during the marriage, they had separate checking accounts and savings accounts, as well as several joint accounts. She admitted that marital funds were used to make payments on an addition to her house. Appellant also stated that appellee owned real property prior to the marriage, that the property was continuously rented for $500 to $600 or $650 a month during the marriage, and that he put the rental income into either a joint account or his logging business account.

Appellant also testified that she had been hospitalized and had undergone surgeries during the marriage because of her "nerves." She admitted that she had some "nerve" problems prior

to the marriage. She stated that she owes one of the hospitals $11,000 and has over $22,000 in other medical bills.

Richard Masters, the owner of the jewelry store, testified that, after appellee saw the ring mounting in the store, appellee told him that each of his girls had a ring that belonged to his first wife and that he wanted to do something for Jamie. Masters stated that appellee paid a total of about $5,000. He stated that it was worth approximately $8,500 but that the retail price would be more than that. He also stated that appellee was alone when he purchased the ring. While Masters remembered measuring appellant's finger, he did not know if she had the ring on in the store. Masters asked appellee if it was to be an engagement ring, and he stated that it was Jamie's ring. Masters also testified that he made a wedding band for that ring.

Jamie Blankenship testified that appellant offered to devise the ring to her. She told appellant that she did not want to get into the middle of a dispute and that it was not her place to comment on the matter. Jamie also testified that she spoke about the ring with appellee and appellant after they married. They told her that the ring was to be hers. She also said that they did not say that she would get the ring after appellant's death but only that it was hers and she was to get it.

While testifying about the parties' property, appellee said that appellant wrote checks out of their joint account. He also confirmed appellant's testimony about the skidder, but he added that he only has a one-half interest in it. He valued the skidder at $5,000, even though he paid $20,000 for it. Appellee testified that he wrecked the 2000 Toyota truck and that the parties paid for appellant's vehicle during the marriage. The parties, he said, made improvements to appellant's pre-marital residence, including installing water meters costing $975, pipe lines costing $2,000, a septic tank costing $1,000, and repairing two house trailers and a small office. Appellant also put an addition on her residence, but he did not help her with the cost of the addition. He also testified that a floor, a sink, and cabinets were placed in one of appellant's house trailers for about $500, and "vinyl rugs" were placed in the house trailers at a cost of $1,000. He also admitted renting his property, making at least a $200 monthly profit. He offered no testimony concerning his intentions about the ring.

The trial court ruled that appellant had a life estate in the ring, which the court valued at $1,105.14, and ordered appellee to pay that amount to appellant. Appellant was ordered to return the

ring to appellee. The trial court also ordered the furniture sold, with appellant to receive the first 26% of the proceeds as compensation for money she paid for the property prior to the marriage and the remaining 74% to be divided equally between the parties. The trial court found that appellee had spent $11,525 to improve appellant's nonmarital real property. In exchange for that interest, appellee was allowed to keep his tools, a table saw, his choice of one sewing machine and one range, and the skidder, as well as his clothes, a television, and a hair dryer at appellee's residence. Appellant was awarded the other sewing machine, a range, and lawn equipment. Appellee's rental property was found to be his separate property and was awarded to him. The trial court stated that an unequal division of the marital property was being made in appellant's favor. A decree memorializing these findings was entered on May 5, 2003. This appeal timely followed.

The supreme court has recently discussed the standard of review for the division of property in a divorce case:

> On appeal, chancery cases, such as divorces, are reviewed *de novo*. With respect to the division of property in a divorce case, we review the chancellor's findings of fact and affirm them unless they are clearly erroneous, or against the preponderance of the evidence; the division of property itself is also reviewed, and the same standard applies. A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. In order to demonstrate that the chancellor's ruling was erroneous, an appellant must show that the trial court abused its discretion by making a decision that was arbitrary or groundless. We give due deference to the chancellor's superior position to determine the credibility of witnesses and the weight to be given their testimony.

Gray v. Gray, 352 Ark. 443, 453-54, 101 S.W.3d 816, 821 (2003) (citation omitted).

Appellant first argues that the trial court erred in returning the ring to appellee. The trial court held that appellee made a gift of the ring to appellant. It is clear that appellee made some sort of gift to appellant and that appellee thereby divested himself of any interest in the ring. Therefore, we agree that the trial court erred in awarding the ring to appellee. We recognize that the interest that third parties may have in the ring remains unresolved. Given, however, that such parties have not been joined in the present

case, the existence and extent of any such interests cannot be resolved in the present proceeding.

As her second point, appellant argues that the trial court erred in giving appellee credit against other marital property for money spent on her separate property. Citing *Box v. Box*, 312 Ark. 550, 851 S.W.2d 437 (1993), she argues that, because the money he spent on her pre-marital house did not increase the value of house, the court erred in offsetting the amount of the improvements against other marital property. *Box*, however, actually supports the court's decision.

The increase in value of property acquired prior to marriage is not marital property. Ark. Code Ann. § 9-12-315(b)(5) (Repl. 2002). The statute, however, further allows a trial court the flexibility to distribute both marital and nonmarital property in order to make an equitable division of marital property. Ark. Code Ann. § 9-12-315(a)(2); *Copeland v. Copeland*, 84 Ark. App. 303, 139 S.W.3d 145 (2003); *Creson v. Creson,* 53 Ark. App. 41, 917 S.W.2d 553 (1996). Here, the trial court found that the appellee was entitled to some benefit by reason of marital funds having been used to improve the appellant's property. That benefit came when the trial judge awarded appellee almost all of the marital property after the furniture was sold. *See Box, supra*; *Williford v. Williford*, 280 Ark. 71, 655 S.W.2d 398 (1983); *Camp v. Camp*, 18 Ark. App. 87, 710 S.W.2d 842 (1986). Given the evidence presented at trial, we cannot say that he erred.

For her third point, appellant asserts that the trial court erred in not dividing the medical bills she incurred during the marriage. Appellant asserts that, to make an equal division of the assets, the liabilities must also be equally divided. In essence, she argues that, because marital *property* must be divided equally unless the court finds that such a division is inequitable, *see* Ark. Code Ann. § 9-12-315 (Repl. 2002), it also requires that the division of *debts* be treated the same way. This court, however, has held that the statute does not apply to the division of marital debts and that there is no presumption that an equal division of debts must occur. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003); *Ellis v. Ellis,* 75 Ark. App. 173, 57 S.W.3d 220 (2001).

Appellant testified that she owed $11,000 to one hospital and over $22,000 in other, unspecified medical bills. But, she also testified that she had these same problems before the

marriage, but neither her testimony nor any medical bills were introduced to indicate which bills were incurred after the parties married. It was appellant's burden to produce sufficient evidence to enable the trial court to divide the medical bills, and she failed to meet that burden. *Wilson v. Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987). Thus, we cannot say that this finding is clearly erroneous. We affirm on this point.

Affirmed in part; reversed in part.

PITTMAN and ROBBINS, JJ., agree.

NATIONSBANC MORTGAGE CORP. *v.*
Alfred HOPKINS, et al.

CA 03-1395 190 S.W.3d 299

Court of Appeals of Arkansas
Division III
Opinion delivered September 8, 2004

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

William F. Smith, for appellees.

The Coutts Law Firm, P.A., by: *James V. Coutts*, for appellee River Valley Bank.

JOHN B. ROBBINS, Judge. This is the second appeal in this case. In the first appeal, *Nationsbanc Mortgage Corp. v. Hopkins*, 82 Ark. App. 91, 114 S.W.3d 757 (2003), we reversed and remanded the trial court's cancellation of a mortgage and promissory note executed by appellee Alfred Hopkins to appellant Nationsbanc. In accordance with our opinion, the trial court, upon remand, entered judgment for Nationsbanc for $146,264.51 due and owing on the note. However, the court denied Nationsbanc's request for an additional $77,393.78 in interest, costs, penalties, and attorney fees. Nationsbanc appeals from that judgment, and we affirm.

As may be ascertained from our prior opinion, Alfred and Patricia Hopkins, who are now divorced, executed approximately $600,000 in promissory notes to Nationsbanc and its predecessors between 1979 and 1995, all of them secured by mortgages on their home property. In 1996, they executed another mortgage securing a note in the amount of $150,000. Thereafter, in the course of refinancing the note pending the divorce, Alfred Hopkins discovered that Nationsbanc had not released the prior mortgages, even though the corresponding notes had been paid in full. For several months, he attempted to contact Nationsbanc to obtain a payoff figure on his current note and obtain a release of the prior mortgages, but Nationsbanc never acknowledged satisfaction of the mortgages or explained its refusal to do so. Ultimately, the Hopkinses stopped paying on the 1996 note, and Nationsbanc filed a foreclosure action in November 1998, seeking the $146,264.51 balance due. The Hopkinses in turn sought cancella-

tion of the 1996 note and mortgage as well as monetary damages for Nationsbanc's failure to release the prior mortgages. Following a trial, the circuit court canceled the 1996 note and mortgage and awarded the Hopkinses $376,423.61 in damages. The basis of the trial court's ruling was that Nationsbanc had violated Ark. Code Ann. § 18-40-104(c) (Repl. 2003), which provides that, if a mortgagee fails to properly acknowledge a mortgagor's satisfaction of a mortgage within sixty days after the mortgagor requests it, the mortgagee "shall forfeit to the party aggrieved any sum not exceeding the amount of the mortgage money."

Nationsbanc appealed the above ruling, and we affirmed all relevant portions of the ruling except the cancellation of the note and mortgage. We held that section 18-40-104(c) was intended to serve as a penalty when a mortgagee failed to acknowledge satisfaction of a mortgage but did not apply to a mortgage that had not yet been satisfied, such as the one accompanying the 1996 note in this case. We therefore concluded that the trial court erred in applying the statute to invalidate the 1996 mortgage and note. *Nationsbanc v. Hopkins, supra.*

After remand, upon entering judgment for Nationsbanc on the note, the trial court refused to award Nationsbanc any interest, attorney fees, costs, or penalties, stating:

> The Court previously found that said note in the sum of $146,264.51 would have been paid off and the mortgage satisfied but for wilful [sic], wanton acts of Nationsbanc. The Court reaffirms this prior finding and the Court finds that Nationsbanc's wrongful acts, refusals to comply with Statutory Law, negligent acts and delays are the reason that said note of $146,264.51 was not paid in full. Due to these wrongful acts the Court denies any award of interest, costs, penalties and attorney fees which accrued due solely to Nationsbanc's wrongful actions. . . . It would be unjust and inequitable to award Nationsbanc said sums above the amount of the principal debt due to their unclean hands. . . .

Nationsbanc now appeals from that order. Although it cites no convincing authority in support of its argument, it contends that the trial court's ruling repudiated our holding in the prior appeal and improperly applied the doctrine of unclean hands.

We disagree that the trial court's refusal to award interest, fees, penalties, and costs was at odds with our prior opinion. The law on the subject states that a trial court must implement both the

letter and spirit of the appellate mandate, taking into account the appellate court's opinion and the circumstances it embraces. *See City of Dover v. A.G. Barton*, 342 Ark. 521, 29 S.W.3d 698 (2000). If an appellate court remands with specific instructions, those instructions must be followed exactly, to ensure that the lower court's decision is in accord with that of the appellate court. *Id.* Where a remand limits the issues for determination, the court on remand is precluded from considering other issues, or new matters, affecting the cause. *Id.* Any proceedings on remand which are contrary to the directions contained in the mandate from the appellate court may be considered null and void. *Id.*

In our prior opinion, we did not remand with specific instructions regarding the note and mortgage, other than to say that the trial court erred in applying section 18-40-104(c) to cancel them. The question of whether interest, penalties, costs, and fees might be awarded on remand was neither broached by the parties in their briefs nor contemplated in the opinion. Thus, the import of our holding was simply that the mortgage and note should be reinstated. We said nothing that would prevent the trial court from considering whether Nationsbanc was entitled to interest, costs, penalties, and attorney fees.

We likewise disagree that error occurred in the trial court's use of the clean-hands doctrine to deny Nationsbanc any relief over and above the amount due on the note. The clean-hands doctrine bars relief to those guilty of improper conduct in the matter as to which they seek relief. *Wesley v. Estate of Bosley*, 81 Ark. App. 468, 105 S.W.3d 389 (2003). Equity will not intervene on behalf of a party whose conduct in connection with the same matter has been unconscientious or unjust. *Id.* In determining whether the clean-hands doctrine should be applied, the equities must be weighed. *Id.; Estate of Houston v. Houston*, 31 Ark. App. 218, 792 S.W.2d 342 (1990). Application of the doctrine of unclean hands is a matter for the trial judge's discretion as to whether the interests of equity and justice require its application. *See Laroe v. Laroe*, 48 Ark. App. 192, 893 S.W.2d 344 (1995). On appeal, we review the application of the doctrine for an abuse of discretion. *See Wesley v. Estate of Bosley, supra.*In its original order, the trial court found that the Hopkinses could have satisfied the 1996 note but for Nationsbanc's refusal to provide a payoff figure and satisfy the other mortgages. The court also concluded that Nationsbanc was in the position of not having the note paid

because of its own wrongful acts. Given those rulings, and the fact that we did not dispute them in our prior opinion, the trial court's determination that Nationsbanc's dilatory conduct should prevent it from recovering interest, fees, costs, and penalties was a proper exercise of the court's discretion. We therefore decline to reverse the court's balancing the equities such that Nationsbanc receives judgment only for the amount owed on the note.

Affirmed.

PITTMAN and HART, JJ., agree.

HARGIS (War Eagle) TRANSPORT
and Arkansas Property & Casualty Guaranty Fund *v.*
James CHESSER

CA 03-1252 190 S.W.3d 309

Court of Appeals of Arkansas
Division I
Opinion delivered September 8, 2004

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

Walters, Hamby & Verkamp, by: *Michael Hamby*; and *Lawrence Fitting*, for appellee.

SAM BIRD, Judge. Hargis Transport Company appeals a decision of the Workers' Compensation Commission that awarded benefits to James Chesser, a former truck driver for the company, for an injury to his right arm. The administrative law judge

found the injury not to be compensable at an initial hearing, but a second hearing was granted for the purpose of taking additional evidence. The law judge found from the new evidence that the injury was compensable; the Commission affirmed and adopted the decision of the law judge.

Hargis raises three points on appeal, first contending that the Commission's decision that Chesser satisfied his burden of proof in regard to new evidence was an abuse of discretion, and was contrary to the facts and law. Second, Hargis contends that substantial evidence does not support the Commission's finding that Chesser acted diligently in obtaining the additional medical evidence. The third point raised is that substantial evidence does not support the Commission's finding that Chesser sustained a compensable injury to his right arm. We disagree with all of these contentions; therefore, the decision is affirmed.

It is not controverted that Chesser reported to Hargis that he injured his right elbow and arm while unloading a truck in North Carolina on October 24, 2000. Hargis sent him for medical care to a general practitioner in Van Buren, Arkansas, and eventually to Drs. James Cheyne and Nils K. Axelson at River Valley Orthopaedic Center in Fort Smith. Hargis later controverted the claim, and Chesser attempted to prove compensability by submitting records of his treating physicians at the initial hearing before the law judge on May 15, 2001. In a decision of July 25, 2001, the law judge ruled that Chesser had failed to prove a compensable injury, specifically, by failing to meet the requirement of our workers' compensation statutes that the injury be established by medical evidence supported by objective findings. Chesser timely appealed the decision to the Workers' Compensation Commission.

On January 15, 2002, before his appeal was decided by the Commission, Chesser filed a motion for remand to the law judge for consideration of new evidence under the authority of Ark. Code Ann. § 11-9-704(b)(7). The motion recapped Chesser's testimony at the initial hearing that he moved from Arkansas to Bacliff, Texas; and that on his last visit preceding the hearing, Dr. Cheyne recommended that Chesser obtain treatment closer to his residence for more aggressive, regular physical therapy than he was getting in periodic visits to Ft. Smith. The motion further stated that on December 17, 2001, Chesser saw medical personnel [in Texas] who recommended an MRI of his right arm; and that the MRI, performed on December 31, 2001, was clearly objective and warranted consideration. In a March 7, 2002, supplemental mo-

tion for remand, Chesser also requested consideration of a faxed copy of medical records, which he stated he had received on Friday afternoon, March 1, 2002, pertaining to a surgical procedure performed on his right arm on February 12, 2002.

On March 27, 2002, the Commission entered an order of remand to the law judge. At the resultant hearing, both parties were afforded the opportunity to present evidence on the issues of whether Chesser's subsequently proffered evidence would change the result reached in the opinion of July 25, 2001, and whether Chesser had exercised proper diligence in obtaining and seeking to introduce the proffered additional evidence.

The law judge noted that the previous denial of the claim was based upon Chesser's failure to meet the requirement of Ark. Code Ann. § 11-9-102(4)(D) that a compensable injury must be established by medical evidence supported by objective findings, and he noted that prior medical records had not established that expert medical opinion was based upon objective physical findings. In an opinion of September 20, 2002, the law judge found that the proffered additional medical evidence showed physical injuries or conditions based upon or supported by purely objective physical findings, and he found that Chesser had acted in a diligent manner in obtaining and seeking to introduce this additional evidence. Admitting the new evidence into the record, the law judge concluded that Chesser had sustained a compensable injury and was entitled to medical and temporary total disability benefits. In a decision of July 29, 2003, the Commission affirmed the decision of the law judge and adopted his findings of fact. The appeal before us arises from the Commission's decision.

1. *Whether the Commission's decision that Chesser satisfied his burden of proof in regard to new evidence was an abuse of discretion, and was contrary to the facts and the law*

2. *Whether substantial evidence supports the Commission's finding that Chesser acted in a diligent manner in obtaining the additional medical evidence*

These points are interrelated, and we will address them as one. Arkansas Code Annotated sections 11-9-704 and 11-9-705 (Repl. 2002) govern the introduction of evidence for controverted workers' compensation claims. Under subsection 11-9-704(b)(7), the Commission may remand any case to the administrative law

judge for the purpose of taking additional evidence. Section 11-9-705 reads in pertinent part:

> (c) INTRODUCTION OF EVIDENCE . . . .
>
> (B) Each party shall present all evidence at the initial hearing.
>
> (C)(i) Further hearing for the purpose of introducing additional evidence will be granted only at the discretion of the hearing officer or commission.

The Commission's discretion should be exercised and the motion to present new evidence should be granted where the movant was diligent and where the new evidence is relevant, is not cumulative, and would change the result. *Mason v. Lauck*, 232 Ark. 891, 340 S.W.2d 575 (1960). The Commission's exercise of discretion in determining whether to remand for the taking of additional evidence will not be lightly disturbed on appeal. *Haygood v. Belcher*, 5 Ark. App. 127, 633 S.W.2d 391 (1982).

Hargis cites its own prerogative to controvert a claim, and it complains that for five months it "labored" under the impression that it had prevailed at the hearing and was not obligated to provide care. It complains that Chesser did not seek care until he was in the emergency room some eight months after Dr. Cheyne instructed him to transfer his care to a physician closer to his residence, that Chesser did not actively seek treatment for his arm, and that he could not produce documentation or recall the name of any physician regarding refusal of treatment. Hargis observes that Chesser was able to travel from Texas to Arkansas for doctors' visits and states that there was no "particular" evidence that Dr. Cheyne's care was gratuitous. Hargis complains that Chesser "managed to obtain additional medical care for his elbow problem that included an MRI" seven months after the first hearing and five months after his claim was denied. Hargis faults Chesser for lacking such evidence as an MRI during the original proceedings, and for "waiting" approximately one month after treatments to file his two motions for remand. Hargis states that fair-minded people could not conclude that Chesser acted with diligence in submitting new evidence.

Chesser testified at the hearing of June 25, 2002, regarding medical care he received after moving from Arkansas. He stated that he had moved from San Leon to Concan, Texas, after the date of the last hearing and had not worked then. He testified that between May and November 2001, he had no financial ability to secure medical services but had attempted to see doctors in the

Galveston and Texas City areas; that he had been unsuccessful in getting treatment at a reduced charge; and that he had been turned away in a waiting room that required him to produce cash before treatment. He agreed that Dr. Cheyne had encouraged him to transfer his case to Texas, but he testified that he was under the impression that he was at a dead end.

Chesser testified that he heard about a program for indigent care only when he went to a Texas emergency room in severe respiratory distress due to an allergic reaction. He testified that someone there noticed that he was favoring his arm; he was treated for the arm problem and was referred to Dr. Gloria Box, an orthopedic surgeon; that he saw Dr. Box and her physician's assistant, Marc Deschaine; that Dr. Box referred him to physical therapy and to Dr. Karen Johnston-Jones, an orthopedic surgical specialist in San Antonio; and that Dr. Johnston-Jones ultimately performed surgery. Chesser described his right arm following surgery as "excellent" and "so much better than it was it's just incredible."

Chesser said that none of the receptionists at the doctors' offices that he attempted to get into ever told him about the indigent-care program, and that had it not been for his hospital stay, he would not have known about the financial assistance that allowed him to see Dr. Box. Chesser stated that he had last seen Dr. Cheyne, his Ft. Smith doctor, in April of 2001; that he had not paid Dr. Cheyne or Dr. Axelson; and that he had no idea who paid them. He testified that he attempted to see a doctor in his area after Dr. Cheyne recommended that he do so, but that "they" would not treat him because it was a workers' compensation injury under litigation in another state.

Medical records generated after the initial hearing were introduced at the hearing upon remand. A clinical note by Deschaine on December 17, 2001, states that "given the mechanism of injury and the associated pop, there could be ligamentous injury about the elbow," and that "an MRI would certainly be valuable as a diagnostic tool." A December 31, 2001, report of the MRI that was performed upon this recommendation reads in part:

> History: Right elbow angular ligament tear.
>
> MRI of the Right Elbow: . . . .
>
> There is a small to moderate joint effusion. There is a nondisplaced vertical, oblique, olecranon process fracture which appears to be recent. . . .

Impression:

1. Small to moderate elbow joint effusion.

2. There is a nondisplaced, vertical, oblique, olecranon process fracture of uncertain age, however it appears to be subacute.

The operative report of Dr. Johnston-Jones, dated February 12, 2002, makes a postoperative diagnosis of right lateral epicondylitis, right radial tunnel syndrome, and partial tear lateral collateral ligament. The report states in part:

> The patient is a 55 year old right handed unemployed previous truck driver who had an on the job injury greater than a year ago. He was using his arm to unload and felt the pop and significant discomfort in his elbow and has had severe pain ever since. He has failed conservative treatment. . . . He has evidence of a significant undersurface tear of the chondral origin by MRI and clinically has not only significant pain but weakness with grip and with elbow extended and also has a lot of guarding with the lateral collateral.

The operative report notes that several steroid deposits of the lateral collateral ligaments required debridement on the undersurface of the ligament, that areas of degeneration of the capsule and common extensor were exposed and the most hemorrhagic areas of the capsule were incised and excised, that the partial tear in the lateral collateral ligament had to be excised, and that degenerative tissue from the undersurface of the common extensor origin was incised and excised.

Finding that Chesser was diligent in seeking to introduce the additional evidence, the Commission acknowledged that he did not consult with Deschaine in Texas until some eight months after Dr. Cheyne advised him to see an orthopedist in the Houston area and have regular physical therapy. The Commission found no merit in Hargis's criticism of Chesser and his attorney for obtaining the additional medical treatment in Texas nor for their timing in presenting reports of this treatment to the Commission. The Commission's opinion included the following assessments:

> First, to the extent that the respondents and the dissent[1] seem to suggest that the claimant should have presented MRI and surgery

[1] This was a 2-1 decision by the Commission.

results at the first hearing, the record establishes that none of the claimant's authorized treating physicians in the Fort Smith area had provided or recommended an MRI, much less accurately diagnosed the actual nature of the elbow injury and performed surgery. Therefore, the MRI and surgery records could not have been presented into evidence at the time of the first hearing.

To the extent that the dissent suggests the claimant was dilatory in seeking testing and surgery in Texas, the Administrative Law Judge, who heard the live testimony and observed the claimant's demeanor, found credible the claimant's testimony that he was unable to obtain medical services in Texas earlier because of his own lack of finances and because the respondents refused to accept their liability for the services sought.

To the extent that the dissent suggests that the claimant was dilatory in presenting the additional evidence to this Commission after undergoing the MRI and later the surgery, we note, as did the Administrative Law Judge, that the claimant had obtained and presented to the Commission a report on the MRI study only 25 days after the study was performed, and the claimant obtained and presented to the Commission a surgery report only 21 days after the surgery was performed. We point out that during these approximately three week periods, the reports had to be dictated and made available to the claimant and his attorney, the reports from Texas had to be sent to the claimant's Arkansas attorney, his Arkansas attorney had to prepare an accompanying motion to submit additional evidence, and the Arkansas attorney had to file that motion and the Texas medical reports with the Arkansas Workers' Compensation Commission. Clearly, the claimant's attorney should be complimented, not criticized, for the relatively short order in which he and his client brought the additional medical reports at issue to the attention of this Commission.

We view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if the decision is supported by substantial evidence. *Geo Specialty Chem., Inc. 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). Questions concerning the credibility of witnesses and the weight to be given their testimony are within the exclusive province of the Commission. *Ellison v. Therma-Tru,* 71

Ark. App. 410, 30 S.W.2d 769 (2000). We defer to the Commission's findings on what testimony it deems to be credible, and it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Id.*

The decision of the Commission, affirming and adopting the opinion of the administrative law judge, explained its finding that Chesser exercised due diligence as follows:

> The claimant's failure to obtain and submit this evidence at an earlier date was not due to any lack of effort on his part. *Rather, the delay in obtaining and submitting this [is] due to matters beyond the claimant's control, including the respondents' failure or refusal to provide appropriate medical services for the claimant's compensable injury, as required by the Act.*

(Emphasis ours.)

We find no abuse by the Commission in ordering the taking of additional evidence. We furthermore hold that the Commission's summary of evidence, as reproduced earlier in this opinion, constitutes substantial evidence to sustain its finding that Chesser acted with diligence in obtaining and presenting additional evidence to the Commission.

3. *Whether substantial evidence supports the Commission's finding that Chesser sustained a compensable injury to his right arm*

Hargis first argues under this point of appeal that the medical records of the initial hearing, without the new evidence introduced at the second hearing, showed only subjective complaints of pain. We need not address this argument because we have held that the Commission did not abuse its discretion in allowing the additional evidence into the record after the date of the initial hearing.

Hargis further argues that even with the additional evidence, Chesser did not satisfy his burden of proof. It complains that a physical exam by Deschaine on December 17, 2001, was essentially normal in all respects; that the MRI of December 20, 2001, was procured fourteen months after the date of injury, with findings of "uncertain age" and appearing "to be recent"; that Chesser did not describe a "pop" in his elbow until visiting Deschaine in December 2001; and that Chesser gave different versions of the occurrence of his injury.

Chesser responds that the additional records show the actual existence of medically established physical injury. He points out that the Commission found his testimony to be credible and that the onset of symptoms he suffered coincided with the histories provided to various physicians.

Arkansas Code Annotated section 11-9-102(4)(D) (Repl. 2002) requires that a compensable injury be established by objective findings. As the Commission noted, in order to prove a compensable injury, Chesser was required not only to prove the requirement of Ark. Code Ann. § 11-9-102(4)(D), but also to meet the requirements of section 11-9-102(4)(A)(a):

> (1) That the injury arose out of and occurred in the course of the employment;
>
> (2) That the injury was caused by a specific incident;
>
> (3) That the injury is identifiable by time and place of occurrence;
>
> (4) That the injury caused internal or external physical harm to the claimant's body;
>
> (5) That the injury required medical services or resulted in disability.

Adopting the decision of the law judge, the Commission concluded that Chesser had met all statutory requirements regarding compensability:

> The claimant has established by medical evidence, supported by objective findings, that actual existence of a physical injury to his right elbow/arm. He has further proven by the greater weight of the credible evidence that this physical injury arose out of and occurred in the course of his employment with this respondent, was caused by a specific incident, is identifiable by time of place and occurrence [sic], caused internal physical harm to his body, and required medical services and resulted in disability.

The determination of whether there is a causal connection between an injury and a disability is a question of fact for the Commission to determine. *Oak Grove Lumber Co. v. Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998). The Commission has the duty of weighing medical evidence, and the resolution of conflict-

ing evidence is a question of fact for the Commission. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). We defer to the Commission's findings on what testimony it deems to be credible, and it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Ellison v. Therma-Tru, supra.*

We hold that the MRI report of December 2001 and the February 2002 operative report of Dr. Johnston-Jones, both introduced at the second hearing, constitute sufficient evidence to uphold this finding. In affirming this remaining point on appeal, we note that the interpretation of the medical evidence and the assessment of testimony is in the realm of the Commission. Therefore, we conclude that substantial evidence supports the Commission's decision that Chesser suffered a compensable workers' compensation injury.

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.

ARKANSAS MIDLAND RAILROAD *v.* DIRECTOR, ESD, et al.

E 03-269 191 S.W.3d 544

Court of Appeals of Arkansas
Division II
Opinion delivered September 15, 2004

Gill, Elrod, Ragon, Owen & Sherman, P.A., by: *Marie B. Miller* and *Chad M. Avery*, for appellant.

Phyllis Edwards, for appellees.

JOHN F. STROUD, Chief Judge. This is an ESD case. The claimant, appellee Darrel Cason, was discharged from his employment with appellant, Arkansas Midland Railroad, because of a random drug test that showed that his urine sample had been adulterated with chromium. Under appellant's employment policies, an employee who tampered with a urine sample was considered to have refused to take the drug test, and any employee who refused to take a drug test was to be notified of his termination. When appellee Cason applied for unemployment benefits after his discharge, he was denied based upon a finding that he had been discharged for misconduct. Cason appealed that denial, and the Appeal Tribunal reversed, concluding that there was not sufficient evidence to prove that Cason had adulterated the urine sample. Appellant appealed that decision, contending that the Arkansas ESD lacked jurisdiction over the case and that sufficient evidence had been presented to prove that Cason had engaged in misconduct. The Board of Review determined that jurisdiction was proper and adopted the Appeal Tribunal's decision. We affirm.

The facts of this case are essentially undisputed. Appellee Cason was employed as a train engineer for appellant. On December 5, 2001, he was tested for drugs after he "drove his engine through a switch that was against him." He did not test positive for drugs at that time. On December 11, 2001, he was selected to be tested as part of his employer's random drug-testing policy. Cason was not able to produce his urine sample immediately, so he gave his cup to the test administrator. The cup was then placed on a shelf in the restroom and appellant left that area. Several other employees entered and left the restroom. Appellant returned in forty-five minutes. He was given his original sample cup, and he testified that he thought that he was observed as he produced his sample. He was not asked to empty his pockets or to wash his hands before producing the sample, two steps required by the drug-testing policy, presumably to ensure an unpolluted sample.

On December 18, Cason was contacted by the medical-review officer. He was told that the test showed that his urine sample had been adulterated with chromium. He was also informed that the adulterated sample could have been caused by several things: 1) that he added something to the sample that adulterated it; 2) that the sample was adulterated by the environment, which included various cleaning chemicals on the shelf where the cup remained for forty-five minutes; 3) that the cup

itself might have been contaminated; or 4) that there could have been a contaminant on his unwashed hands.

Cason informed his supervisor that there was a problem with the sample and that he needed to have the second, "split," sample tested. He was told that an adulterated test was the equivalent of a refusal to take the test, and that he was accordingly discharged in compliance with company policy. He was told that he could appeal the decision and pay the $200 cost of testing the second sample. Cason chose not to pay the fee for a second test.

For its first point of appeal, appellant challenges the employment security department's "jurisdiction to award railroad unemployment benefits" to appellee Cason. We find no error in the Board's conclusion that its jurisdiction was proper. Moreover, we specifically note appellee ESD's acknowledgment in its brief that it has awarded Cason only Arkansas unemployment benefits and that it has no jurisdiction to award benefits based on railroad wages.

In refuting appellant's claim that Arkansas lacks jurisdiction in this case, the Board recognized that 45 U.S.C. § 363 (2000) provides that a claimant may not file a claim for unemployment benefits under the laws of the individual states if the claimant's claim for benefits is "based upon" employment with a railroad. The Board then explained that, as it related to unemployment, the term "based upon" meant the basis upon which the claimant was able to establish a claim for benefits. It further explained that the issue then became "whether [Cason's] ability to establish a valid claim for benefits stems from his employment with the last employer, which was a railroad, or instead rests on his employment with those employers contained within his base period, *which are not railroads*." (Emphasis added.) The Board concluded that Cason's claim for benefits was based upon the employment contained within his base period (non-railroad employment), and not from his last work (railroad employment). The Board acknowledged that a claimant's separation from his last work determined his/her eligibility to receive benefits, but explained that eligibility for benefits and the ability to file a claim for benefits were two distinctly different things and that it was the employment within the base period that governed the claimant's ability to file a claim, not the nature of his last work.

The Board compared Cason's situation to the jurisdictional question that arises when a claimant has had employment within two or more states:

> A similar jurisdictional question arises when a claimant has had employment within two or more states. When a claimant files a claim for benefits, before any consideration is given to the claimant's separation from last work, the Department must determine if the claimant can even establish a monetary claim for benefits, and if so, which state shall have jurisdiction over the claim. This is done by examining the employment and wages contained within the claimant's base period, regardless of the nature or location of his last work. . . . It is this base period, and not the location of the last work, which determines which state shall have jurisdiction. For example, if all of the claimant's wages within his base period are from employment within the State of Arkansas, then Arkansas has both jurisdiction and liability over the claimant's claim for benefits, regardless of whether or not the claimant's last work was located within another state. Similarly, in the current case, all of the claimant's wages within his base period are from employment with non-railroad employers. Thus, the fact that the last employer was a railroad does not alter the fact that the claimant's ability to establish a claim, as distinguished from his eligibility to receive benefits, is based upon his employment with the non-railroad employers, and not upon the nature of his last work.

We find that this analogy is sound, and because it is undisputed that only non-railroad wages from Cason's base period were used to determine the basis for his claim, we agree with the Board that jurisdiction was properly exercised in this case.

For its remaining point of appeal, appellant contends that the Appeal Tribunal and Board of Review erred in finding that appellant had failed to present sufficient evidence to establish that Cason was fired for reasons amounting to misconduct. We disagree.

Arkansas Code Annotated section 11-10-514 (Repl. 2002) provides in pertinent part:

> (a)(1) If so found by the Director of the Arkansas Employment Security Department, an individual *shall be disqualified for benefits if he or she is discharged from his or her last work for misconduct in connection with the work.*
>
> . . .
>
> (b) If he or she is discharged from his or her last work for misconduct in connection with the work on account of dishonesty,

> drinking on the job, reporting for work while under the influence of intoxicants, including a controlled substance, *testing positive for illegal drugs pursuant to a United States Department of Transportation-qualified drug screen conducted in accordance with the employer's bona fide written drug policy,* or willful violation of bona fide rules or customs of the employer pertaining to the safety of fellow employees, persons, or company property, he or she shall be disqualified from the date of filing the claim until he or she shall have ten (10) weeks of employment in each of which he or she shall have earned wages equal to at least his or her weekly benefit amount.

(Emphasis added.)

In *Maxfield v. Director, AESD,* 84 Ark. App. 48, 54, 129 S.W.3d 298, 302 (2003), we explained:

> 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).

The findings of the Board of Review are conclusive if they are supported by substantial evidence. *Billings v. Director, ESD,* 84 Ark. App. 79, 133 S.W.3d 399 (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.*

Here, the Board found in pertinent part:

> [T]he Board notes that the employer has the burden of proving misconduct by a preponderance of the evidence. The evidence in the current case does not meet this burden. The evidence indicates that although it is possible that the claimant's actions caused the urine sample to be altered, it is just as possible that the alteration was caused by something apart from the claimant. There is simply insufficient evidence to show that the claimant's actions either

> caused, or were the most likely cause of, the alteration of the urine sample. Therefore, the decision of the Appeal Tribunal, which reversed the Department determination, is affirmed on the finding that the claimant was discharged from last work for reasons which do not constitute misconduct in connection with the work.

(Citation omitted.) We conclude that the Board could reasonably reach this opinion based upon the evidence that was before it.

Affirmed.

HART and VAUGHT, JJ., agree.

James Odis GOSSETT, Jr. *v.* STATE of Arkansas

CA CR 03-1419 191 S.W.3d 548

Court of Appeals of Arkansas
Division IV
Opinion delivered September 15, 2004

David L. Dunagin, for appellant.

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

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case was charged with non-support, a Class-D felony. He pled guilty to that offense and received a six-year suspended imposition of sentence on September 18, 2002. As a condition of his suspension, appellant was ordered to pay arrearages in the amount of sixty dollars per week in addition to child support in the amount of fifty dollars per week as ordered by the court. He failed to make these payments as ordered, and a petition to revoke his suspension was filed. After a revocation hearing September 10, 2003, the trial court found that appellant violated the terms of his suspension by willfully failing to pay these amounts, and sentenced the appellant to six years' imprisonment, with an additional three years' suspended imposition of sentence. This appeal followed.

For reversal, appellant contends that the evidence adduced at trial was insufficient to support a finding that he violated the conditions of his suspended imposition of sentence. We affirm.

In revocation proceedings, the burden is on the State to prove by a preponderance of the evidence that the defendant has violated a condition of his suspension. *Jones v. State*, 52 Ark. App. 179, 916 S.W.2d 766 (1996). Where the sufficiency of the evidence is challenged on appeal from an order of revocation, we will not reverse the trial court's decision unless its findings are clearly against the preponderance of the evidence; in making our review, we defer to the superior position of the trial court to determine questions of credibility and the weight to be given to the evidence. *Id.*

In the present case, there was evidence that appellant was $20,000 in arrears, and that he had made only three fifty-dollar payments during the year following his conviction for non-support. There was also evidence that these payments were made only after appellant had been arrested and detained in Fort Smith, Arkansas, on charges of failure to pay child support. On February 10, 2003, appellant secured his release by posting a cash bond in the amount of $500. Appellant forfeited this bond by failing to appear in court as ordered. He was located through N.C.I.C. and arrested in the state of Washington on charges of failure to appear and non-support on April 23, 2003, and was extradited to Arkansas on August 2, 2003. Appellant testified at trial, asserting that he had been unable to make the ordered payments because he was unemployed and was unable to find work during the period in question.

We do not think that the trial court erred in declining to believe appellant's testimony. There was evidence that appellant was an able-bodied and skilled welder capable of earning a good wage. Although we recognize that a probationer cannot be punished by imprisonment solely because of a failure to pay restitution in the absence of a determination that the failure to pay is willful, a defendant's failure to make bona fide efforts to seek employment or to borrow money to pay restitution may justify imprisonment. *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997). Here there was evidence that appellant was able to quickly raise $500 to secure his release from jail following his arrest in Arkansas. Furthermore, appellant's failure to appear and subse-

quent apprehension in the state of Washington can properly be viewed as flight, and it is well-settled that flight is a circumstance from which criminal intent may be inferred. *See, e.g., Jones v. State*, 31 Ark. App. 23, 786 S.W.2d 851 (1990); *Oliver v. State*, 14 Ark. App. 240, 687 S.W.2d 850 (1985).

Affirmed.

GLADWIN and NEAL, JJ., agree.

James R. FILYAW *v.* Dr. Michael BOUTON, *et al.*

CA 03-1380 191 S.W.3d 540

Court of Appeals of Arkansas
Division IV
Opinion delivered September 15, 2004

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

Warner, Smith & Harris, PLC, by: *G. Alan Wooten, Matthew C. Carter*, and *J. Steven Bell*, for appellees.

Cox Law Firm, by: *Walter B. Cox* and *James R. Estes*, for appellees Dr. Catherine Womack, Dr. Steven A. Edmondson, and Sparks Medical Foundation.

Davis, Wright, Clark, Butt & Carithers, PLC, by: *Constance G. Clark* and *Sidney P. Davis*, for appellee Sparks Regional Medical Center.

ROBERT J. GLADWIN, Judge. The trial court dismissed this wrongful-death action for lack of subject-matter jurisdiction because the suit was brought by appellant James Filyaw, the special administrator of the estate of Katherine Brown, deceased, prior to the date that the order appointing appellant was filed with the court clerk. On appeal, appellant contends that the trial court improperly

granted the motion to dismiss because the order of appointment was effective when signed, not when the order was actually filed with the clerk. We affirm.

The facts of this case are not disputed. From July 21, 1999, until her death on July 27, 1999, Katherine Brown was receiving medical care from appellee Dr. Michael Bouton at appellee Sparks Regional Medical Center (Sparks). Appellees Dr. Catherine Womack and Dr. Steven Edmondson consulted with Bouton concerning the use of the anticoagulant Coumadin. Appellant filed a petition seeking appointment as special administrator of Brown's estate on July 20, 2001, and Circuit Judge Norman Wilkinson signed an order appointing appellant that same day. The order of appointment was not filed with the circuit clerk's office until July 23, 2001. However, appellant had filed his wrongful-death complaint on July 20, 2001, the same day that the order of appointment was signed. Appellant's acceptance of the appointment was also filed on July 23, 2001, and letters of administration were issued the same day. Appellant later filed both a first-amended complaint and a second amended complaint. Appellees answered, denying the allegations of the complaint. Appellees moved to dismiss the complaint, alleging that the court lacked subject-matter jurisdiction.[1] Appellees argued that, under Ark. R. Civ. P. 58 and Administrative Order No. 2, the order appointing appellant as special administrator was not effective until filed with the clerk. The trial court found that the complaint was a nullity because it was filed prior to the filing of the order appointing appellant special administrator. The trial court also found that, because appellant did not refile the suit after the order of appointment was filed, it was barred by the applicable statute of limitations. Therefore, the trial court dismissed appellant's complaint, and this appeal followed.

Appellant argues one point: that the trial court erred in dismissing the lawsuit. When reviewing a trial court's decision on a motion to dismiss, the facts alleged in the complaint are treated as true and are reviewed in the light most favorable to the

[1] In their original answers, Dr. Womack and Dr. Edmondson both admitted that the court had subject-matter jurisdiction. Sparks also admitted jurisdiction in its answer to the original complaint but was dismissed by appellant's taking a nonsuit before being rejoined as a party by appellant's second-amended complaint. All three later moved to dismiss the complaint for lack of subject-matter jurisdiction.

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

In Arkansas, a medical-malpractice action must be brought within two years of "the date of the wrongful act complained of and no other time." Ark. Code Ann. § 16-114-203 (Supp. 2003). The medical malpractice act applies to all causes of action for medical injury arising after April 2, 1979, including wrongful-death and survival actions arising from the death of a patient. *See St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County*, 348 Ark. 197, 73 S.W.3d 584 (2002); *Pastchol v. St. Paul Fire & Marine Ins.*, 326 Ark. 140, 929 S.W.2d 713 (1996).

For the first part of his argument, appellant argues that the order appointing him special administrator was effective when signed, not when filed with the clerk. However, in a long series of cases beginning with *Standridge v. Standridge*, 298 Ark. 494, 769 S.W.2d 12 (1989), both the supreme court and this court have rejected that contention and held that a judicial order is not effective under Rule 58 and Administrative Order No. 2 until it is filed with the clerk of court.[2] Rule 58 provides:

> Subject to the provisions of Rule 54(b), upon a general or special verdict, or upon a decision by the court granting or denying the relief sought, the court may direct the prevailing party to promptly

[2] *See Judkins v. Hoover*, 351 Ark. 552, 95 S.W.3d 768 (2003); *Price v. Price*, 341 Ark. 311, 16 S.W.3d 248 (2000); *Shackelford v. Arkansas Power & Light Co.*, 334 Ark. 634, 976 S.W.2d 950 (1998); *Blaylock v. Shearson Lehman Bros., Inc.*, 330 Ark. 620, 954 S.W.2d 939 (1997); *Clayton v. State*, 321 Ark. 217, 900 S.W.2d 537 (1995); *General Motors Acceptance Corp.*, 318 Ark. 640, 887 S.W.2d 292 (1994); *Nance v. State*, 318 Ark. 758, 891 S.W.2d 26 (1994); *Kelly v. Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992); *A-1 Bonding v. State*, 64 Ark. App. 135, 984 S.W.2d 29 (1998); *Morrell v. Morrell*, 48 Ark. App. 54, 889 S.W.2d 772 (1994); *Brown v. Imboden*, 28 Ark. App. 127, 771 S.W.2d 312 (1989).

> prepare and submit, for approval by the court and opposing counsel, a form of judgment or decree which shall then be entered as the judgment or decree of the court. The court may enter its own form of judgment or decree or may enter the form prepared by the prevailing party without the consent of opposing counsel.
>
> Every judgment or decree shall be set forth on a separate document. A judgment or decree is effective only when so set forth and entered as provided in Administrative Order No. 2. Entry of judgment or decree shall not be delayed for the taxing of costs.

Section (b)(2) of Administrative Order No. 2 provides:

> The clerk shall denote the date and time that a judgment, decree or order is filed by stamping or otherwise marking it with the date and time and the word "filed." A judgment, decree or order is entered when so stamped or marked by the clerk, irrespective of when it is recorded in the judgment record book.

Rule 58 specifically provides that it is to be read in connection with Administrative Order No. 2. Appellant was appointed special administrator of Brown's estate by order signed on July 20, 2001. This was the relief requested in his petition to the probate court. The order granting that relief was not filed with the clerk until July 23, 2001. Therefore, under Rule 58 and Administrative Order No. 2, the order appointing appellant was not effective until July 23, 2001, when it was filed with the circuit clerk and the letters of administration were issued.

■ Appellant argues that Rule 58 and Administrative Order No. 2 do not apply in this situation because Ark. Code Ann. § 28-48-103(f) (2004) makes an order appointing a special administrator nonappealable and Rule 54(a), referenced in Rule 58, defines "judgment" as any order from which an appeal lies. However, section 28-48-103(f) does not offer any guidance as to when an order appointing a special administrator *is* effective. In this regard, *Jenkins v. Means*, 242 Ark. 111, 411 S.W.2d 885 (1967), is instructive. That case involved an automobile accident in which both drivers were killed. As a result, the estate of driver one sued the estate of driver two and named the personal representative of driver two's estate as a defendant. However, the probate court had not yet appointed a personal representative for driver two's estate.

The estate of driver two then sued the estate of driver one in a different venue and named the personal representative of driver one's estate, already appointed, as the defendant. The question before the Arkansas Supreme Court was which suit was first-filed for purposes of determining priority of venue. The court held that the first suit, even though it was first-filed, had never been commenced and did not have priority for venue purposes, because the named defendant, the personal representative of driver two's estate, did not exist when suit was filed. Also, the supreme court held that it would not retroactively amend the pleadings in the first suit to account for the appointment of the personal representative. The court further noted that, under what is now Ark. Code Ann. § 28-40-102(b) (2004), a personal representative cannot sue or be sued until letters of administration have been issued.

Appellant attempts to distinguish *Jenkins* as being a venue case, which is not an issue in the present case. However, *Jenkins* is important for its holding that a personal representative cannot act until the letters of administration have issued, and the only way the clerk will know to issue the letters is to have the order of appointment filed under Rule 58 and Administrative Order No. 2. In the present case, the letters of administration were not issued until July 23, 2001, *after* appellant had filed the wrongful-death action. Until the issuance of the letters, appellant had no standing under *Jenkins* to file suit. Therefore, the complaint filed on July 20, 2001, was a nullity.

In *McKibben v. Mullis*, 79 Ark. App. 382, 90 S.W.3d 442 (2002), this court, relying on *St. Paul Mercury Insurance*, *supra*, held that the trial court did not err in dismissing a wrongful-death complaint filed by the surviving husband as executor when he was not appointed executor until some six months after the complaint was filed. This court held that the husband's subsequent appointment as executor did not relate back to the filing of the original complaint because the original complaint was a nullity because all of the heirs had not been named in the complaint and, therefore, was not properly filed. *McKibben* controls the outcome of this case because, as in *McKibben*, an improper complaint was filed prior to the effective appointment of the personal representative and a proper complaint was not filed prior to the expiration of the limitations period. The fact that appellant's order of appointment

was filed prior to the expiration of the limitations period does not change the analysis because appellant did nothing to ratify or refile the action prior to the running of the statute.

Affirmed.

PITTMAN and NEAL, JJ., agree.

Jose Armando FLORES, Jr., Alejandro Hinojosa, and Kervin D. Robertson *v.* STATE of Arkansas

CA CR 03-1221 194 S.W.3d 207

Court of Appeals of Arkansas
Division III
Opinion delivered September 15, 2004

Stuart Vess, for appellant.

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

ANDREE LAYTON ROAF, Judge. Appellants Jose Flores, Alejandro Hinojosa, and Kervin Robertson entered conditional pleas of nolo contendere to possession of marijuana and were each sentenced to ten years' imprisonment. On appeal, appellants argue that the trial court erred in failing to grant their motions to suppress the evidence obtained during an illegal search of sealed containers in their vehicle, which they allege was stopped without probable cause. We affirm.

At the suppression hearing, Trooper Richard Eads with the Arkansas State Police testified that on March 14, 2003, at approximately 2:18 p.m., he made a traffic stop of a vehicle that he had observed speeding on Highway 67 in White County. Eads stated that the vehicle was going seventy-four miles per hour in a seventy-mile-per-hour zone. Flores was driving, Hinojosa was the front seat passenger, and Robertson, the owner of the vehicle, sat in the rear seat. Eads testified that he asked Flores to bring his license and the vehicle registration and accompany him to his police car. While in the process of issuing Flores a warning ticket for speeding, Eads became suspicious based on appellants' answers to questions asked during the traffic stop. For example, Flores stated that he and Hinojosa were from Houston, Texas, and were on their way to a one-day refrigeration seminar in St. Louis, while Robertson, who had Missouri tags on the vehicle, stated that he was on his way to visit family in Missouri. Eads testified that he

found it unlikely that Flores and Hinojosa would travel that distance to attend a one-day seminar in St. Louis, that they would be wearing their uniforms during the journey, and that they would not know where they were staying in St. Louis. Eads testified that he asked Robertson for consent to search the vehicle and that Robertson gave his permission. According to Eads, he knew that Robertson was the owner of the vehicle because Flores and Robertson had told him that and because the vehicle was registered to Robertson. A police videotape of the traffic stop and the search was also entered into evidence.

During the search, Eads found two large freon bottles in a partially sealed box in the rear of the vehicle. He shook the bottles, and instead of the liquid he expected, the bottles appeared to be empty. Eads wondered why appellants would be attending a refrigeration seminar with empty freon bottles. He opened the seal on one of the bottles and smelled a strong odor of marijuana. On closer examination, Eads found that the bottles had been cut in half and resealed with a sealant. A large quantity of marijuana was found inside the bottles, and appellants were arrested and charged with possession of marijuana.

Motions to suppress were filed by appellants, arguing that there was no probable cause to stop the vehicle and that the search of the vehicle was illegal. After hearing all of the testimony, the trial court denied the motions by letter opinion filed on September 10, 2003. The court found that the traffic stop was pretextual, in that it was not made because the vehicle was speeding but rather because of the race of the occupants and because the vehicle had out-of-state tags. However, relying on *State v. Harmon*, 353 Ark. 568, 113 S.W.3d 75 (2003), the trial court found that the fact that the stop was pretextual did not necessarily invalidate the subsequent search as long as the search itself conformed to the requirements of state and federal law. The court further found that Robertson's consent to the search of the vehicle was voluntary and that the State met its burden of proof on that issue. The court stated that it was not relying on the audio portion of the videotape to show consent because it was of such poor quality, but stated that nothing on the videotape indicated that Robertson was under threat, duress, or coercion in giving his consent to the search. Finally, relying on *Florida v. Jimeno*, 500 U.S. 248 (1991), the trial court found that it was reasonable for Trooper Eads to conclude that the permission granted by Robertson included a search of any

container found inside the vehicle and that the scope of the search did not exceed reasonable bounds.

Subsequent to the denial of their motions to suppress, appellants entered conditional pleas of guilty to the charge of possession of marijuana, reserving their right to appeal the suppression issue under Ark. R. Crim. P. 24.3(b). Appellants were each sentenced to ten years' imprisonment.

Appellants argue on appeal that the trial court erred in failing to grant their motions to suppress the evidence obtained during an illegal search of sealed containers in a vehicle stopped without probable cause. In reviewing the denial of a motion to suppress, appellate courts 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). We also defer to the superior position of the trial judge to decide the credibility of witnesses and to resolve evidentiary conflicts. *Id.*

Appellants first contend that the trial court erred by holding, consistent with *State v. Harmon*, *supra*, that a pretextual traffic stop of their vehicle did not require suppression of the evidence. In *Harmon*, the supreme court held that, unlike pretextual arrests, our state constitution does not support invalidation of a search because a valid traffic stop was made by a police officer who suspected other criminal activity. *Id.* Appellants claim that the ruling in *Harmon* was incorrect and that the issue should be revisited. However, this court lacks the authority to overrule decisions of the Arkansas Supreme Court. *Brown v. State*, 63 Ark. App. 38, 972 S.W.2d 956 (1998). The trial court was correct in this case in relying on *Harmon* and in finding that the fact that the stop of appellants' vehicle may have been pretextual did not invalidate the subsequent consensual search of the vehicle.

Appellants also argue that there should be an exception to *Harmon* where it is clear that the traffic stop was racially motivated. As appellants recognize, this type of argument has previously been addressed in *Whren v. United States*, 517 U.S. 806 (1996), where the Court indicated that racially-motivated stops and arrests are an Equal Protection issue rather than a Fourth Amendment issue. Appellants nevertheless contend that the only

procedure available to deter these types of actions is through the exclusion of evidence seized during the racially-motivated stop or arrest and that this court should hold that all evidence seized under these circumstances should be excluded under our state constitution. However, as stated earlier, this court does not have the authority to overrule the supreme court's decision in *Harmon* holding that a pretextual stop, which is otherwise valid, is not a violation of our state or federal law.

Appellants next argue that there was no probable cause for the stop of their vehicle. Citing Ark. R. Crim. P. 3.1, appellants contend that an officer may only stop and detain a person when he reasonably suspects that the person is committing, has committed, or is about to commit a felony or a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. A traffic stop, however, can be distinguished from a Rule 3.1 detention. A police officer may stop and detain a motorist where the officer has probable cause to believe that a traffic violation has occurred. *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001); *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998). Probable cause for a traffic stop exists when facts and circumstances within an officer's knowledge are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected. *Laime, supra*; *Travis, supra*. Once the officer has made a valid traffic stop, he may detain the offending motorist while he completes a number of routine tasks related to the traffic violation, including computerized checks of the vehicle's registration and the driver's license and criminal history, as well as the writing up of a citation or warning. *Laime, supra*. This detention is unrelated to a Rule 3.1 detention. *Id.*

Here, Trooper Eads testified that appellants' vehicle was traveling seventy-four miles per hour in a seventy-mile-per-hour zone and that he stopped the vehicle for speeding. Because the trial court found that the traffic stop was pretextual and that the officer did not stop the vehicle because it was speeding, appellants assert that the officer did not have probable cause for the stop. However, as the State argues, a finding that the stop was pretextual does not equate to a finding that there was no probable cause for

the stop, as these are two different concepts. The trial court did not find that the vehicle was not speeding, but rather stated that the reason for the stop was not based on the speeding violation. Under Ark. Code Ann. § 27-51-201(c) (Repl. 1994), it is a violation of the law to drive a vehicle on a highway in excess of the speed limit. Because Eads had probable cause to believe that appellants were traveling in excess of the posted speed limit, the traffic stop was valid.

Appellants next challenge the validity of Robertson's consent to a search of the vehicle. They first contend that Robertson's consent was invalid because it was not reasonable for Trooper Eads to believe that Robertson had the authority to consent to the search, especially given that Flores was the driver. Citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990), appellants argue that there must be facts available to the officer that would warrant a person of reasonable caution to believe that Robertson had authority to consent to the search. Contrary to appellants' argument, such evidence was present in this case, as Eads testified that Flores told him that Robertson owned the vehicle, that Robertson told him that he was the owner, and also that the vehicle was registered to Robertson. According to Ark. R. Crim. P. 11.2, the consent to a search of a vehicle must be obtained by the person registered as its owner or by the person in apparent control of its operation and contents at the time consent is given. Here, Eads obtained consent from the person registered as the vehicle's owner, Robertson, in compliance with Rule 11.2.

Appellants also argue that Robertson's consent did not extend to the freon tanks contained in the vehicle. However, where there are no limits placed on the search, the consent to search includes any containers found inside the vehicle. *Florida v. Jimeno, supra*; *Miller v. State*, 342 Ark. 213, 27 S.W.3d 427 (2000). The standard for measuring the scope of a suspect's consent to search is that of objective reasonableness, or what the typical reasonable person would have understood by the exchange between the officer and the suspect. *Jimeno, supra.* If the police wish to search closed containers within a vehicle, they do not need to separately request permission to search each container, although the suspect is free to limit the scope of the search. *Id.* Here, Robertson placed no limitation on the scope of the search, and Eads testified that appellants were standing by and watching as he

searched the freon tanks, but did not object or attempt to stop him. Thus, it was reasonable for Eads to assume that the permission granted by Robertson included a search of any container found inside the vehicle, and the trial court did not err in denying the motions to suppress on this basis. The trial court's ruling denying appellants' motions to suppress was not clearly erroneous, and we affirm.

Affirmed.

BIRD and CRABTREE, JJ., agree.

NORTH LITTLE ROCK SCHOOL DISTRICT *v.*
Lousene LIPSMEYER, *et al.*

CA 04-376 191 S.W.3d 550

Court of Appeals of Arkansas
Opinion delivered September 15, 2004

PER CURIAM. Appellees' motion to strike appellant's abstract and brief and motion to dismiss appeal is denied. Appellees' brief is due in thirty days.

SAM BIRD, Judge, concurring. Although I agree with the decision of this court to deny appellant's motion to strike appellant's brief and dismiss this appeal, I do so only because it appears that appellant has relied to its detriment on a practice of the clerk of this court of granting informal, unauthorized extensions of time for parties to file briefs.

From a review of the pleadings, correspondence, and other matters in the clerk's file, it appears that appellant timely filed its record on April 8, 2004. Pursuant to Ark. S. Ct. R. 4-4(a), the clerk issued its "Notice of Filing of Appeal" in which appellant was informed that its brief was due for filing within forty days, which would have made it due not later than May 18, 2004. No brief was tendered for filing by that date.

On June 11, 2004, appellant filed a motion for leave to file a belated abstract and brief, arguing that it had not received the

clerk's notice of the brief's due date. Appellee responded with a motion to dismiss the appeal. On June 30, 2004, this court denied appellee's motion to dismiss, granted appellant's motion to file its late brief, and ordered that appellant's brief was due on July 15, 2004.

On July 14, 2004, acting pursuant to his authority under Ark. S. Ct. R. 4-4(f)(1), the clerk granted to appellant a seven-day extension in which to file its brief, making it due not later than July 22, 2004. On July 22 appellant tendered its brief to the clerk for filing, but the clerk refused to file it because the brief's index to the addendum was defective. However, the clerk granted appellant an additional seven-day extension in which to correct the indexing defect, an extension not provided for under the supreme court's rules. On July 23, appellant tendered its corrected brief, which was accepted by the clerk and filed.

On July 26, 2004, appellee filed its present motion, arguing that the clerk was without authority to grant the second seven-day extension that it granted on July 22, and urging us to strike the untimely brief and dismiss the appeal. I agree with appellant's argument that the clerk was without authority to grant the second seven-day extension. However, it is apparently a common and longstanding practice in the clerk's office to grant such unauthorized extensions for the purpose of permitting parties to correct "technical deficiencies" in briefs that are timely tendered, though not accepted, for filing. I believe that, in the absence of another motion by appellant for leave to file a belated brief, application of the supreme court's rules would be grounds for this court to grant appellee's motion and dismiss this appeal. *See* Ark. Sup. Ct. R. 4-4(f)(1); 4-5. But to do so in this case, without notice to the bar that the clerk's longstanding practice is not authorized by the supreme court's rules, would be unjust. Therefore, I join in the decision to deny appellee's motion in this case.

STROUD, C.J., PITTMAN, VAUGHT, and CRABTREE, JJ., join in this concurring opinion.

Mark HARNESS *v.* Buddy CURTIS
and Rose CURTIS

CA 03-1437 192 S.W.3d 267

Court of Appeals of Arkansas
Division II
Opinion delivered September 22, 2004

Daniel Murray Traylor, for appellant.

Kristi A. Mattes, for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Mark Harness, appeals from the circuit court's decision granting appellees, Buddy Curtis and Rose Curtis, possession of real property and awarding them damages in the amount of $5,000 after concluding that appellant, as the purchaser, materially breached the parties' contract. He also appeals from the circuit court's denial of his claim for the damages that resulted from his wrongful dispossession. We hold that the trial court erred in enforcing a forfeiture of appellant's contractual rights, in awarding damages to appellees, and in refusing to award damages to appellant.

On November 17, 1994, the parties entered into a contract in which appellant agreed to purchase, for $35,000, a tract of real property on which a doublewide mobile home, a "body shop" garage, and a storage shed were located. Appellant paid $5,000 in cash and agreed to pay the balance of $30,000 in monthly installments of $295.15. The parties agreed that time was of the essence and that, "if [appellant] default[ed] in the payment of any installment of principal and interest for a period of thirty (30) days," or violated any of the other covenants, appellees could either declare the entire debt due and payable or rescind the agreement. Further, the agreement provided that upon recission of the agreement, all money paid by appellant would be retained by appellees as rent, and after notice, appellees could demand possession of the property. The parties also agreed that the "agreement shall not be sold, transferred or assigned without written consent of [appellees], and in the event of any sale, assignment or transfer, without written consent, [appellees] shall have the right to exercise the options herein before provided...." Appellant agreed that he "shall not commit or permit waste; and shall maintain the property in as good condition as at present," and "[u]pon any failure so to maintain, [appellees] may cause reasonable maintenance work to be performed at the cost of [appellant]."

For the first time in seven years, appellant was eight days late with a monthly payment in December 2001. On December 9, 2001, appellees had the sheriff serve appellant with a notice to

vacate the property within ten days. On January 14, 2002, appellees filed an unlawful-detainer complaint alleging that appellant had agreed to make monthly payments on the first of each month "with no grace period" and that appellant had breached the agreement by failing to make the December 1, 2001, payment and by committing waste upon the property. Appellant filed a counterclaim requesting damages for wrongful dispossession.

At a preliminary hearing held February 19, 2002, appellee Buddy Curtis testified that appellant had always made his payments on time but, in December 2001, no payment was forthcoming. He said that on the ninth or tenth of December, he went to the residence to see what had happened and observed that appellant "had turned the place into a junk yard...." He testified that there were thirty-five to forty vehicles parked on the property and that there was "trash everywhere." He learned that appellant was in jail and that appellant's daughter, Melissa Davis, and his brother, Richard Harness, were present on the premises. He told Richard that the agreement "was void." Richard gave him a copy of a "contract" between Richard and appellant that provided that, on October 1, 1996, appellant had sold to Richard "1 parcel of land at 5324 Wordsmith Trail, North Little Rock[,] Ark[.]" with the "property measuring 90 ft. length by 30 ft. width lying on the east side of garage for the sum of $2,500.00." Curtis testified that, although the parties' agreement provided that appellant was not supposed to "sell anything," he had "sold something." At this hearing, the circuit court concluded that appellees had established a prima facie case of unlawful detainer and issued a writ of possession, with a trial to be held on a later date.

At the June 28, 2002, trial, the court considered testimony given at the earlier hearing and heard additional testimony. On cross-examination, Mr. Curtis admitted that the agreement was prepared by his attorney. He also admitted that, according to the contract, appellant had until the end of December 2001 to make the December payment. He also admitted that he had not asked appellant to clean up the property because he "no longer wanted to be associated with" appellant.

Following the hearing, the judge ruled that there was an enforceable land-sale contract and that appellant had breached it. When asked to specifically state his findings of fact and conclusions of law, he said that the conveyance to Richard in October 1996 and the late payment were breaches of the contract. The court's written order provided that appellant had materially breached the

contract, that the funds paid by appellant would be considered rent for the period that appellant had occupied the property, and that appellees were entitled to remain in possession of the property. The order awarded appellees $5,000 for damages to the property and $350 in attorney's fees. This appeal followed.

The standard that we apply when we review 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).

Appellant argues on appeal that the trial court erred in: (1) awarding possession of the property to appellees; (2) awarding damages in the amount of $5,000 to appellees for repairs they made to the property after appellant was ejected; (3) refusing to award appellant damages that he sustained as a result of his wrongful dispossession of the property. We agree with appellant on all points.

Appellant contends that the trial court should have treated the contract as a mortgage giving him an equity of redemption. We need not address that issue, however, because appellant did not sufficiently breach the agreement to warrant forfeiture of his rights thereunder. When performance of a duty under a contract is contemplated, any nonperformance of that duty is a breach. *Zufari v. Architecture Plus*, 323 Ark. 411, 914 S.W.2d 756 (1996). However, a relatively minor failure of performance on the part of one party does not justify the other seeking to escape any responsibility under the terms of the contract. *Vereen v. Hargrove*, 80 Ark. App. 385, 96 S.W. 3d 762 (2003). Although appellant failed to make a payment on December 1, 2001, that was not a material breach under the terms of the parties' agreement, as the contract did not give appellees the right to declare a default until thirty days without payment had passed. By serving appellant with a notice to vacate on December 9, appellees committed the first material breach of the agreement, which released appellant from his contractual obligations. *See Vereen v. Hargrove, supra.*

Moreover, while Arkansas's appellate courts have upheld forfeiture clauses in executory land sale contracts, *see Abshire v. Hyde*, 13 Ark. App. 33, 679 S.W.2d 214 (1984), a court may refuse to enforce a forfeiture provision in a land contract when there are

substantial equitable circumstances. *See Hatfield v. Mixon Realty Co.*, 269 Ark. 803, 601 S.W.2d 894 (Ark. App. 1980). The right of forfeiture can be a harsh remedy producing great hardships, and therefore, before a forfeiture is enforceable, equity requires strict compliance with the important terms of the contract even where there is an express provision for forfeiture. *Triplett v. Davis*, 238 Ark. 870, 385 S.W.2d 33 (1964). Appellees did not substantially comply with the default provision of the contract when they declared a default and served appellant with notice to vacate only eight days after the payment was due.

Appellant also contends that the trial court clearly erred in finding that appellant's purported conveyance of property to Richard breached the agreement between appellant and appellees. We agree. According to the document memorializing the conveyance, appellant sold Richard a parcel of land. The agreement between appellant and appellees, however, provided that the "*agreement* shall not be sold, transferred or assigned without written consent." (Emphasis added.) Here, appellant clearly did not sell, transfer, or assign the agreement to Richard; instead, he purportedly sold a small portion of the land to Richard. Given the plain language of the agreement, we conclude that the trial court clearly erred in finding that appellant breached the parties' agreement when he executed a document purporting to sell to Richard a small portion of the land.

We also note that, by awarding damages to appellees, the trial court obviously believed that appellant committed waste on the property. Our review of the evidence, however, leads us to conclude that a finding to that effect would be clearly against a preponderance of the evidence. The contract provided: "Buyer shall not commit or permit waste; and shall maintain the property in as good condition as at present, reasonable wear and tear excepted." Here, Mr. Curtis testified that appellees had spent $5,394.34 to repair the property. Appellees' daughter, Tina Tendall, also testified about the repairs. Although Mr. Curtis and Ms. Tendall testified extensively about the state of the property after appellant's eviction, other than describing it as "very nice," they presented no specific evidence of its condition at the time appellant took possession of it. Without such proof, we cannot say that the residence actually deteriorated, in excess of normal wear and tear, during the term of the contract. In *O'Kane v. O'Kane*, 117

Ark. 33, 173 S.W. 821 (1915), the court explained that waste involves the destruction or removal of buildings, the carrying away of the soil, the cutting of ornamental or sheltering trees and shrubs, and the cutting of saplings and timber. Here, there is no evidence of any kind of destruction to the property, and therefore, we cannot say as a matter of law that the unsightly presence of thirty or forty vehicles on this property amounted to waste.

In light of appellant's history of timely payments and appellees' material breach of contract in prematurely declaring default, we reverse the trial court's forfeiture of appellant's contractual rights. We order the contract reinstated and direct that, on remand, the trial court award possession of the property to appellant.

We also reverse the trial court's award of $5,000 to appellees for damages on the ground that appellant caused or permitted waste on the property. When the damages to the property are capable of repair, restoration costs are a recoverable element of damages for temporary damage done to the property. *State v. Diamond Lakes Oil Co.*, 347 Ark. 618, 66 S.W.3d 613 (2002). When injury to real property is temporary, the measure of damages is the cost of restoring the property to the same condition that it was in prior to the injury. *Id.*; *see also* Howard W. Brill, *Arkansas Law of Damages* §§ 30-1, 30-2 (4th ed. 2002). In our view, there was a failure of proof that the repairs performed by appellees were more than normal wear-and-tear damages to a mobile home that was twenty to forty years old. Therefore, we reverse the award of damages awarded to appellees.

Appellant also argues that, because he was wrongfully dispossessed of the property, the circuit court erred in failing to award him damages pursuant to Ark. Code Ann. § 18-60-311 (Repl. 2003). Again, we agree and remand for the circuit court to determine the damages that he sustained as a result of the wrongful dispossession.

Reversed and remanded.

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

Peggy PARIS *v.* STATE of Arkansas

CA CR 03-1413 192 S.W.3d 277

Court of Appeals of Arkansas
Division II
Opinion delivered September 22, 2004
[Rehearing denied October 27, 2004.]

Appellant, *pro se.*

Mike Beebe, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Peggy Paris, appeals from the circuit court's order for destruction of her gaming devices. Appearing before this court pro se, she raises several issues on appeal, arguing, among other things, that the machines sought to be destroyed were statutorily permissible amusement devices. Because we conclude that the circuit court did not clearly err in finding that the machines were illegal gambling devices as well as being slot machines specifically excluded from the definition of amusement devices, we affirm the court's order.

Thirty-four devices were seized from appellant's business, the Golden Goose Arcade. Following the seizure, appellant sought return of the seized property, arguing that the machines were amusement devices permitted by statute. After a hearing, the court denied her motion and, as requested by the State, entered an order permitting the destruction of the devices. In the order of destruction, the court found that the seized devices were illegal gambling devices and also slot machines specifically excluded from the definition of amusement devices. Appellant challenges this ruling on appeal.

In her argument, appellant notes that "amusement devices" are defined as "any coin-operated machine, device, or apparatus which provides amusement, diversion, or entertainment and includes, but is not limited to, such games as . . . video games . . . whether or not such machines show a score, and which are not otherwise excluded in this subchapter. . . ." Ark.CodeAnn. § 26-57-402(1) (Supp. 2003). She argues that her devices were permissible video games, not prohibited gambling devices. The State, however, notes that the statutes further provide that nothing contained in Ark. Code Ann. § 26-57-402 and other statutes "shall be deemed to legalize, authorize, license, or permit any machines commonly known as slot machines, roscoes, jackpots, or any machine equipped with any automatic money payoff mechanism." Ark. Code Ann. § 26-57-403(a) (Repl. 1997). Further, the State notes that our criminal statutes prohibit gambling devices, citing Ark. Code Ann. § 5-66-104 (Repl. 1997), which provides as follows:

> Every person who shall set up, keep, or exhibit any gaming table or gambling device, commonly called A. B. C., E. O., roulette, rouge et noir, or any faro bank, or any other gaming table or gambling device, or bank of the like or similar kind, or of any other description although not herein named, be the name or denomina-

> tion what it may, adapted, devised, or designed for the purpose of playing any game of chance, or at which any money or property may be won or lost, shall be deemed guilty of a misdemeanor and on conviction shall be fined in any sum not less than one hundred dollars ($100) and may be imprisoned any length of time not less than thirty (30) days nor more than one (1) year.

As there was a bench trial, on review we determine whether the circuit court's findings were clearly erroneous. *Sharp v. State*, 350 Ark. 529, 532, 88 S.W.3d 848, 850 (2002). At the bench trial, the trial judge not only heard testimony from Officer Kimberly Pearson of the Searcy Police Department regarding how the machines operated, but also, after receiving permission from the parties, personally examined the machines. In his order, he described the machines as follows:

> With these games, the player pays money to purchase credits, which are electronically loaded onto the machine by the operator of the arcade. After the player determines how many of the credits on the machine are to be placed at risk by a particular play of the machine, the player starts the operation of the machine by a manual act of pushing or punching a button or device located on the machine. The machine then operates by causing pictures, diagrams, lines or other depictions, herein after referred to as "*icons*[,"] on the video screen of the machine to move in a random pattern at a very high velocity. The movement of the "icons" stop[s] when the player pushes a stop button or, if no such button is pushed, at a time determined by a preset electronic command within the machine.
>
> . . . .
>
> If the "icons" stop in a certain pattern the player wins a preset number of credits. If not, the player [loses] the amount of credits which were placed at risk and those credits are subtracted from the total on the machine. If all credits are lost the player must purchase additional credits from the arcade operator.

Pearson, who operated the devices at the arcade while undercover, testified that after ending a session, a player "cashed out" by having the operator of the arcade present the player with a five-dollar ticket for each five-hundred credits acquired, which could then be used to play the game at a later time. Alternatively, the player could use the tickets to purchase items from a prize display. When purchasing something upon cashing out, the player was required to sign an affidavit stating that nothing was received that had a value of over $12.50.

The trial judge further wrote that "[a]fter hearing the evidence and viewing the operation of the machines," it was his opinion that "no player is capable of manipulating the location of the 'icons' by manually stopping the machine and no level of skill for such an act is involved." The court noted that the movement of the icons "is simply [too] fast for such human manipulation," and that the location of the icons when the machine stopped was "purely a function of chance or a preset location controlled by the machine['']s internal electronic software." Pearson testified that there was no element of skill in the game and that it was purely a game of chance.

In determining whether the court clearly erred in concluding that the devices were slot machines and illegal gambling devices, we are guided by the Arkansas Supreme Court's opinion in *Sharp*. There, the court stated that "[t]o be a prohibited gaming device, the device must be one that is adapted or designed for the purpose of playing a game of chance at which money or property may be won or lost," and "[w]here the machine is played to win or lose by hazard of chance, it is a gaming device." *Sharp*, 350 Ark. at 534, 88 S.W.3d at 852. The operation of the devices in *Sharp*, which the court described as slot machines, was based on the chance that a certain pattern of objects would appear on the monitor. Credits had to be purchased to begin playing the machines, and the reason for using the credits while playing the machines was to win or lose credits. Further, the court noted the testimony that if players won, they received credits that allowed them to continue to play or to redeem the credits for prizes. The court stated that "[t]he intent was to play a game of chance, that is the credits were risked in the hope that ... the images would appear in the proper order...." *Id.* at 534, 88 S.W.3d at 852. Thus, the court concluded that "[t]here was a risk undertaken between the player and the business, a contest of chance, whereby either the player or the business would be the winner. The other would necessarily be the loser. This is a game of chance." *Id.* at 534-35, 88 S.W.3d at 852. The court held that the circuit court did not err in finding that the devices were illegal gaming devices subject to destruction under Ark. Code Ann. § 5-66-104.

The operation of the devices in the case at bar is remarkably similar to operation of the devices described in *Sharp* as slot machines. In both instances, purchased credits were risked in a game of chance for the purpose of obtaining additional credits or a prize. Thus, just as devices described as slot machines in *Sharp*

were determined to be illegal gaming devices, appellant's devices are likewise gambling devices proscribed by Ark. Code Ann. § 5-66-104. Further, because they are slot machines, they are expressly excluded by Ark. Code Ann. § 26-57-403(a) from the definition of amusement devices found at Ark. Code Ann. § 26-57-402(1). Consequently, we conclude that the circuit court did not clearly err in finding that the devices were illegal gambling devices as well as being slot machines excluded from the definition of amusement devices, and we affirm on this point.

In challenging the circuit court's ruling, appellant also argues that the court erred in stating in the order of destruction that the intent of the law was to permit only children to play amusement devices. What the trial judge actually said was that while "it may have been the intention of some legislators to allow children to play amusement games in a pizza parlor and win a stuffed animal," it was not, in his opinion, "the intent of the legislature to allow public establishments, which offer adult patrons gambling devices on which they could bet, win[,] or lose unlimited amounts of money." Given our affirmance of the court's finding that the devices were illegal gaming devices and also prohibited slot machines, we need not address appellant's argument that adults may play amusement devices.

Appellant raised on appeal several other issues that were not raised at trial and therefore not preserved for appellate review. We note that even constitutional issues must first be presented below to be preserved for appellate review. *See, e.g., Nance v. State*, 339 Ark. 192, 200, 4 S.W.3d 501, 506 (1999). Appellant asks that this court overlook these procedural irregularities because she is appearing pro se. However, as our supreme court has said before, pro se appellants receive no special consideration of their argument and are held to the same standard as licensed attorneys. *See Eliott v. State*, 342 Ark. 237, 241, 27 S.W.3d 432, 435 (2000).

Appellant argues that she was denied equal protection, that she was selectively prosecuted, and that the taking of her property constituted cruel and unusual punishment. Before the circuit court, however, the only constitutional argument made by appellant was that various statutes were void for vagueness and overbroad, citing her rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution. Thus,

the issues raised on appeal were not raised at trial and consequently were not preserved for appellate review.

Appellant further argues on appeal that, even though her trial counsel consented to the court personally inspecting the devices, the court erred in making the inspection and relying on those observations in making a decision. Again, this issue was not raised at trial and therefore was not preserved for appellate review. In this point on appeal she further contends that the court should have considered the evidence presented to the court. There is, however, no indication that the court did not consider the evidence presented.

Appellant also argues on appeal that Pearson should not have been allowed to testify as a lay witness regarding the operation of the devices. Appellant's argument at trial, however, was that Pearson could not testify as an expert witness, but only as a lay witness regarding their operation. Thus, the issue raised on appeal was not raised at trial, and consequently, we will not address it.

Affirmed.

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

AUTOZONE *v.* Wanda HORTON

CA 04-26 192 S.W.3d 291

Court of Appeals of Arkansas
Division III
Opinion delivered September 22, 2004

Rieves, Rubens & Mayton, by: *Elton A. Rieves III*, for appellant.

Choate Law Firm, PLLC, by: *Penny Collins Choate*, for appellee.

SAM BIRD, Judge. Appellee Wanda Horton fell and was injured when she was walking into appellant AutoZone's store in Searcy, Arkansas, on March 28, 2002. Horton later received medical care and underwent surgery related to the injuries sustained in the fall. In a complaint filed against AutoZone, Inc., in the White County Circuit Court, Horton alleged that she was injured after her foot was caught in an unsecured doormat that protruded above the surface of an abutted doormat; and that this caused her to fall to the ground, striking her shoulder and face. AutoZone denied any negligence and stated that it had no knowledge of any abnormal condition of the mats situated in front of its door that could have been "attributable" to a fall. AutoZone alleged that any injuries to Ms. Horton resulted from her own negligence or negligence by a third party.

A jury trial resulted in a verdict in favor of Horton for $31,000, which was entered as the trial court's judgment on October 3, 2003. AutoZone appeals, contending that the trial

court erred: (1) in refusing to grant AutoZone's motions for a directed verdict, made on the basis that there was insufficient evidence of negligence or breach of duty to an invitee; (2) in instructing the jury on circumstantial evidence; and (3) in instructing the jury on general negligence by use of Arkansas Model Instruction—Civil 203.

We agree with the first point on appeal: we hold that the trial court erred in refusing to grant a directed verdict. Because of this holding, we need not address AutoZone's points concerning jury instructions. The case is reversed and dismissed.

Testimony at the trial was given by Richard Fry and Laura Berry, both former employees of AutoZone, as well as by appellee Horton. Fry testified that he was working at the store when Horton was injured. He testified that he did not see her fall, but that he saw her on the ground and that her foot was under a corner of the mat. He stated that an AutoZone employee straightened the mats, which Fry described as heavy, weighing approximately thirty to forty pounds. Fry testified that he had tripped over the mats more than twice in the six-and-a-half years he had worked for AutoZone, but that he had no knowledge of any customer ever tripping on them. He said that the mats were a potential hazard if not straightened up. He testified that the mats had curled on several occasions when he turned the corner while pushing up to fifteen cases of oil on a dolly or a cart, that he straightened the mats out when this occurred, and that he did not know if every employee did so.

Laura Berry testified that she worked for AutoZone for four years and was working there when Horton was injured. Berry stated that she saw Horton lying on the ground and saw one of her shoes away from her. Berry testified that the shoe was lying under the mat on the other side from Horton, with the top part under the mat; but during her testimony she also read her deposition statement that the shoe was beside Horton and not beneath the mat. Berry described the mats as black, textured, and heavy, probably a good fifteen or twenty pounds. She testified that she had seen them side by side, or end to end, and had never observed them to be overlapped; she stated, however, that she did observe the mats in an overlapping position after Horton tripped. Berry said that the mats did not move at all when she put an item such as a battery on a dolly and rolled the dolly over them, that she did not know if the mats moved for anybody else, and that she was not aware of anyone else ever tripping over them.

Wanda Horton testified that on the day in question she was walking straight into the store, and that the next thing she knew she was on the ground. She stated:

> I was walking down in front of all the vehicles and stuff and everything seemed clear to me. The next thing I knew I fell. I tripped over the mat. When I was walking up to the mat I tripped over it and fell flat.

Horton stated that she was wearing a pair of tennis shoes with open back, closed toe, and thick sole; that she had owned several such pairs; and that she had never experienced problems with them. She said that someone told her that her shoe was under the mat after she fell. She denied that her shoes grabbed the concrete to cause the fall.

Horton testified that she had been in the AutoZone store at least every month or two "since the last twenty years." She said that she always looked at the mats; that once they had been crooked; and that as a general rule they were laid out side by side, "lapped over kindly, because they was too wide to put in front of the door." She testified that she was being careful on the day of her injury when she walked towards the door of the store; that the door mats were flat like they always were; that they were smooth; and that she did not see anything unusual when she was walking. She read aloud her deposition statement that she had seen the mats overlapped as she approached them, and she testified that the mats had been overlapped from time to time. Horton testified that she did not know what caused her to fall. She read the statements in her deposition that she did not know what caused her to fall; that she tripped over the mat and fell; but that, as far as she knew, the mats were in their normal position.

As its first point on appeal, AutoZone contends that the trial court erred in refusing to grant its motions for a directed verdict, made on the basis that there was insufficient evidence of negligence or breach of duty to an invitee. In determining whether a directed verdict should have been granted, the appellate court reviews the evidence in the light most favorable to the party against whom the verdict is sought and gives it its highest probative value, taking into account all reasonable inferences deducible from it. *Curry v. Thornsberry*, 354 Ark. 631, 128 S.W.3d 438 (2003). A motion for directed verdict should be granted only if there is no substantial evidence to support a jury verdict: stated another way, a motion for a directed verdict should be granted only when the

evidence viewed is so insubstantial as to require the jury's verdict for the party to be set aside. *Id.* Where the evidence is such that fair-minded persons might reach different conclusions, a jury question is presented and the directed verdict should be reversed. *Id.* It is not the province of the appellate court to try issues of fact, but simply to examine the record to determine if there is substantial evidence to support the jury verdict. *City of Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481 (2000).

A property owner has a duty to exercise ordinary care to maintain his premises in a reasonably safe condition for the benefit of an invitee. *Kopriva v. Burnett-Croom-Lincoln-Paden*, 70 Ark. App. 131, 15 S.W.3d 361 (2000). Possible causes of a fall, as opposed to probable causes, do not constitute substantial evidence of negligence. *Id.*

In *Van DeVeer v. RTJ, Inc.*, 81 Ark. App. 379, 101 S.W.3d 881(2003), we further addressed the duty of care that a premises owner owes to invitees:

> [A]s follows in *Restatement (Second) of Torts,* § 343 (1965):
>
> > A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
> >
> > (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> >
> > (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> >
> > (c) fails to exercise reasonable care to protect them against the danger.
>
> The basis for a premises owner's liability under this rule is the superior knowledge of an unreasonable risk of harm of which the invitee, in the exercise of ordinary care, does not or should not know. *Jenkins v. Hestand's Grocery, Inc.*, 320 Ark. 485, 898 S.W.2d 30 (1995). There is an exception to this general rule, which states that a "possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Restatement (Second) of Torts,* § 343A(1) (1965).

> Arkansas cases have also recognized the general duty that a premises owner owes to an invitee and the exception to this duty where the dangerous condition is either known or obvious to the invitee. *See, e.g., Jenkins v. Hestand's Grocery, supra; Jenkins v. Int'l Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994); *Young v. Paxton*, 316 Ark. 655, 873 S.W.2d 546 (1994); *Carton v. Missouri Pac. R.R. Co.*, 303 Ark. 568, 798 S.W.2d 674 (1990); *Kuykendall v. Newgent*, 255 Ark. 945, 504 S.W.2d 344 (1974); *Ramsey v. American Auto. Ins. Co.*, 234 Ark. 1031, 356 S.W.2d 236 (1962). These rules are the basis of AMI Civ.3d 1104, which states that the premises owner owes a duty to an invitee to use ordinary care to maintain the premises in a reasonably safe condition. No such duty exists, however, if the condition of the premises that creates the danger was known by or obvious to the invitee, unless the premises owner should reasonably anticipate that the invitee would be exposed to the danger despite his knowledge of it or its obvious nature. *Id.*

81 Ark. App. at 384-85, 101 S.W.3d at 883-84 (2003).

The burden of proof is always on the party asserting negligence, as negligence is never presumed. *Morehart v. Dillard Dep't Stores*, 322 Ark. 290, 908 S.W.2d 331 (1995). To establish a prima facie case of negligence, appellant must show that he sustained damages, that the defendants were negligent, and that such negligence was a proximate cause of his damages. *Id.* While a party may establish negligence by direct or circumstantial evidence, he cannot rely upon inferences based on conjecture or speculation. *Id.*

In the present case, AutoZone asserts that it exercised ordinary care in placing mats in front of its door, that there was no evidence that the mats were placed in any way other than a reasonable manner, and that the mere fact that Horton slipped and fell on the mat does not give rise to any inference of negligence. Horton asserts that evidence of AutoZone's employees' prior knowledge of the tripping hazard was direct evidence that AutoZone was aware of the hazard and failed to take steps to protect its customers from injury. She also asserts that AutoZone should have known of the dangerous hazard created by its employees when carts or dollies were rolled over the doormats, causing the mats to curl; and that AutoZone should have reasonably anticipated that invitees would be exposed to the danger caused by AutoZone's failure to maintain its premises in a reasonably safe condition. She asserts that it was a jury question as to whether the dangerous condition was open and obvious, as was the question of whether

the invitee should reasonably have been anticipated to encounter the dangerous condition. She concludes that AutoZone breached a duty it owed to her, and that the breach was the proximate cause of her injuries.

We do not agree with Horton's arguments. Although a former employee of AutoZone testified that he had tripped on the mat and that it buckled when he rolled a heavy dolly across it, he testified that he straightened the mat each time it buckled. He and another former employee stated that they had not seen anyone trip, and neither of them testified that they had seen the mat buckle when used by other employees. Horton herself testified that she observed the mats to be flat and smooth and that she saw nothing unusual as she approached them.

We hold that there was not substantial evidence that AutoZone had knowledge that the mats constituted a "tripping hazard." The evidence presented, viewed in the light most favorable to Horton, showed that her shoe was under the mat after she fell. The jury could only have speculated that any unusual condition of the mats resulted directly from AutoZone's negligence, and that such condition of the mats caused Horton to fall. The evidence does not establish that AutoZone breached any duty of care to Horton. We hold that the trial court erred in denying AutoZone's motions for a directed verdict.

Reversed and dismissed.

CRABTREE and ROAF, JJ., agree.

J.C. HARRISON, Jr. *v.* J.D. LOYD, Faber Mullins, Trustees of Mount Vernon Church of Christ

CA 03-1377 192 S.W.3d 257

Court of Appeals of Arkansas
Division III
Opinion delivered September 22, 2004
[Rehearing denied November 3, 2004.]

James F. Lane, P.A., for appellant.

Robert W. Henry, P.A., for appellees.

SAM BIRD, Judge. J. C. Harrison Jr. appeals an August 21, 2003, decision of the Faulkner County Circuit Court that denied his claim to a reversionary interest in certain real estate. After considering the pleadings and briefs of the parties, the trial court rejected appellant's prayer that the quiet-title portion of an October 22, 1965, decree of the Faulkner County Chancery Court be declared void and subject to collateral attack.

Appellant raises three points, contending that the trial court erred (1) in finding that appellant's father, J. C. Harrison Sr., conveyed his interest in the land to predecessors in interest of appellees, the trustees of the Mount Vernon Church of Christ, by means of a January 10, 1957, deed; (2) in ruling that a 1965 decree was res judicata to the issues appellant presented in the 2003 proceeding; and (3) in sanctioning appellant under Rule 11 of Arkansas Rules of Civil Procedure by assessing attorney's fees and expenses against him. Appellees assert that the trial court did not err regarding these three points, and they also request that attorney's fees and expenses be levied against appellant as appropriate sanctions for pursuing this appeal. We affirm appellant's first and second points on appeal. We reverse the trial court's assessment of attorney's fees and expenses against appellant, and we do not assess sanctions against him for appealing the trial court's decision to this court.

The facts of this case are as follows. Appellant is an heir at law of J. C. Harrison Sr., who died in 1994. A warranty deed of December 6, 1946, executed by Harrison Sr. and Violet Harrison, his wife, purported to convey unimproved land to the Church of Christ of Mount Vernon, Arkansas, with the following provision: "The above property is to revert back to J. C. and Violet Harrison or their heirs in the event the said Church of Christ is disbanded or has no further use of the said property." Although the deed was never recorded, a church building was constructed on the land described in the deed shortly after it was executed. The congregation met there for a number of years.

On January 10, 1957, Harrison Sr., by then a widower, executed a warranty deed for a parcel of land that included the

parcel described in the 1946 deed. The grantors and grantees named in the deed were identical: D.C. Beene, S. K. Riggins, Dewey Mason, J. C. Harrison Sr., and Cletus Heffington, who are identified as Trustees for Mt. Vernon Church of Christ. Only "J. C. Harrison Sr., Widower" is typed in a space at the top of the deed form where the grantor is normally identified; the singular pronoun "I" is used twice in referring to the grantor in the habendum clause; the signature at the bottom is that of J. C. Harrison Sr. alone; and the deed is acknowledged solely by J. C. Harrison Sr., who is not identified in the acknowledgment as a trustee of the church. The deed was recorded in Faulkner County.

On August 16, 1963, Harrison Sr. executed a deed whereby he, as grantor, purported to convey to himself and other persons as trustees of the church the same lands described in the 1957 deed. This deed, which contained certain restrictions not pertinent to this appeal, was also recorded.

On August 16, 1965, Harrison Sr. filed a complaint against trustee Randall Leach, asking that Leach be ordered to deliver the 1947 deed for filing of record or, alternatively, return it to Harrison Sr.[1] The complaint stated that after the execution of the unrecorded 1947 deed, Harrison Sr. had executed and delivered to the Church of Christ a different deed bearing only his name; that "the second deed [executed in 1957] ... conveys the meaning and intent of the grantor and grantee"; but that, for reasons of sentiment, Harrison Sr. wished to have the first deed recorded in order to show that his wife had participated in the first deed and in a gift to the church. An answer filed by Leach and other persons, claiming to constitute a majority of the board of trustees of the Mt. Vernon Church of Christ, asked that Harrison Sr. be enjoined from recording the 1947 deed unless the reversionary clause were stricken, and that title to the lands described in the 1957 deed be confirmed and quieted in the trustees and their successors in office.

On October 22, 1965, the Faulkner County Chancery Court entered a consent decree that concluded Harrison Sr.'s suit.

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[1] Harrison Sr. is identified in the complaint as Cecil Harrison.

Appellant notes that although the date of the first deed is December 6, 1947, its date of notarization is December 6, 1946. He states his belief that it was executed in 1946. In the briefs before us, both parties refer to the 1946 deed. The 1965 complaint and resulting 1965 consent decree identify the first deed as a 1947 deed, but the order from which the present appeal is taken calls it a 1946 deed.

The decree stated that the first deed conveying land to the Church of Christ of Mount Vernon was executed by Harrison Sr. (Cecil) and his wife, that it contained a reversionary clause, that the deed "was executed without monetary consideration to grantors but . . . in consideration of other donations by other persons" to help build a church on the lot described in the deed, and that the deed had never been recorded. The decree also addressed the 1957 deed:

> On January ___, 1957, the said J. C. Harrison, Sr. executed a deed, which is of record in Book 140, Page 341, Deed records of Faulkner County, Arkansas, by which he conveyed to the trustees of said Church of Christ of Mt. Vernon for a valuable consideration, a parcel of land, including said parcel conveyed on December 6, 1947, and other lands in Faulkner County, Arkansas, to-wit:
>
> > Beginning at the southeast corner of Lot Numbered Nineteen (19), in Block Numbered Three (3) of the town of Mount Vernon, Arkansas, and running west 206 feet; thence running north 70 feet; thence running east 206 feet; thence running south 70 feet to the point of beginning,
>
> in which there were no restrictions or reversions.

The chancery court further ordered that the land at issue be confirmed and quieted:

> in Randall Leach, J. D. Loyd, D. G. Beene, Faber Mullins, S. K. Riggins, J. C. Harrison, Sr., J. C. Harrison, Jr., Cletus Heffington, and Dewey Mason, as trustees for the Church of Christ of Mt. Vernon, Arkansas, free from any and all restrictions and from any possibility of said parcel of land, or any part thereof, reverting to the plaintiff, his heirs or assigns, in case the said Church of Christ of Mt. Vernon should disband or cease to use said property for church purposes.

Additionally, the court ordered that the trustees return to Harrison Sr. the unrecorded 1947 deed, which contained the reversionary clause, so that he might have it recorded if he so desired.

In 2002 appellant, J. C. Harrison Jr., filed a complaint for declaratory judgment against the trustees of the church seeking a declaration of the rights of the parties in and to the real property that had been the subject of the Faulkner County Chancery Court's October 22, 1965, consent decree. He attached to his complaint the 1946 deed, which was referred to as Deed #1; the 1957 deed, referred to as Deed #2; and the file of the 1965

chancery case. In his complaint appellant asked that the quiet-title portion of the 1965 decree be declared void and subject to collateral attack because of an alleged legal defect:

> Defendant Leach knew that Plaintiff herein, J.C. Harrison, Jr., had an interest in the subject land as a remainderman under Deed #1. Ark. Stat. Ann. §§ 34-1902 and 1903 required that Plaintiff herein, J.C. Harrison, Jr., be named as a counter defendant in the quiet title counterclaim. Further, Ark. Stat. Ann. § 34-1905 required the publication of notice of the quiet title claim in a newspaper having a circulation in Faulkner County, Arkansas. There was no such notice issued by the Chancery Clerk and, consequently, no publication.

Appellant also asked for a declaration that he, as an heir at law of Harrison Sr. and Violet Harrison, was a remainderman under the unfiled Deed #1; that the church trustees were bound by the reversion provision of Deed #1; and that Deed #2 was ineffective as a transfer of the property because Harrison Sr. executed it in his capacity as a trustee of the church and not in his individual capacity.

Appellees responded that appellant's assertions regarding Deeds #1 and #2 had been fully litigated in the 1965 case, and that his claims were barred by res judicata. Appellees denied that appellant had standing as an heir or in any other manner to maintain his cause of action, and denied that the grantors in Deed #2 were the trustees. They affirmatively asserted that no possible defect in the pleadings could be raised regarding the 1965 case because Harrison Sr., the sole plaintiff therein, was the only party who could object; and that having so failed, Harrison Sr. and all those who claimed by, through, or under him were bound by the court's decree. They asserted that all necessary and proper parties were before the court in the 1965 case, that the decree could not be collaterally attacked, and that the decree was a final and complete disposition of all matters involving those parties. They asserted that Deed #1 was void because the Church of Christ of Mt. Vernon was not incorporated at the time the deed was executed, resulting in no grantee capable of taking and holding title. Finally, appellees alleged that the 1957 deed was an unlimited conveyance of all the interest that Harrison Sr. had in the lands described therein, including any reversionary interest he may have retained in Deed #1 if it were valid, which validity appellees denied. Appellees asserted in a motion for sanctions that the appellant had filed a frivolous lawsuit.

In the 2003 decree of the Faulkner County Circuit Court, the order under our review, the trial court made the following findings: (a) that appellant's purported reversionary interest in the land at issue was claimed through the 1946 deed, the grantee was an unincorporated religious association, and the deed was not delivered to or accepted by the named trustees of the grantee; (b) that the 1957 deed was accepted and recorded by the grantees, who were the named trustees of the church; (c) that in the agreed decree of 1965, the chancery court determined that the 1946 deed was void for lack of monetary consideration to the grantors and because, the Church of Christ of Mt. Vernon not being a valid corporation, there was no grantee capable of taking title under that deed.

In the 1965 decree, title to the lands was confirmed and quieted in the then trustees of the church, free from any and all restrictions and free from any possibility of reversion to Harrison Sr., his heirs, and assigns. Noting the previous ruling of the chancery court that appellant's predecessor in title had no title to the lands, the circuit court ruled that appellant was barred by res judicata from retrying the same lawsuit in a later proceeding. The circuit court assessed $3741.32 against appellant for attorney's fees and expenses incurred by appellees in defending against "a frivolous cause."

1. *The 1957 Deed*

Appellant contends in his first point of appeal that the trial court erred in finding that his father, J. C. Harrison Sr., conveyed his interest in the real property to predecessors in interest of appellees by means of the deed of January 10, 1957. As a general rule, the requisites of a valid deed are that there be competent, identifiable parties and subject matter; a valid consideration; effective words expressing the fact of transfer or grant; and formal execution and delivery. *White v. Zini*, 39 Ark. App. 83, 838 S.W.2d 370 (1992).

Appellant concedes that the 1946 deed is void for want of a capable grantee because the Church of Christ of Mount Vernon did not formally exist at that time. He characterizes the 1957 deed as "an obvious attempt to convey the realty from J. C. Harrison, Sr." to the trustees of the church. However, noting that the grantor and grantee are the same parties, he argues that the 1957 deed's legal defect of conveying land from and to identical parties

renders the deed of no force or effect. He further contends that the 1957 deed conveyed nothing because only Harrison Sr.'s interest as a church trustee was conveyed and because the church, by and through its trustees, did not have any property to convey under the 1946 deed. We do not agree with these arguments.

In *Bishop v. City of Fayetteville*, 81 Ark. App. 1, 97 S.W.3d 913 (2003), we related the well-settled rules that must be followed in cases involving the construction of a deed:

> When interpreting a deed, the court gives primary consideration to the intent of the grantor. *Winningham v. Harris*, 64 Ark. App. 239, 981 S.W.2d 540 (1998). When the court is called upon to construe a deed, it will examine the deed from its four corners for the purpose of ascertaining that intent from the language employed. *Id.* The court will not resort to rules of construction when a deed is clear and contains no ambiguities, but only when the language of the deed is ambiguous, uncertain, or doubtful. *Id.* When a deed is ambiguous, the court must put itself as nearly as possible in the position of the parties to the deed, particularly the grantor, and interpret the language in the light of attendant circumstances. *Id.*
>
> It is only in case of an ambiguity that a deed is construed most strongly against the party who prepared it, *see Gibson v. Pickett*, 256 Ark. 1035, 512 S.W.2d 532 (1974), or against the grantor. *Goodwin v. Lofton*, 10 Ark. App. 205, 662 S.W.2d 215 (1984). Even then, the rule is one of last resort to be applied only when all other rules for construing an ambiguous deed fail to lead to a satisfactory clarification of the instrument and is particularly subservient to the paramount rule that the intention of the parties must be given effect, insofar as it may be ascertained, and to the rule that every part of a deed should be harmonized and reconciled so that all may stand together and none be rejected. *Gibson v. Pickett, supra.* In arriving at the intention of the parties, the courts may consider and accord considerable weight to the construction of an ambiguous deed by the parties themselves, evidenced by subsequent statements, acts, and conduct. *Wynn v. Sklar & Phillips Oil Co.*, 254 Ark. 332, 493 S.W.2d 439 (1973). Courts may also acquaint themselves with and consider circumstances existing at the time of the execution of a contract and the situation of the parties who made it. *Id.*

Bishop, 81 Ark. App. at 8-9, 97 S.W.3d at 918-19 (2003).

In the case we now review, an ambiguity exists in the 1957 deed because identical parties are typed on the deed form as both grantors and grantees. An examination of the four corners of the

deed, however, enables us to determine the intent of the parties from the language employed. Only the name J. C. Harrison, Sr. is typed in the space at the top where the grantor's name typically appears; the singular pronoun "I" is typed in twice as the grantor in the habendum clause; the sole signature at the bottom of the deed is that of J. C. Harrison Sr.; and the deed is acknowledged only by Harrison Sr., and not in his capacity as a trustee.

It is clear to us that the listing of identical names as both grantors and grantees is merely a scrivener's error, and on this basis alone we would not hesitate to find that Harrison Sr. as an individual, not acting as a trustee of the church, was the grantor. Additionally, however, there is other evidence that Harrison Sr. was the grantor in the 1957 deed. Harrison Sr. agreed to convey a tract of land as his pledge to the new church and he executed the 1946 deed. That deed failed because there was no proper grantee or monetary consideration and because the church did not accept it due to the reversionary clause. The 1957 deed was signed by Harrison Sr., and it was acknowledged and delivered to the church trustees. Harrison Sr. stated in his 1965 complaint that the second deed "conveyed the meaning and intent of the grantor and the grantee." From this evidence, we find that the intention of Harrison Sr. was to convey the realty to the trustees of the church, and that the 1957 deed was a valid conveyance of the lands therein described. Thus, we hold that the circuit judge did not clearly err in finding that appellant's father, Harrison Sr., conveyed his interest in the land to predecessors in interest of appellees, the trustees of the Mount Vernon Church of Christ, by means of the January 10, 1957, deed.

2. *The 1965 Decree as Res Judicata*

The trial court ruled that because the 1965 consent decree had decreed that appellant's predecessor in title had no title to the subject lands, appellant was barred by res judicata from retrying the same lawsuit in a later proceeding. The trial court then ordered:

> It is accordingly considered, ordered, adjudged and decreed that the 1946 deed above referred to was void because there was no consideration to the Grantors for the same and there was no legal entity named as grantee therein which was capable of holding title thereto: that as the result thereof that 1946 deed was void and is a nullity, that the Plaintiff herein has no reversionary interest in the

> lands described in the 1946 deed pursuant to the 1946 deed or any other conveyance; that the Defendants' plea of res judicata is proper and the Plaintiff is barred from again trying the issues tried by his predecessor in title in the said 1965 Chancery Court decree.

Appellant argues that res judicata, or claim preclusion, does not apply in this case because in the 1965 suit the trial court and parties did not comply with the statutory quiet-title procedures, such as by naming in the quiet-title petition any person known to claim an interest in the land and by publishing notice of the petition. Appellant contends that because these required procedures were not followed, the 1965 quiet-title decree was void and is subject to his collateral attack in the present suit. Appellees respond that all persons who were required to be notified of the 1965 suit and who had an interest in the land were before the court in that action, and that appellant cannot collaterally attack the decree. We agree.

Four elements must exist for res judicata to apply: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same cause of action or claim; (4) both suits involve the same parties or their privies. *Crockett & Brown, P.A. v. Wilson,* 314 Ark. 578, 864 S.W.2d 244 (1993). Res judicata bars not only the relitigation of claims that were actually litigated in the first suit, but also those that could have been litigated. *Searcy v. Davenport,* 352 Ark. 307, 100 S.W.3d 711 (2003). Thus, where a lawsuit is based on the same events as the subject matter of the previous lawsuit, res judicata will apply even if the subsequent lawsuit raised new legal issues and seeks additional remedies. *Id.*

We hold that because the 1946 deed was void, appellant had no reversionary interest in the property under that deed. Appellant's only possible interest in the land would have been that of a statutory heir of his father, Harrison Sr., who in 1957 deeded away all his interest in the land and retained no reversionary interest. Because Harrison Sr. was still alive in 1965, appellant was not an heir and had no interest in Harrison Sr.'s land that would have entitled appellant to notice of the 1965 quiet-title action. Thus, appellant's current claims are barred under the doctrine of res judicata. *See Bentrup v. Hoke,* 245 Ark. 572, 433 S.W.2d 139 (1968) (homeowner was precluded by res judicata from operating a beauty parlor in her home because her predecessors in title had previously litigated the issue).

Appellant admits that if the 1957 deed was valid, appellees could have instituted the quiet-title action under common law, as the party in possession holding legal title, and they would not have had to comply with the statutory quiet title procedures. *See Driver v. Driver*, 223 Ark. 15, 263 S.W.2d 914 (1954) (equity jurisdiction to quiet title, independent of statute, can be invoked only by a plaintiff in possession holding the legal title, the remedy at law being otherwise adequate). We hold that because the current action involves the same subject matter as the 1965 suit, because the same parties or their privies are involved, and because the 1965 decree was a final judgment based upon proper jurisdiction, appellant's claims in the current suit are barred by res judicata. We affirm the trial court's ruling that appellant was barred by res judicata from retrying the same issues previously tried.

3. *Assessment of Sanctions*

Appellees' motion for sanctions at the trial level asserted that appellant knowingly, maliciously and wrongfully, and for the purpose of harassing appellees, caused his attorney to file a frivolous complaint to re-litigate the precise findings and orders in the 1965 chancery case when appellant "knew or should have known his purported cause of action was without just cause and without hope of success." The trial court granted the motion, awarding appellees attorney's fees and expenses in the sum of $3741.32. We reverse the awarding of sanctions.

Rule 11 of Arkansas Rules of Civil Procedure (2004) reads in pertinent part:

> (a) Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both,

> an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The primary purpose of Rule 11 sanctions is to deter future-litigation abuse. *Hodges v. Cannon*, 68 Ark. App. 170, 5 S.W.3d 89 (1999), citing *Crockett & Brown, P.A. v. Wilson*, 321 Ark. 150, 901 S.W.2d 826 (1995). By signing a pleading, motion or other paper, a party or attorney warrants that to the best of his knowledge, information and belief, formed after a reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as harassment or unnecessary delay. *State v. Craighead Co. Bd. of Election Comm'rs*, 300 Ark. 405, 779 S.W.2d 169 (1989). The party asking for Rule 11 sanctions has the burden of proving a violation of the rule. *Id.*

The imposition of sanctions pursuant to Rule 11 is a serious matter to be handled with circumspection, and the trial court's decision is due substantial deference. *Hodges v. Cannon, supra*, citing *Williams v. Martin*, 335 Ark. 163, 980 S.W.2d 248 (1998). We review a trial court's determination of whether a violation of Rule 11 occurred under an abuse-of-discretion standard. *Id.* In deciding an appropriate sanction, trial courts have broad discretion in determining whether sanctionable conduct has occurred and what an appropriate sanction should be. *Id.*

The practice of law is not an exact science: Rule 11 does not require a lawyer to anticipate with precision how the evidence will be perceived, nor is it intended to permit sanctions just because the trial court later decides that the attorney against whom sanctions are sought was wrong. *Hodges v. Cannon, supra,* citing *Crockett & Brown, P.A. v. Wilson, supra.* In exercising its discretion under Rule 11, the trial court is expected to avoid using the wisdom of hindsight and should test the lawyer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. *Id.* The essential issue is whether the attorney who signed the pleading or other document fulfilled his or her duty of reasonable inquiry into the relevant law, and the indicia of reasonable inquiry into the law include the

plausibility of the legal theory espoused in the pleading and the complexity of the issues raised. *Id.*

We do not agree with appellees' characterization of this case as frivolous. We do not agree that the issues presented by this litigation are so simple that the result could be or should have been readily ascertainable by appellant's counsel when the complaint was filed. Although the trial judge ultimately ruled in appellees' favor, the answers to the factual and legal issues presented for the court's consideration were not foregone conclusions without thorough examination. While our decision upholds the trial court's findings that appellant's father conveyed interest in the land by means of the 1957 deed and that the 1965 decree was res judicata to the issues appellant presented in the 2003 proceeding, we found these issues to be complex, and they have required much examination on our part. Therefore, we hold that sanctions were not justified at the trial level, nor are they called for on appeal. We reverse the sanctions assessed against appellant, and we remand to the trial court for entry of an order in keeping with our holding.

Affirmed in part; reversed and remanded in part.

CRABTREE, J., agrees.

ROAF, J., concurs.

Donald HEAPE *v.* STATE of Arkansas

CA CR 03-1446 192 S.W.3d 281

Court of Appeals of Arkansas
Division IV
Opinion delivered September 22, 2004

Morley Law Firm, by: *Stephen E. Morley*, for appellant.

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

SAM BIRD, Judge. Donald Heape was tried before the bench in the Pulaski County Circuit Court on the charge of committing sexual indecency with a child. He was convicted and was sentenced to thirty-six months' probation and a fine of $250. On appeal he challenges the sufficiency of the evidence. Under Arkansas Code Annotated section 5-14-110(a)(1) (Supp. 2001), a person who is eighteen years old or older commits the crime of sexual indecency with a child if "the person solicits another person who is less than fifteen years of age. . . to engage in sexual intercourse, deviate sexual activity, or sexual contact." Appellant contends on appeal, as he did below in motions for a directed verdict, that statements he made to a fourteen-year-old girl did not constitute a solicitation. We disagree and therefore hold that the evidence was sufficient to uphold the conviction.

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or

circumstantial. *Alexander v. State*, 78 Ark. App. 56, 77 S.W.3d 544, (2002). Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Id.* The longstanding rule in the use of circumstantial evidence is that the evidence must exclude every other reasonable hypothesis than that of the guilt of the accused to be substantial, and whether it does so is a question for the fact finder. *Id.*

The events from which the charge arose occurred on September 3, 2002, when appellant was thirty years old. Rachel Willingham testified that on September 3 she went next door to babysit in the evening, as she usually did each week; Rachel was fourteen at the time. Rachel testified that her next-door neighbors were appellant Donald Heape, Mr. and Mrs. Heape, and their two grandchildren, boys around ages five and seven. (Mrs. Heape testified that Donald was her son.) Rachel stated that she arrived at the Heapes' home, that Mr. and Mrs. Heape left, and that Donald came to the residence about forty-five minutes later. Rachel testified that Donald came up behind her while she was in the kitchen getting ice cream for the boys and said to her, "I'll pay you five-hundred bucks if you'll have sex with me." Rachel further testified:

> I kind of shook my head and pretty much just walked away. Right after that, he was on the porch. He told me to come out on the porch for a second and I did. He said, "You know I was just kidding." When I said okay, he said, "But I'll pay you a thousand to do it." I again told him no and he said, "Oh, I'm just kidding. I'm just kidding." I did not think he was kidding. I felt very uncomfortable.
>
> This was near the end of the time when I was babysitting the kids. Donald told the kids that they had a really good babysitter and to give me a kiss. They said they did not want to do that. Donald said, "Oh, it's easy. Just do this," and then he kissed me on more my neck [sic], and that was it.

Rachel testified that she walked home after Mr. and Mrs. Heape returned; that although Mrs. Heape came and asked her if Donald had hurt her or if anything had happened, she told Mrs. Heape that she was "just uncomfortable" and did not say what had happened; but that she eventually told her mother.

Rachel testified that when Donald said that he would give her $500 to have sex with her, she understood that to mean sexual

intercourse; and that she took his request to be a serious one. She stated that she had never seen anyone intoxicated and did not know if he was intoxicated, but that he was drinking beer and was sitting in a corner drinking beer when Mr. and Mrs. Heape got home. On cross-examination she testified: "He did not say to me, 'Will you have sex with me for $500?' He said, 'I would pay $500 to have sex with you.' That was a fair statement." She also stated that she did not think that she would be raped or that anything bad would happen, that Donald produced no money and took no overt action to have sex with her, and that she just wanted to get out of there.

Sherry Shaw, Rachel's mother, testified that Mrs. Heape told her during initial arrangements about babysitting that Donald had a house key but that Mrs. Heape did not expect him to come in at any time, and that Mrs. Heape said that no males would be allowed in the house during babysitting. Ms. Shaw also testified that she talked to Rachel about "the birds and the bees" and had instructed her to inform an adult if inappropriate contact were to happen.

Ms. Shaw testified that Mrs. Heape telephoned her to say that there was something she should know about Rachel's babysitting on September 3; that Mrs. Heape asked if Rachel had said anything, to which Ms. Shaw replied no; and that Mrs. Heape said that Donald had come home while Rachel was babysitting. Ms. Shaw testified that while driving home from a football game three days later, she asked Rachel if there was something she wanted to talk about. Ms. Shaw testified that she persisted when Rachel hesitated; that Rachel said something had happened; that they pulled to the side of the road; that Rachel said that it was hard to talk about; that her mother asked if someone had come in to the house while Rachel was babysitting; and that Rachel said yes and told her mother what had happened.

Mrs. Heape testified that when she and her husband returned from choir practice on September 3, her grandsons and Rachel were on the couch watching television, and Donald was talking on the telephone at the desk with his feet propped up, was drinking beer, and was extremely intoxicated. Mrs. Heape testified that Rachel and the kids said hi; that Rachel said yes when Mrs. Heape asked if everything was okay; that Mrs. Heape walked Rachel into the garage and asked if she was okay, and Rachel said she was; and

that Rachel was very calm, was not crying, and just smiled. Mrs. Heape testified that she did not know then about an inappropriate comment.

Appellant contends that the evidence was insufficient to show that he made a solicitation or intended to do so. He notes that for several days Rachel did not tell anyone about his requests for sex although she testified that she thought he was not kidding. He points to Rachel's testimony that he actually said "I would pay you to have sex with you" and not "Will you have sex with me for $500?"; that he took no overt actions to follow through; and that she did not think that he would rape her or that anything bad was going to happen. He notes testimony that Rachel had been instructed to tell an adult when something inappropriate happened but that she said nothing until her mother pressed her. He also notes testimony that although he was extremely intoxicated that night, Rachel seemed calm and told his mother that everything was okay.

Appellant cites W. LaFave, *Substantive Criminal Law* § 11.1(b) to suggest that false charges of solicitation may result from a misunderstanding as to what the defendant said.[1] Appellant argues that a rhetorical question may appear to be a solicitation. He frames the issue before us as whether Rachel knew what was said. He contends that circumstantial evidence made it as likely that he made his statement in the subjunctive, *i.e.*, "I would have sex with you for $500," as that he asked Rachel to have sex with him for

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[1] Objections to making solicitation a crime or to extending it to such minor crimes as adultery are sometimes based upon the fear that false charges may readily be brought, either out of a misunderstanding as to what the defendant said or purposes of harassment. Wayne R. LaFave, *Substantive Criminal Law* § 11.1(b) "Policy Considerations," at 193 (3d ed. 2004) (footnotes omitted). This risk is inherent in the punishment of almost all inchoate crimes, although it is perhaps somewhat greater as to the crime of solicitation in that the crime may be committed merely by speaking. *Id.*

Under Arkansas Code Annotated section 5-3-301(a) (Repl. 1997), a person solicits the commission of an offense if, with the purpose of promoting or facilitating the commission of a specific offense, he commands, urges, or requests another person to engage in specific conduct which would:

(1) Constitute that offense;

(2) Constitute an attempt to commit that offense;

(3) Cause the result specified by the definition of that offense; or

(4) Establish the other person's complicity in the commission or attempted commission of that offense.

$500 or $1000. Noting the presumption that a person intends the natural and probable consequences of his acts, *see Alexander v. State*, 78 Ark. App. 56, 77 S.W.3d 544 (2002), he concedes that intent would be proven "if the State proved that what was said was actually a solicitation seriously proposing sex for hire from this fourteen year old girl."

Appellant's reliance upon subsection 11.1(b) is misplaced. The introductory paragraph to Section 11.1 of Wayne R. LaFave, *Substantive Criminal Law* (3d ed. 2004), entitled "Common Law and Statutes," includes the following statement:

> For the crime of solicitation to be completed, it is only necessary that the actor *with intent that another person commit a crime*, have enticed, advised, incited, ordered or otherwise *encouraged that person to commit a crime*. The crime solicited need not be committed.

Id. at 189 (footnotes omitted, emphasis added). Appellant was not charged under our criminal code with the offense of solicitation, and the abstract shows no argument at trial that the victim herself was encouraged to commit a crime. Appellant was charged with and convicted of sexual indecency with a child, which includes the element of soliciting a person less than fifteen years old to engage in sexual intercourse, deviate sexual activity, or sexual contact.

Both appellant and the State rely upon our recent case of *Jimenez v. State*, 83 Ark. App. 377, 128 S.W.3d 483 (2003), an appeal from a conviction for solicitation to commit capital murder, where we wrote:

> The crime of solicitation requires neither a direction to proceed nor the fulfillment of any condition. It is, in essence, asking a person to commit a crime. The gravamen of the offense is in the urging. *Gardner v. State,* 41 Md. App. at 200, 396 A.2d at 311.

Jimenez v. State, supra. Because the present appeal is from a conviction other than the crime of solicitation, we find *Jiminez* of limited guidance.

The first rule in considering the meaning of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Rush v. State*, 324 Ark. 147, 919 S.W.2d 933 (1996). *See also George v. State*, 358 Ark. 269, ___ S.W.3d ___ (2004); *Cummings v. State*, 353 Ark. 618, 110

S.W.3d 272 (2003) (citing with approval our decision in *Gabrion v. State*, 73 Ark. App. 170, 42 S.W.3d 572 (2001), where we stated that "lewd," which is not defined in our criminal code, is a common word with an ordinary meaning).

Under Arkansas Code Annotated section 5-14-110(a)(1) (Supp. 2001), as noted previously in this opinion, a person commits sexual indecency with a child if the person solicits another person who is less than fifteen years of age. . . to engage in sexual intercourse, deviate sexual activity, or sexual contact. The definitions of the verb "solicit" in *Webster's Third New International Dictionary* 2169 (1993) include the following:

> 3 : to make petition to : ENTREAT, IMPORTUNE . . . ; *esp* : to approach with a request or plea (as in selling or begging). . .
>
> 4 : to move to action . . .
>
> 7 : to endeavor to obtain by asking or pleading : plead for . . . ; *also* to seek eagerly or actively
>
> 10 : to serve as a temptation . . . [.][2]

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Jimenez v. State, supra.* Here, the evidence reviewed in such a light shows that appellant offered the fourteen-year-old victim money in exchange for sex. She understood that he meant sexual intercourse, and she took his request to be a serious one. The fact finder clearly could have found from appellant's words and actions that, within the ordinary meaning of the word "solicit," he solicited the child to engage in sexual intercourse, activity, or contact. Therefore, we hold that the evidence was sufficient to show that appellant, by offering the girl money in exchange for sex, solicited her to engage in sexual intercourse, deviate sexual activity, or sexual contact.

Appellant also directs us to the requirement of culpability. When a statute does not prescribe a culpable mental state, as is the case here, culpability is nonetheless required and is established only

[2] Examples omitted; irrelevant definitions omitted.

if a person acts purposely, knowingly, or recklessly. Ark. Code Ann. § 5-2-203 (Supp. 2001). A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result. Ark. Code Ann. § 5-2-202(1).

We find no merit in appellant's argument that he was merely rhetorically questioning the fourteen-year-old girl about sex rather than soliciting her, and that he had no intent to make such a statement. There was testimony that he offered to pay money in exchange for sex, that he offered her more money after she refused him, and that he kissed her on the neck after encouraging the young boys in her charge to kiss her. This constituted substantial evidence from which the fact finder could have found that appellant intended his remarks to solicit sex with the girl. Therefore, we affirm appellant's conviction for the crime of sexual indecency with a child.

Affirmed.

CRABTREE, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. I concur in affirming this case. Although appellant Donald Heape argues that the evidence was insufficient to support his conviction for sexual indecency with a child, and contends specifically that he lacked the culpable mental state required for the commission of the offense, he did not make this argument to the trial court in his motion to dismiss, but merely recited his actions and stated that it "does not constitute a solicitation." Heape further argued to the trial court that he requested no specific sexual act as should be required by the statute, as a basis of his motion to dismiss.

Accordingly, I conclude that the argument Heape now raises on appeal, that there was insufficient evidence of the requisite culpable mental state, is not preserved. Heape's remarks to a fourteen-year-old girl clearly were crude and out of place. However, rather than holding that the rather lame and ridiculous statements made by Heape and the attendant circumstances of this case constituted evidence beyond a reasonable doubt of his criminal intent, I would affirm without addressing the merits. The statute at issue has not been interpreted by this court or the supreme court in its present form. It has evolved significantly over

the years, from requiring that a minor be enticed or lured into a vehicle, house or other place for a conviction for "indecent proposal to minor" to attain,[1] to the misdemeanor offense of "sexual solicitation of a child" less than fourteen years old,[2] to the felony offense of "sexual solicitation of a child" less than fourteen years old,[3] to the current "sexual indecency" felony with a person less than fifteen years old.[4] Like the traveler who jokes about bombs while waiting in the security line at the airport, Mr. Heape is paying dearly for his loose tongue, in this instance with a felony conviction.

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[1] It shall be unlawful for any person with lascivious intent to entice, allure, persuade, or invite, or attempt to entice, allure, persuade or invite, any child under fourteen (14) years of age to enter any vehicle, room, house, office or other place for the purpose of proposing to such child the performance of an act of sexual intercourse or an act which constitutes the offense of sodomy for the purpose of proposing the fondling or feeling of the sexual or genital parts of such child or the breast of such child, if the child be a female, or for the purpose of committing an aggravated assault on such child, or for the purpose of proposing that such child fondle or feel the sexual or genital parts of such person. Ark. Stat. § 41-1126 (Repl. 1964).

[2] (1) A person commits sexual solicitation of a child, if being eighteen (18) years old or older, he solicits any person not his spouse who is less than fourteen (14) years old to engage in sexual intercourse, deviate sexual activity or sexual contact.

(2) Sexual solicitation of a child is a class A misdemeanor. Ark. Stat. § 41-1810 (Repl. 1977).

[3] (a) A person commits sexual solicitation of a child if, being eighteen (18) years old or older, he solicits any person not his spouse who is less than fourteen (14) years old to engage in sexual intercourse, deviate sexual activity, or sexual contact.

(b) Sexual solicitation of a child is a Class D felony. Ark. Code Ann. § 5-14-110 (Repl. 1997) (the 1995 Amendment reclassified this offense as a "Class D felony").

[4] (a) A person commits sexual indecency with a child if:

(1) Being eighteen (18) years old or older, the person solicits another person who is less than fifteen (15) years of age or who is represented to be less than fifteen (15) years of age to engage in sexual intercourse, deviate sexual activity, or sexual contact. Ark. Code Ann. § 5-14-110 (Supp. 2003).

Rick W. DILLARD *v.*
BENTON COUNTY SHERIFF'S OFFICE

CA 04-025 192 S.W.3d 287

Court of Appeals of Arkansas
Division II
Opinion delivered September 22, 2004
[Rehearing denied October 27, 2004.]

McKinnon Law Firm, by: *Laura J. McKinnon*, for appellant.

Roberts Law Firm, P.A., by: *Michael Lee Roberts*, *Andrew M. Ivey*, and *John D. Webster*, for appellees.

LARRY D. VAUGHT, Judge. Claimant Rick W. Dillard appeals from the Arkansas Workers' Compensation Commission's holding that his claim for permanent-partial disability benefits was properly dismissed for lack of prosecution and that each of his subsequent claims were time barred. We reverse the decision of the Commission and remand for an award of benefits.

The facts of this case are not controverted. Dillard injured his right wrist after slipping and falling on January 17, 1997, while working as a law-enforcement officer. As a result of this fall, Dillard sustained a compensable injury (a torn wrist ligament). Because the injury was deemed compensable, Dillard's employer paid for his medical treatment following the injury (its last payment for Dillard's medical services was tendered on June 24, 1998). Throughout the treatment period, Dillard continued working in a light-duty capacity.

Dr. James F. Moore, M.D., treated Dillard's injury. Dillard was released from Dr. Moore's care in the winter of 1997. At the conclusion of Dillard's therapy, on December 4, 1997, Dr. Moore assigned a ten percent permanent-partial impairment rating to Dillard's right-upper extremity. Despite Dr. Moore's conclusion, Dillard's employer refused to pay any permanent-disability benefits.

Presumably, this refusal prompted Dillard to retain legal counsel. After retaining his first attorney, Dillard filed a claim for benefits using the Commission's AR-C form. Dillard signed this AR-C on March 3, 1998, and it was filed with the Commission on June 5, 1998. This claim was dismissed — without a hearing — on February 25, 1999, for lack of prosecution. His claim was refiled in 2000, and then filed again (after retaining another attorney) in 2002. Dillard's new attorney requested, and was granted, a hearing in conjunction with the 2002 refiling.

Following the 2003 hearing, the Administrative Law Judge (ALJ), and ultimately the majority of the Commission, found that Dillard's 1998 AR-C was properly dismissed for lack of prosecu-

tion. The ALJ noted that, according to the record, Dillard did not object to the administrative dismissal of this claim. The ALJ further reasoned that all subsequent claims were time barred. This appeal followed.

In considering appeals from decisions of the Commission, we view the evidence and all reasonable inferences therefrom in the light most favorable to the Commission's findings and will affirm the decision if the findings are supported by substantial evidence. *Williams v. Browns' Sheet Metal/CNA Ins. Co.*, 81 Ark. App. 459, 105 S.W.3d 382 (2003).. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

In our review of the Commission's conclusion, we first turn our attention to the allowable time for filing a claim for benefits as set out in Ark. Code Ann. § 11-9-702 (Repl. 2002). This statute recognizes two types of claims. Subsection (a) covers an initial claim — a claim that is filed prior to receiving any benefits. Initial claims must be filed within two years of the date of injury. After filing an initial claim, one must request a hearing within six months. If, at the expiration of the six months, no hearing request is made, the claim may be dismissed without prejudice. However, the dismissal must be preceded by a motion requesting such relief, and a hearing.

The second type of claim — a claim for additional benefits — is set out in subsection (b) of the statute. According to the statute, in cases where any compensation has been paid, the claim for additional compensation, including disability or medical, will be barred unless filed within one year from the date of the last payment of compensation or two years from the date of the injury, whichever is greater. Further, a hearing request must be made within six months of the filing, or the claim may, upon motion and after hearing, if necessary, be dismissed without prejudice. Once a claim is dismissed, the claim is considered to have never been filed, and unless a new claim is filed within the statutory period of time allowed by section 11-9-702, the statute of limitations will bar any subsequent claims.

Thus, the focus of this appeal is the 1998 AR-C claim form that Dillard filed. Dillard's claim was made on a form provided (and presumably designed) by the Commission. The form has a section entitled "Claim Information." The section has two parts

that are relevant to this case. The first portion of the form states, "If this claim is for initial benefits (no benefits, either medical or indemnity has been received), what compensation benefits are you claiming?" Underneath this sentence, there are seven blanks beside different types of benefits. The other relevant portion of the AR-C's "Claim Information" section questions, "If this claim is for additional benefits, what specific benefits are you claiming?" The same seven blanks listed in the initial benefits section are listed underneath this question.

Dillard's attorney at the time filled out his claim form and checked only the "Permanent Total Disability," "Rehabilitation," "Attorney Fees," and "Medical Expenses" boxes located under the "initial" benefits section. However, because Dillard's employer had previously paid all of his medical expenses, the claim should have been one for "additional" benefits. His form had no checked boxes under the additional benefits section, and the law requires that "a claim for additional compensation must specifically state that it is a claim for additional compensation. Documents which do not specifically request additional benefits shall not be considered a claim for additional compensation." Ark. Code Ann. § 11-9-702(c) (Repl. 2002).

After Dillard failed to timely request a hearing, his employer moved for the claim to be dismissed. Significantly, the dismissal request was made under Commission Rule 13, which allows a dismissal without a hearing after notice to the parties pursuant to Ark. Code Ann. § 11-9-702(b)(4), the portion of the statute relating to additional benefits. The ALJ granted the motion and dismissed "pursuant to Rule 13 for lack of prosecution, without prejudice, with a refiling within the limitations set out in Ark. Code Ann. § 11-9-702(b)."

In the subsequent ALJ opinion that barred Dillard's later-filed "additional" claims because the limitations period had run, the ALJ noted that Dillard's "original AR-C filed with the Commission on June 8, 1998, requested only initial benefits and as the law at that time required that a claim for additional benefits had to specifically state that it was a request for additional benefits or it would not be considered a claim for additional benefits." Notably, the ALJ also concluded that "[b]ut for the claim being barred by the statute of limitations, [Dillard] would have at least been entitled to his impairment rating for his compensable wrist injury." This second ALJ opinion was affirmed and adopted by the

full Commission. Dillard asks this court to reverse the Commission's decision and reinstate his claim.

The resolution of this appeal is not dependent on how Dillard's 1998 AR-C claim is classified. Regardless of whether his request is classified as an "initial" claim or an "additional" claim, he is entitled to benefits. First, if the claim is classified as a claim for "additional" benefits (despite the fact that the wrong boxes were checked) then the claim, because it was timely filed, tolls the statute of limitations. *Spencer v. Stone Container Corp.*, 72 Ark. App. 450, 38 S.W.3d 309 (2001). This tolling is based on this court's observation that "[i]f the statute is not tolled when the claimant files a claim for additional benefits, what could possibly toll the statute? We prefer to think that the statute means what its plain language implies." *Bledsoe v. Georgia-Pacific Corp.*, 12 Ark. App. 293, 295, 675 S.W.2d 849, 295 (1984).

In support of the proposition that the 1998 claim is more properly classified as an "additional" claim, the fact that it was dismissed pursuant to the Commission's own rules designed to deal with "additional" claims is relevant. Further, the fact that the dismissal occurred without a hearing, which is not an acceptable option (according to the statute) for "initial" claims, is persuasive. This approach — dismissal without hearing — is only statutorily acceptable in "additional" claims.

In the instant case, Dillard filed a form AR-C requesting benefits that he had not previously received — permanent disability benefits, rehabilitation, and attorney fees. It is also relevant that Dillard's treating doctor opined that Dillard was entitled to a ten percent impairment rating to his upper-right extremity. After Dillard's employer refused to pay for his permanent impairment, the claim was filed. In his claim, Dillard identified that an attorney had been retained to pursue the claim and requested "additional" benefits— benefits that had not previously been provided to him. It is also clear that his employer had previously provided benefits. To hold that a claim form requesting benefits, where an employer had previously provided benefits and a claimant has previously received benefits, is not a claim for "additional" benefits is a classic example of form over substance.

However, if we were to find that the strictures of our state's workers' compensation legislation require a finding that, because of Dillard's failure to technically comply with the "call" of the form, his claim was not one for "additional" benefits,

then question remains — what type of claim did he file? If it is not an "additional" claim, and all claims (according to the form) are either "additional" or "initial," then his claim must have been for "initial" benefits. Under this second scenario, if Dillard's claim is classified as an "initial" claim, the Commission must also be reversed. As noted above, in claims for initial benefits, the claim cannot be dismissed without a hearing. Dillard's claim was dismissed without the ALJ first conducting a hearing. This is a clear violation of Ark. Code Ann. § 11-9-702(a).

In sum, whether Dillard's 1998 AR-C is classified as an initial or an additional claim, he is entitled to benefits. As discussed above, the Commission affirmed the ALJ's finding that "but for the claim being barred" Dillard would have been entitled to benefits. Because we have concluded that there is insufficient evidence to support the Commission's finding that Dillard's claim was properly dismissed, we reverse the decision of the Commission and remand for an award of ten percent permanent-partial impairment to Dillard's right-upper extremity.

Reversed and remanded.

STROUD, C.J., and HART, J., agree.

Paul Anthony MOORE *v.* STATE of Arkansas

CA CR 03-1387 192 S.W.3d 271

Court of Appeals of Arkansas
Division III
Opinion delivered September 22, 2004

[Rehearing denied October 27, 2004.]

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

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

ANDREE LAYTON ROAF, Judge. Appellant Paul Moore was convicted of four counts of rape and was sentenced to thirty years' imprisonment on each count, to be served concurrently. On appeal, Moore argues that the trial court erred in (1) denying his motion to dismiss for lack of speedy trial based upon pre-arrest delay; (2) permitting the State to introduce character evidence in violation of Arkansas Rule of Evidence 404(b); and (3) denying his motions for a mistrial. We affirm.

Because Moore does not challenge the sufficiency of the evidence supporting his conviction, only a brief recitation of the relevant facts is necessary. In June 1999, an arrest warrant was issued for Moore. The issuance of the warrant stemmed from the Little Rock Police Department's investigation of allegations that in November 1998, a man driving a red-orange Chevrolet pickup truck had followed Megan Welsh and her siblings home and attempted to enter her bedroom window; that in December 1998, two victims, J.S. and K.H., had reported that a man forcibly entered J.S.'s home, placed duct tape on the girls, undressed them,

and forced them at gunpoint to perform sexual acts on each other and then on him; that in December 1998, the Welshes saw the same pickup truck that had followed Megan, and wrote down its license-plate number and reported the information to the police; and that when presented with a photo spread the victims and witnesses all identified Moore as the perpetrator. Moore was not arrested until November 2001, and the criminal information charging him with four counts of rape was not filed until January 8, 2002. The delay was caused by the Little Rock Police Department's failure to enter the 1998 warrant in the ACIC system.

At the pretrial hearing, Moore moved to dismiss the case, arguing that his right to a speedy trial under the Sixth Amendment of the Constitution had been violated because of the more than two-year delay between the issuance of the arrest warrant and his actual arrest. During his argument, Moore cited *Doggett v. United States*, 505 U.S. 647 (1992), and *Barker v. Wingo*, 407 U.S. 514 (1972). The State responded that while the period between the issuance of the warrant and Moore's arrest was two years and five months, Moore was brought to trial within one year of his arrest. The State also argued that the statute of limitations permits the State to commence prosecution for rape, a class Y felony, within six years of the alleged occurrence. The trial court denied Moore's motion to dismiss, finding that the delay in Moore's arrest was not a speedy trial issue and further finding that the statute of limitations did not bar prosecution of this case.

At trial, the State presented testimony regarding the investigation of the two cases. James Sloan, a detective with the Little Rock Police Department, testified that on December 7, they did a walk-through at J.S.'s home and found duct tape in a garbage can outside. The following colloquy occurred next:

> STATE: And were you able to develop a suspect in this case?
>
> A: Yes, eventually we did.
>
> STATE: And who was that person?
>
> A: Mr. Anthony Moore, Paul Anthony Moore.
>
> STATE: Okay. And did you have any other names that you —

DEFENSE: Your Honor I'm going to —

STATE CONTINUING: — understood to be associated with him?

DEFENSE: — object

COURT: Sustained.

STATE: Well, can I ask if they were any —

DEFENSE: May we approach?

<Outside of the jury's hearing>

COURT: Aliases?

At this point, defense counsel moved for a mistrial, arguing that the State was asking for additional names. The court sustained the objection, but denied the motion for mistrial. But, the court indicated, "I don't know about the prejudice; so, let's stay away from that [the aliases]."

Sloan continued his testimony, explaining that based on the license plate information provided by the Welshes, more information was discovered. The following colloquy occurred:

STATE: All right. And, based on that information, what did you do?

A: Based on that information, a vehicle description was given. I ran that vehicle description through our system and came up — based on the license plate information, it came back to the suspect. At that point, I made contact with the Department of Revenue and also Pulaski County Jail and was sent a picture of the suspect.

Moore's counsel again moved for a mistrial, arguing that the witness's testimony that he contacted the Pulaski County jail to obtain a picture of Moore suggested that Moore had a criminal record. Defense counsel also reminded the court that the State had previously raised the issue of aliases and argued that the additional reference to the county jail created the implication that Moore had a criminal record. The court stated that there was no clear

implication that the witness had obtained the picture from the jail because he also mentioned contacting the Department of Finance and Administration. The trial court denied the motion, instructing the State to advise its witness not to mention the Pulaski County jail. Sloan then testified that he had contacted the Department of Finance and Administration and that he had been able to obtain a photograph of Moore.

Sloan also testified that he showed the photo spread to Barbara Welsh, Richard McKinnie, Megan Welsh, K.H., and J.S., and they all identified Moore as the perpetrator. Following Sloan's testimony, the State presented evidence showing that a 1975 red and white Chevrolet pick-up truck with license plate number "208CTS" was registered to Paul Moore, in November 1998.

At the conclusion of the State's case and at the conclusion of all of the evidence, the defense renewed its motion for mistrial, requested that the trial court consider the cumulative effect of the errors, and challenged the sufficiency of the evidence. The motions were denied.

On appeal, Moore first argues that the trial court erred in denying his motion to dismiss based upon the Sixth Amendment right to speedy trial. In his brief Moore states, "The issue raised in this case but not addressed by any Arkansas case . . . is whether one's right to a speedy trial under the Sixth Amendment accrues with the issuance of an arrest warrant." Moore requests that this court find that the trial court erred when it held that his Sixth Amendment right to a speedy trial had not been violated and that this court reverse and dismiss his case pursuant to *Doggett v. United States*, *supra*.

In *United States v. Marion*, 404 U.S. 307 (1971), the Supreme Court considered whether a three-year delay between the alleged criminal act and the filing of the indictment required dismissal of the defendants' case. The appellees moved to dismiss their case for violation of their due process rights and speedy trial rights under the Fifth and Sixth Amendments. The Supreme Court stated, "In our view, however, the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused,' an event that occurred in this case only when the appellees were indicted." *Id.* at 313. The Court further observed that the Sixth Amendment was not intended to cover "pre-accusation" delay. *Id.* at 315. Thus, it is either a formal indictment or information or an actual restraint that triggers the

protections of the Sixth Amendment. The Court "decline[d] to extend the reach of the amendment to the period prior to the arrest." *Id.* at 329.

Ten years later in *United States v. MacDonald*, 456 U.S. 1 (1982), the Supreme Court again addressed the difference between the Sixth Amendment right to speedy trial and the Fifth Amendment due process right that may be violated by pre-indictment delay. The appellee had alleged that a two-year delay between the submission of the investigation for murder to the Justice Department and a federal indictment charging him with murder violated his Sixth Amendment right to a speedy trial.

Citing *Marion, supra*, the Court reiterated that the Speedy Trial Clause of the Sixth Amendment does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused. "Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment . . . or to a claim under any applicable statute of limitation, no Sixth Amendment Right to a speedy trial arises until charges are pending." *Id.* at 7. (Citations omitted.) Pre-arrest delay must be scrutinized under the Due Process Clause.

Notwithstanding the Supreme Court precedent excluding pre-indictment delay from Sixth Amendment Speedy Trial analysis, Moore relies on *Doggett v. United States,* 505 U.S. 647 (1992), for the proposition that the Sixth Amendment now encompasses pre-arrest delay. In *Doggett, supra*, the appellant was not arrested until 8 1/2 years after his indictment, due to the government's negligence. In analyzing the case, the Supreme Court concluded, "that the Sixth Amendment right of the accused to a speedy trial has no application beyond the confines of a formal criminal prosecution. Once triggered by arrest, indictment, or other official accusation, however, the speedy trial enquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice." *Id.* at 655.

Clearly, there is not a Sixth Amendment speedy-trial right due to pre-indictment or pre-arrest delay. Moore relies heavily on *Doggett, supra*, in which the appellant had been indicted but not arrested; however, in this instance Moore had not been arrested or indicted. In *Marion, supra;* and *MacDonald, supra*, the Supreme Court made it clear that pre-indictment delay arguments are more appropriately analyzed under a Fifth-Amendment Due Process argument, and expressly declined to extend the reach of

the Sixth Amendment to the period prior to arrest. The Court specifically held that the Sixth Amendment does not cover pre-accusation delay, which includes pre-indictment and pre-arrest delay. *See Marion, supra.* Thus, Moore's argument must fail under a federal constitution analysis.

Turning to Arkansas case law, we likewise have not recognized a Sixth Amendment speedy trial right for pre-accusation delays. In *Young v. State*, 14 Ark. App. 122, 685 S.W.2d 823 (1985), and *Forgy v. State*, 16 Ark. App. 76, 697 S.W.2d 126 (1985), this court analyzed claims of pre-indictment and pre-arrest delay under the due process clause. *Forgy, supra*, cites *Marion, supra*, and holds that a due process violation resulting from pre-arrest delay does not arise until the defendant can demonstrate prejudice. In *Young, supra*, the court discussed the burdens in a due process analysis based on pre-indictment delay.

The *Young* court also discussed the statute of limitations as it relates to the analyses of pre-indictment and pre-arrest delay. In *Young, supra*, the defendant was accused of rape, a class Y felony, for which the statute of limitations is six years. *See also* Ark. Code Ann. § 5-14-103 (Repl. 1997); Ark. Code Ann. § 5-1-109 (Repl. 1997). The court stated, "It is clear from [the] cases that mere pre-indictment delay is not a sufficient ground for aborting a criminal prosecution within the period of limitation. The accused has the burden of first showing prejudice." *Young,* 14 Ark. App. at 127, 685 S.W.2d at 826.

More recently, in *Jones v. State*, 347 Ark. 455, 65 S.W.3d 402 (2002), the Arkansas Supreme Court held, "The Constitutional right to a speedy trial is violated only by vexatious, capricious, and oppressive delays manufactured by the ministers of justice." *Id.* at 463, 65 S.W.3d at 407. Quoting *MacDonald, supra*, the court wrote, "Although a delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment, or to a claim under any applicable statute of limitation, no Sixth Amendment right to a speedy trial arises until charges are pending." *Id.* at 462, 65 S.W.3d at 407.

In this regard, Moore has asserted his claim of error only under the Sixth Amendment. Moore has made no Fifth Amendment argument, and we cannot consider arguments not raised below or specifically argued on appeal. *Howard v. State*, 348 Ark. 471, 79 S.W.3d 346 (2002).

Further, Moore was charged with rape, which carries a six-year statute of limitation. As the trial court observed, the charge was brought within the limitation period. The State commenced prosecution within six years of the alleged offense. Accordingly, the trial court properly denied Moore's pre-trial motion to dismiss. *Young, supra*; *Jones, supra*; Ark. Code Ann. § 5-1-109 (Repl. 1997); Ark. Code Ann. § 5-14-103 (Repl. 1997).

Moore next argues that the trial court erred in denying his two motions for mistrial. Moore couches his argument in terms of Ark. R. Evid. 404(b) character evidence; however, he in essence argues that the trial court erred in failing to grant his motions for mistrial when the State made reference to his aliases and when its witness intimated that he obtained a picture of Moore from the Pulaski County jail. Moore did not object below based on Rule 404(b) character evidence, and we cannot consider this aspect of his argument for the first time on appeal. *Howard, supra.*

In regard to the denial of the motions for mistrial, it is well-settled that a mistrial is a drastic remedy, which should only be used where there has been an error so prejudicial that justice cannot be served by continuing the trial or when the fundamental fairness of the trial itself has been manifestly affected. *Barr v. State*, 336 Ark. 220, 984 S.W.2d 792 (1999). The trial court is in the best position to decide the issue of prejudice because of its first-hand observation. *Id.* The trial court has wide discretion in granting or denying a motion for a mistrial, and absent an abuse of that discretion, the trial court's decision to deny a motion for a mistrial will not be disturbed. *Id.* Even assuming that the prosecutor made inappropriate comments, when the evidence of guilt is overwhelming and the error is slight, we can declare that the error was harmless and affirm. *Id.* Lastly, an admonition has been held sufficient to cure improper statements made during a witness's testimony. *Smith v. State*, 351 Ark. 468, 95 S.W.3d 801 (2003). But, it is the defendant's obligation to request a curing instruction, and a failure to request one will not inure to the defendant's benefit on appeal. *Id.*

We cannot say that the trial court abused its discretion in denying Moore's motions for mistrial. Regarding the inquiry about aliases, the trial court denied Moore's motion, but instructed the State to stay away from that line of questioning. Consequently, because there was no testimony about any alleged aliases, Moore

cannot demonstrate prejudice. Further, Detective Sloan's testimony that he obtained Moore's picture from the Department of Finance and Administration cleared up any inference that it might have been obtained from the county jail. Even assuming that the jury understood Sloan's testimony as suggesting that he attempted to obtain a photo of Moore from the jail, such testimony would not necessarily indicate that Moore had a prior criminal conviction. More importantly, Moore never asked for an admonition. Finally, in light of the testimony regarding the rape of J.S. and K.H., the incident involving Megan Welsh, the vehicle and license-plate information, the presence of duct tape in J.S.'s garbage can, and the unequivocal identification by the victims and other witnesses of Moore as the perpetrator, the error, if any, would be only slight. *Barr, supra.*

Moore also argues that a mistrial was warranted due to cumulative errors throughout the trial. An argument of cumulative error is entertained in only rare and egregious cases. *Childress v. State*, 322 Ark. 127 (1995) (citing *Alexander v. Chapman*, 289 Ark. 238, 711 S.W.2d 765 (1986) (where there were twenty-eight objections and repeated admonitions, but the appellee's conduct did not stop)). Here, the two instances complained of would hardly constitute egregious conduct even if error had occurred. No testimony about Moore's aliases was ever presented, and the testimony regarding the source of Moore's photo made it clear that the photo was obtained from the Department of Finance and Administration. Accordingly, the argument based upon cumulative error is without merit.

Affirmed.

BIRD and CRABTREE, JJ., agree.

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