Michael E. POLLARD *v.* MERIDIAN AGGREGATES, *et al.*

CA 04-218 193 S.W.3d 738

Court of Appeals of Arkansas
Division I
Opinion delivered September 29, 2004

Walters, Hamby & Verkamp, by: *Michael Hamby*; and *Lawrence Fitting*, for appellant.

David L. Pake, for appellee Second Injury Fund.

JOHN B. ROBBINS, Judge. Appellant Michael Pollard sustained a compensable injury to his lower back while working for appellee Meridian Aggregates in late March 2000. On October 10, 2000, he underwent a decompressive lumbar laminectomy at L2-3 and L3-4. Although Meridian Aggregates accepted responsibility for medical benefits and temporary total disability benefits, it controverted Mr. Pollard's claim to benefits for a permanent anatomical impairment and permanent wage loss. Because Mr. Pollard had a pre-existing back condition and had two prior surgeries, appellee Second Injury Fund was made a party to the case.

In determining whether Mr. Pollard was eligible for permanent benefits, the Workers' Compensation Commission applied Ark. Code Ann. § 11-9-102(4)(F)(ii) (Supp. 2003), which provides:

> (ii)*(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.

"Major cause" is defined as more than fifty percent of the cause, and a finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. § 11-9-102(14) (Supp. 2003). The Commission found that Mr. Pollard had a preexisting stenosis condition that was asymptomatic prior to the work injury, and that the work injury caused the stenosis to become symptomatic, resulting in surgery. The Commission concluded:

> While it does not appear that the Arkansas courts have ever addressed this precise question stated in this precise manner, we understand Section 102(4)(F)(ii)(a) to require the claimant to establish that a work injury in fact caused some degree of identifiable abnormality at issue, and that the claimant has not established his burden of proof where the preponderance of the evidence instead establishes that the work injury only aggravated a preexisting stenosis condition. *Accord Needham v. Harvest Foods*, 64 Ark. App. 141, 987 S.W.2d 141 (1998). Since the claimant has failed to establish by a preponderance of the evidence that his work-related injury caused the stenosis which required surgery, we find that the claimant has failed to establish that his compensable injury was the major cause of [his permanent anatomical impairment].

Based on its decision that Mr. Pollard failed to establish that he sustained a compensable anatomical impairment, the Commission also denied his claim for permanent disability benefits.

Mr. Pollard now appeals, arguing that the Commission erred in finding that he failed to prove that his work injury was the major cause of his impairment rating. Because the Commission denied benefits pursuant to its finding that the claimant failed to show 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. *See Daniels v. Arkansas Dep't of Human Servs.*, 77 Ark. App. 99, 72 S.W.3d 128 (2002). We agree with Mr. Pollard that the Commission's opinion fails to display a substantial basis for denying permanent benefits, and we reverse.

Mr. Pollard testified that he began working for Meridian Aggregates in 1999 and that he was required to operate various types of equipment. He stated that in March 2000 he was operating a track hoe and that the whipping action of the track hoe began to aggravate his back. Mr. Pollard stated that his back pain continued

to get worse as a result of his job duties. He testified that by April 4, 2000, it got to the point where he could not even straighten up, and his employer told him to take off work until he got the problem fixed. Mr. Pollard visited a series of doctors, and ultimately came under the care of Dr. Guy Danielson, who performed the decompressive lumbar laminectomy at L2-3 and L3-4 on October 10, 2000.

Mr. Pollard testified that he had prior back problems in 1985 related to the L4-5 and L5-S1 discs. As a result of these problems, Dr. Danielson performed a decompressive lumbar laminectomy and fusion. Mr. Pollard testified that after the 1985 surgeries he was off work for almost a year. However, he indicated that the surgeries were successful, and that after returning to work he had no further soreness or problems with his back until March 2000. During this time span, he worked at different jobs including as a security guard, logger, and equipment operator. Mr. Pollard maintained that his back did not cause him to miss any work between 1986 and 2000.

Mr. Pollard testified that, since his most recent injury, he has experienced numbness and pain. He stated that he cannot stand or sit for long periods of time and uses a cane to walk. Mr. Pollard stated that he is physically unable to return to any of his prior jobs, and he could think of no job that he could perform on a full-time basis.

Mr. Pollard argues on appeal that the Commission erred in finding, as a matter of law, that he failed to prove his compensable injury was the major cause of his impairment that resulted from the October 10, 2000, surgery. He contends that this was a fact question to be considered by the Commission, and that he established the major-cause requirement by a preponderance of the evidence.

In support of his argument, Mr. Pollard cites *Wal-Mart Stores, Inc. v. Westbrook*, 77 Ark. App. 167, 72 S.W.3d 889 (2002). In that case, the appellee suffered a work-related aggravation of a pre-existing rotator-cuff tear. The claimant's treating physician, Dr. Lipke, assigned a 30% impairment rating to the body as a whole, and gave the opinion that 10% of the impairment was caused by the work-related injury, and 90% by the pre-existing injury. The Commission awarded compensation for a 3% impairment, and in affirming we stated, "Dr. Lipke's exacting testimony provided the Commission with a preponderance of the evidence

from which to determine that the compensable injury was the major cause of appellee's 3% impairment." *Wal-Mart Stores, Inc. v. Westbook*, 77 Ark. App. at 173, 72 S.W.3d at 893.

In light of our decision in *Wal-Mart Stores, Inc. v. Westbrook, supra*, we agree that the Commission erred in finding that an aggravation of a pre-existing condition is not capable of meeting the major-cause requirement. Moreover, the evidence in this case demonstrates that the March 2000 work-related aggravation was the major cause of some anatomical impairment, and there is no evidence to the contrary.

While it is undisputed that Mr. Pollard had a pre-existing back condition, this condition was causing him no problems prior to the March 2000 compensable injury. On September 6, 2000, Dr. Danielson directly addressed causation and reported, "The patient was relatively [a]symptomatic prior to his injury, therefore, the injury would be considered the cause of his present condition."[1] It is clear that the need for surgery and resulting impairment would not have occurred but for the work-related aggravation.

The only physician to assign an impairment rating in this case was Dr. Kent Hensley. In a May 14, 2002, letter, Dr. Hensley stated:

> This patient has had a spinal fusion with two additional surgeries at a total of five levels. This results in a 19% permanent partial impairment of the whole man. He has loss of range of motion that results in a 14% permanent partial impairment of the whole man. He has no radicular symptomatology or radicular signs. Combining the above according to the Guides results in a total of 30% permanent partial impairment of the whole man. In my opinion apportionment is appropriate. As a result of his prior two surgeries, the patient is felt to have a 15% permanent partial impairment of the whole man. As a result of his more recent surgery following his claimed injury during his employment for Meridian Aggregates, he is felt to have an additional 15% permanent partial impairment of the whole man regarding his lumbar spine.

In response to a letter from Meridian Aggregates' counsel, Dr. Hensley wrote on August 28, 2002:

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[1] Dr. Danielson's report contains the word "symptomatic," but by context this is obviously a typographical error.

> Please note that previously I had combined 19% and 15% according to the guides, which gave only 30% as provided by the table in the guides. Given that range of motion is not to be utilized he, therefore, is felt to have a total of 19% permanent partial impairment of the whole man regarding his lumbar spine. According to your note it is also a fact under Arkansas law that an injury is compensable only if it is the "major cause" of the disability or impairment. Major cause is defined as greater than 50% of the cause. Clearly the "major cause" of this patient's disease process was his preexisting disease. In my opinion his preexisting disease accounted for 80% of his disease process and at most 20% was as a result of any aggravation secondary to the "jarring" that occurred during his employment. Therefore, under Arkansas law, it is my opinion that his claimed injury is not compensable based on the above instructions.

Dr. Hensley's first letter indicates that the most recent surgery resulted in an impairment rating independent of the prior surgeries. In his second letter, Dr. Hensley asserts that appellant's "preexisting disease accounted for 80% of his disease process," but this does not resolve whether or not the compensable injury was the major cause of an impairment. Significantly, Mr. Pollard's back disease did not require surgery, or any other medical treatment, prior to the compensable aggravation.

■ While the Commission relied on *Needham v. Harvest Foods*, 64 Ark. App. 141, 987 S.W.2d 141 (1998), in reaching its decision to deny benefits, that case is distinguishable. In *Needham v. Harvest Foods, Inc.*, we affirmed the denial of permanent benefits where the appellant was given a 4% anatomical impairment rating for a condition that predated the aggravation. In the present case, there is no evidence that Mr. Pollard was assigned any rating for his pre-existing stenosis, and there is evidence that his impairment resulted from the aggravation that caused the need for surgery.

■ Appellee Second Injury Fund argues that the Commission's opinion must be affirmed pursuant to Ark. Code Ann. § 11-9-704(c)(1)(B) (Repl. 2002), which provides, "Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." However, we disagree because there were objective findings to support an impairment. Spinal stenosis, or narrowing of the spine, was detected on a myelogram and CT scan, and this finding

clearly is not within the voluntary control of the patient. Furthermore, decompression surgery was performed October 10, 2000, to provide Mr. Pollard some relief.

We reverse and remand this case because the Commission erred in finding that Mr. Pollard's compensable aggravation was not the major cause of a physical impairment. On remand, it is within the Commission's authority to assess its own impairment rating using the AMA *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), rather than rely solely on its determinations of the validity of the ratings assigned by a physician. *See Avaya v. Bryant*, 82 Ark. App. 273, 105 S.W.3d 811 (2003). We direct the Commission to Table 75 on page 113 of the AMA *Guides*, where it prescribes an impairment rating of 8% for spinal stenosis treated by a single-level lumbar decompression, without fusion and without residual signs and symptoms. Notably, the applicable AMA *Guides* provide no permanent impairment rating for spinal stenosis that has not been operated on. Because we reverse on the issue of anatomical impairment, the Commission must also address Mr Pollard's argument that he is entitled to permanent wage-loss disability.

Reversed and remanded.

GRIFFEN and BAKER, JJ., agree.

CORN INSURANCE AGENCY, INC., *et. al.* *v.*
FIRST FEDERAL BANK of ARKANSAS, F.A.

CA 03-1399 194 S.W.3d 230

Court of Appeals of Arkansas
Division I
Opinion delivered September 29, 2004

John P. Corn, for appellants.

Marian M. McMullan, and *Kelly Halstead,* for appellee.

KAREN R. BAKER, Judge. This appeal involves the priority of mortgage liens held by appellee First Federal Bank of Arkansas, F.A., and Bank of Yellville's assignee, appellant Corn Insurance Agency, Inc., on 1.95 acres in Pulaski County owned by appellants Joe Swaffar and Sandra Swaffar. We hold that the Pulaski County Circuit Court erred in deciding this case by summary judgment and reverse and remand for trial.

The Swaffars borrowed money from Bank of Yellville on August 21, 1985. They signed a note to Bank of Yellville and gave a mortgage on approximately five acres in Pulaski County to secure that debt on the same date. On June 18, 1986, Bank of Yellville gave the Swaffars a deed of partial release to 1.95 acres within their tract. The partial release deed was recorded on June 23, 1986. The Swaffars obtained it from Bank of Yellville because they had applied for a loan with First Federal Savings & Loan Association of Malvern, Arkansas (First Federal of Malvern), which would be secured by a first mortgage on the 1.95 acres; without the release from Bank of Yellville, First Federal of Malvern would not be in a first-lien-priority position. After receiving $100,000 for the release of the 1.95 acres, Bank of Yellville executed the partial release deed, and First Federal of Malvern made the loan to the Swaffars. The partial release deed, however, contained what appellee has called scrivener's errors. On June 17, 1986, the Swaffars gave First Federal of Malvern a mortgage to secure their debt to it. This mortgage also contained an error. When First Federal of Malvern attempted to correct the legal description in their mortgage by filing a correction mortgage, it corrected the original error but made another mistake in omitting a call from the description. This correction mortgage was filed on October 7, 1988.

Bank of Yellville filed a foreclosure action against the Swaffars in the Pulaski County Chancery Court in May 1989. In its complaint, Bank of Yellville acknowledged that its deed of partial release had contained errors and asserted that, in May 1989, it had attempted to cure those errors by executing a correction deed of partial release of the 1.95 acres. This correction deed of partial release, however, was not filed, and only a copy of the original is in this record. That action was dismissed without prejudice on July 31, 1990.

Bank of Yellville made another loan to the Swaffars in November 1989, which was also secured by a mortgage on the Swaffars' entire five acres. Resolution Trust Corporation, acting as receiver for First Federal of Malvern, assigned the 1986 Swaffar mortgage to First Federal Savings of Harrison on May 2, 1990. It was recorded on June 21, 1990, and also contained an error in the legal description.

Appellee filed this action against the Swaffars and Bank of Yellville on May 21, 2001. In its complaint, it alleged that the Swaffars were in default on the June 17, 1986 promissory note and

asserted the priority of its mortgage lien on the property. In its counterclaim, cross-claim, and third-party complaint, Bank of Yellville alleged that the Swaffars had defaulted on their 1989 note and asserted the priority of its mortgage lien on the property. Appellee filed an amended complaint in June 2002, alleging that there were errors in the relevant property descriptions as a result of the parties' mutual mistakes and requested reformation of the Swaffars' mortgage to First Federal of Malvern to reflect the parties' intent. Appellee also requested reformation of the correction mortgage, the assignment, and the partial release deed to reflect the proper legal description of the property. Appellee sought enforcement of the debt reflected in the promissory note and enforcement of its mortgage on the property securing that debt, as reformed.

In their answer, the Swaffars set forth the affirmative defenses of laches and limitations. In its answer, Bank of Yellville also asserted those defenses and alleged that its interest in the property was superior to that of appellee. Bank of Yellville filed an amended counterclaim, cross-claim, and third-party complaint on July 16, 2002, asserting that the Swaffars had defaulted in their debt to it and seeking to recover the amount due under the November 15, 1989 promissory note and to foreclose on the November 15, 1989 mortgage, which it asserted was superior to the interests of all other parties.[1]

On July 24, 2002, Bank of Yellville assigned all of its interest in the Swaffars' 1989 promissory note and mortgage and its rights and claims in this litigation to appellant Corn Insurance Agency, Inc. (Corn). An order substituting Corn for Bank of Yellville in this action was signed by the circuit court on August 30, 2002.

Appellee moved for summary judgment on February 11, 2003. In support of its motion, appellee filed copies of the documents discussed above and the affidavits of First Federal of Malvern's attorney, Don Spears, an employee of appellee, Carolyn Thomason, and appellee's executive vice-president, Ross Mallioux.

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[1] Other parties with claims against the Swaffars' property were brought into this action as third-party defendants. Those parties have not asserted any claims to the property superior to those held by appellee and Corn. David Henry, trustee of the JTS Irrevocable Trust, intervened in this action because the Swaffars conveyed their property to him.

Corn and the Swaffars filed a joint motion for partial summary judgment. They asserted that appellee's complaint for reformation was time-barred and that, without reformation, the documents upon which appellee relied could not establish an enforceable lien. In support of their motion, they attached the affidavit of John Tweedle, a registered land surveyor, and copies of the assignment from Bank of Yellville. They argued that there was no evidence that Bank of Yellville was mistaken as to the legal description contained in the deed of partial release; that there was no evidence that the promissory note upon which appellee relied had been endorsed to appellee or was in appellee's possession; and that this action was filed outside the period of limitations. They also argued that there was no evidence that the correction mortgage had ever been assigned to appellee. They contended that appellee did not have a lien on the property but that, if it did, it would be inferior to that possessed by Corn. Appellants further argued that appellee had not submitted sufficient evidence to establish that it was the holder of a note.

In the July 7, 2003 order granting appellee's motion for summary judgment and denying Corn's motion for summary judgment, the court made the following findings:

> 9. That due to various scrivener's errors as hereinabove set out on the First Federal Mortgage, First Federal Correction Mortgage, RTC Assignment and Bank of Yellville Partial Release Deed, the Court finds said errors, occurred by mutual mistakes of the parties thereto and did not properly reflect their true intent; that the aforesaid errors were contrary to the desires and intents of the parties hereto to create the first lien in favor of the Plaintiff herein on the 1.95 acres fronting Mabelvale Pike owned by the Separate Defendants, Joe Thomas Swaffar and Sandra Carol Swaffar, husband and wife; that it was the intent of the parties thereto notwithstanding their mutual mistake to provide to the Plaintiff a first Mortgage lien on 1.95 acres fronting Mablevale Pike owned by the Separate Defendants, Joe Thomas Swaffar and Sandra Carol Swaffar, husband and wife, herein, said property being correctly described as follows, to-wit:
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> > Commencing at the Southwest corner of the Northwest 1/4 Southeast 1/4, Section 3, Township 1 South, Range 13 West; thence North 17°26'24"E 569.80 feet; thence South 88°24'07"E 189.18 feet to the point of beginning; thence South 88°24'07"E 418.82 feet to the West boundary of Mabelvale

> Pike; thence along said West boundary S 09°18'00"W 209.52 feet; thence North 88°30'00"W 400.05 feet; thence North 04°07'44"E 208.52 feet to the point of beginning comprising 1.95 acres, more or less.

> The Court finds it was the intent that Bank of Yellville release its 1985 mortgage lien and that RTC assign the Mortgage and Correction Mortgage to Plaintiff on the property described in this paragraph.

> That the Separate Defendants, Joe Thomas Swaffar and Sandra Carol Swaffar, husband and wife, have continued, since the acquisition of the aforesaid property, to be in possession of the above described property and made payments to the Plaintiff and the Plaintiff's predecessor upon said Mortgage until default as hereinafter set out; that by reason of the above scrivener's error and the mutual mistake on the part of the parties hereto and the parties to the instruments as delineated, the First Federal Mortgage (Instrument No. 86-36060), First Federal Correction Mortgage (Instrument No. 88-53641), RTC Assignment (Instrument No. 90-34142), and Bank of Yellville Partial Release Deed 86-35810) should be reformed and construed to reflect the proper description covering 1.95 acres as set out in this paragraph.

The court found the Swaffars to be in default and granted judgment to appellee against them in the amount of $213,557.10, and $6,045 as attorney's fees, plus interest, and found that appellee has a first lien on the property. The court ordered the property to be sold if the judgment was not paid within ten days. In granting the relief, however, the court did not reform the documents but interpreted them, stating:

> IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED BY THIS COURT that due to the various scrivener errors as hereinabove set out on the First Federal Mortgage, First Federal Correction Mortgage, RTC Assignment and Bank of Yellville Partial Release Deed, said errors being made through the mutual mistake of the parties hereto and contrary to the desires and intentions of the parties hereto, the aforesaid description of the property as set out in the above described instruments be, and the same is hereby interpreted to reflect the more particular description reflecting the parties true intentions, described as follows, to-wit:

> Commencing at the Southwest corner of the Northwest 1/4 Southeast 1/4, Section 3, Township 1 South, Range 13 West; thence North 17°26'24"E 569.80 feet; thence South 88°24'07"E 189.18 feet to the point of beginning; thence South 88°24'07"E 418.82 feet to the West boundary of Mabelvale Pike; thence along said West boundary S 09°18'00"W 209.52 feet; thence North 88°30'00"W 400.05 feet; thence North 04°07'44"E 208.52 feet to the point of beginning comprising 1.95 acres more or less.

On September 12, 2003, the court entered a final judgment finding the Swaffars to be in default on their obligation to Corn, granting Corn judgment in the amount of $156,648 plus $15,000 in attorney's fees and ordering foreclosure if the judgment was not paid within ten days. The court found that Corn's mortgage on the property is second to that held by appellee on the 1.95 acres and first as to the adjoining lands. This appeal followed.

Appellants do not argue that the trial court erred in deciding this case by summary judgment. Instead, they assert that, as a matter of law, summary judgment should have been granted to Corn for the following reasons: (1) appellee failed to produce evidence of an assignment of the Swaffars' 1986 First Federal of Malvern mortgage and note to appellee, First Federal Bank of Arkansas, F.A.; (2) appellee failed to produce the original 1986 promissory note given by the Swaffars to First Federal of Malvern; (3) appellee failed to properly identify the property that was the subject of the 1986 mortgage given by the Swaffars to First Federal of Malvern; (4) appellee's action is barred by the statute of limitations and by laches. Our disposition of the first two points on appeal renders it unnecessary to decide the third and fourth points.

Summary judgment is to be granted only when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *State Farm Mut. Auto. Ins. Co. v. Henderson*, 356 Ark. 335, 150 S.W.3d 276 (2004). Normally, on a summary-judgment appeal, the evidence is viewed most favorably for the party resisting the motion and any doubts and inferences are resolved against the moving party, but in a case where the parties agree on the facts, we simply determine whether the appellee was entitled to judgment as a matter of law. *Aloha Pools & Spas, Inc. v. Employer's Ins. of Wausau*, 342 Ark. 398, 39 S.W.3d 440 (2000). When parties file cross-motions for summary judgment, as was done in this case, they essentially agree that there are no material facts remaining, and summary judgment may

be an appropriate means of resolving the case. *Cranfill v. Union Planters Bank, N.A.*, 86 Ark. App. 1, 158 S.W.3d 703 (2004).

The filing of cross-motions for summary judgment, however, does not necessarily mean that there are no material issues of fact in dispute. In some cases, a party may concede that there is no issue if his legal theory is accepted and yet maintain that there is a genuine dispute as to material facts if his opponent's theory is adopted. *Wood v. Lathrop*, 249 Ark. 376, 459 S.W.2d 808 (1970); *Cranfill v. Union Planters Bank, N.A., supra*; *Chick-a-Dilly Props., Inc. v. Hilyard*, 42 Ark. App. 120, 856 S.W.2d 15 (1993); *Moss v. Allstate Ins. Co.*, 29 Ark. App. 33, 776 S.W.2d 831 (1989); *Heritage Bay Prop. Regime v. Jenkins*, 27 Ark. App. 112, 766 S.W.2d 624 (1989). In *Cranfill v. Union Planters Bank, supra*, we held that a case may appropriately be decided by summary judgment when the parties proceed on the same legal theory and the same material facts in making cross-motions for summary judgment. Here, the parties have proceeded on different legal theories. Appellee contends that, when the documents on which it relies were drafted, the parties were mutually mistaken as to the proper legal description of the 1.95 acres and that the court should interpret those documents in keeping with the parties' intent. Appellants, however, assert that those property descriptions were legally insufficient and, therefore, appellee's lien (if any) is secondary to that held by Corn. Accordingly, we hold that this case was not amenable to decision by summary judgment and that it should have gone to trial.

The Assignment

This case must also be reversed and remanded for two additional reasons, both of which involve a failure of proof on the part of appellee. Relying on our decision in *Beal Bank, S.S.B. v. Thornton*, 70 Ark. App. 336, 19 S.W.3d 48 (2000), appellants argue that appellee failed to establish that it is the assignee of the Swaffars' June 17, 1986 note and mortgage to First Federal of Malvern. Appellee asserts that appellants failed to raise this issue to the trial court and cannot, therefore, raise it on appeal. We disagree. At the hearing on the motions for summary judgment, Corn's attorney challenged the assignment.

Appellee filed a copy of the May 2, 1990 assignment by RTC, as receiver for First Federal of Malvern, to First Federal Savings of Harrison. There is nothing in the record, however, to

reflect an assignment from First Federal Savings of Harrison to appellee. Appellee states in its brief that First Federal Savings of Harrison changed its name to First Federal Bank of Arkansas, F.A. (appellee). That fact, however, is not documented in the record. Under the holding in *Beal Bank*, that failure of proof should have prevented the entry of summary judgment for appellee. In *Beal Bank*, we explained the importance of the plaintiff's proof of assignment as follows:

> Unless the defendant admits the assignment under which the plaintiff claims, the plaintiff has the burden of proving that there was a valid assignment in order to show that he or she has a cause of action. 6 AM. JUR. 2d *Assignments* § 191 (1999). "Whether an assignment of contract rights has occurred is determined by the intent of the parties; the assignor must intend to transfer a present interest in the subject matter of the contract." *Id.* at section 135. The intent of parties to an assignment is a question of fact derived from the instruments and the surrounding circumstances; therefore, whether an assignment occurred is a question of fact for the trial court. *Id.* at sections 136 and 190.
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> > The assignee's burden of proving the existence of the assignment is met by evidence that is satisfactory in character to protect the defendant from another action by the alleged assignor, and which shows that there was a full and complete assignment of the claim from an assignor who was the real party in interest with respect to the claim.
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> *Id.* at section 193.

70 Ark. App. at 341, 19 S.W.3d at 51.

Given the clear requirement that appellee prove that it has a valid assignment of the documents on which it relies, its failure to do so warrants reversal of the summary judgment.

The Original Promissory Note

Additionally, appellants argue that appellee's failure to produce the original June 17, 1986 promissory note given by the Swaffars to First Federal of Malvern should have barred the entry of judgment for appellee. Although appellee attached a copy of this note to its amended complaint, it did not produce the original, which it admitted was in its possession. It has long been held that

there can be no judgment on a note when it is not introduced into evidence and its absence is not explained. *See McKay v. Capital Resources Co.*, 327 Ark. 737, 940 S.W.2d 869 (1997); 12 AM. JUR. 2d *Bills and Notes* §§ 658, 677, 679 (1997). Because appellee did not produce the original of this note or sufficiently explain its absence, it failed to establish its status as a holder entitled to sue on it.

For these reasons, we order the summary judgment for appellee reversed and this case remanded for trial.

Reversed and remanded.

ROBBINS and GRIFFEN, JJ., agree.

Fred PHILLIPS *v.* STATE of Arkansas

CA CR 03-1152 194 S.W.3d 222

Court of Appeals of Arkansas
Division II and III
Opinion delivered September 29, 2004

William R. Simpson, Jr., Public Defender, *Tracey Overman*, Deputy Public Defender, by: *T.K. Smith*, Rule XV Law Student, and *Erin Vinett*, Deputy Public Defender, for appellant.

Mike Beebe, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

KAREN R. BAKER, Judge. At a bench trial in Pulaski County Circuit Court, appellant, Fred Phillips, was convicted of breaking or entering in violation of Arkansas Code Annotated section 5-39-202 (Repl. 1997) and theft of property in violation of Arkansas Code Annotated section 5-36-103(a)(1), (b)(4) (Repl. 1997). He was sentenced to a term of 120 months in the Arkansas Department of Correction. Appellant's sole point on appeal is a challenge of the sufficiency of the evidence based on the State's fingerprint evidence.

The State's case against the appellant was entirely circumstantial, consisting of appellant's fingerprints found inside the passenger door of the car along the top edge of the window where the window meets the rubber seal. The supreme court has affirmed convictions where the only evidence the State presented against the defendants was their fingerprints found inside the building. *See Howard v. State*, 286 Ark. 479, 695 S.W.2d 375 (1985) (appellant's fingerprints were found on the glass rim of a wall inside the store where the robber had vaulted into the office booth); *Ebsen v. State*, 249 Ark. 477, 459 S.W.2d 548 (1970) (a burglar broke a pharmacy's plate glass window to gain entry, and appellant's fingerprints were found on a large piece of broken glass found inside the building).

The test for determining the sufficiency of the evidence is whether substantial evidence, direct or circumstantial, supports the verdict. *Dye v. State*, 70 Ark. App. 329, 331, 17 S.W.2d 505, 507 (2000). Substantial evidence is that which is of sufficient force to compel reasonable minds to reach a conclusion beyond suspicion and conjecture. *Id.* Circumstantial evidence may constitute substantial evidence to support a conviction. *Medlock v. State*, 79 Ark. App. 447, 456, 89 S.W.3d 357, 363 (2002). The evidence must exclude every other reasonable hypothesis than that of the guilt of the accused, and the question of whether it does is for the trier of

fact to decide. *Id.* On review, this court must determine whether the fact-finder resorted to speculation and conjecture in reaching its verdict. *Id.* It is in the province of the fact-finder to determine the weight of the evidence and the credibility of witnesses. *Johnson v. State*, 337 Ark. 196, 202, 987 S.W.2d 694, 698 (1999).

Applying the case law to the facts of this case, we cannot say that the fact-finder resorted to speculation and conjecture in reaching its verdict. On April 17, 2002, Detective Mickey Schuetzle with the North Little Rock Police Department found his personal car in his apartment parking lot with the passenger door partially open. He testified that the vehicle had been secured the previous evening around 9:00. He approached the car and discovered that it appeared to have been broken into, and that items of personal property were strewn about inside the car, and eventually ascertained that approximately fifty compact discs were taken from his car. He did not observe any damage to the car door.

Upon discovering that his car had been broken into, Detective Schuetzle notified his supervisor and began to process the car for physical evidence. The Detective's police car was parked next to his personal car and contained all the items necessary to collect the evidence. He took photographs of the exterior of the car, showing the condition and position of the door. He dusted the interior of the passenger-side window for fingerprints and located several prints along the top edge of the passenger window, where the window meets the convertible's rubber seal. Detective Schuetzle removed the prints with fingerprint tape and attached the tape to fingerprint evidence cards. He did not fill out the back of the fingerprint-evidence cards, but stated the only place in the car that he took fingerprints was from the interior of the passenger window. He took the fingerprint-cards directly to the North Little Rock Police Department, where he completed an evidence envelope and sealed the fingerprint-cards awaiting their submission to the crime lab. He then placed the sealed envelope in a locked filing cabinet until he could take it to the state crime lab.

The analysis of the fingerprint evidence cards by the Arkansas State Crime Laboratory revealed three valuable prints, and one with sufficient value that could be entered into the Automatic Fingerprint Identification System. The fingerprints collected from the interior passenger window of the car matched appellant's fingerprints.

Appellant's argument for reversal relies upon the *Standridge v. State*, 310 Ark. 408, 837 S.W.2d 447 (1992), in which the court

held that a fingerprint found on an easily movable cup located several feet away from marijuana plants was insufficient to compel the conclusion that the defendant was engaged in the manufacture of marijuana. Our supreme court found it significant that the State's fingerprint expert stated that the cup could have been located anywhere in the world when the defendant touched it. The witness also testified that the print could have been made up to a year earlier.

Unlike *Standridge,* appellant's fingerprints were not found on an easily moveable object, but were located at the apparent location of entry to the car, the location of the crime, on the interior of the car's window. The photographs of the car that Schueltze took just after discovering the break-in show that its exterior was covered with dew, but the interior of the car was dry. The fingerprint analyst testified that a fingerprint or latent print is nothing more than almost one hundred percent water. The analyst testified that moisture is detrimental to obtaining a print, unless the print is a greasy print in which case there's a possibility that the print would not be totally destroyed by the moisture. While the analyst also testified there was no way of telling whether the print analyzed was from grease or moisture, there was no evidence that there was moisture in the interior of the car from where the print was taken.

■■ Because appellant's fingerprint was located at the apparent point of entry into the car, the fingerprint was placed while the window was dry and it was not degraded by the morning dew, and from its location and position the trier of fact could reasonably infer that the person had pried the window back to gain entry to the car where there was no damage to the car door itself, we cannot say that the fact-finder resorted to speculation and conjecture.

Accordingly, we affirm.

PITTMAN, ROBBINS and VAUGHT, JJ., agree.

HART and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I would reverse this case. The sole item of evidence tying Phillips to the offenses of breaking and entering and theft of property is a single fingerprint on the inside of the window of the car in question. The owner found the car door ajar in a parking lot after it had been parked

there overnight, and there was at least one unidentified fingerprint out of the three prints removed from the window. Although neither this court nor the supreme court has held that a single fingerprint is insufficient to support a conviction in circumstances analogous to this case, the published authorities all go to the length of setting out additional corroborating evidence. *See Lamb v. State*, 74 Ark. App. 245, 45 S.W.3d 869 (2001) (affirming conviction where appellant's palm print found inside passenger window of stolen truck, vehicle was found within a block of appellant's home, and appellant fled to another state when he learned the police were looking for him); *Tucker v. State*, 50 Ark. App. 203, 901 S.W.2d 865 (1995) (affirming conviction where, in addition to fingerprint evidence, stolen vehicle was found near appellant's apartment and appellant had relatives living near the car lot from which the vehicle was stolen). There is none in this case.

The law in fingerprint cases is clear. If there is corroborating evidence in addition to the fingerprint, then this court has determined that the fingerprint evidence sufficiently supports the conviction. This is clearly shown in *Lamb, supra* and *Tucker, supra*. In this case there is no additional corroborating testimony. There was no testimony from an eyewitness who saw Phillips leave the fingerprint on Schuetzle's window as in *Howard v. State*, 286 Ark. 479, 695 S.W.2d 375 (1985), where an eyewitness testified that she observed the defendant touch the glass rim of the office wall. There was no corroborating testimony indicating that Phillips lived nearby, or was seen near or in the vehicle, and none of the victim's property was recovered from Phillips at the time of his arrest. Further, although the victim, a police officer, dusted for fingerprints inside the car, other than the single print on the window of the door standing ajar, Phillips' prints did not turn up, even though the perpetrator removed the contents of the glove box and center console and scattered them throughout the car. Because the State's case is entirely circumstantial, there is not a strong enough link between the inferences that would prove Phillips' guilt to a moral certainty. The trial court was left to speculate as to whether Phillips actually entered the vehicle or took Schuetzle's property. According, I would reverse and dismiss.

HART, J., joins.

Tonya SMITH and William Smith *v.* FARM BUREAU MUTUAL INSURANCE COMPANY of ARKANSAS, INC.

CA 03-1349 194 S.W.3d 212

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered September 29, 2004

[redacted]

[redacted]

[redacted]

Gary Eubanks & Associates, by: *Russell Marlin* and *Robert S. Tschiemer*, for appellants.

Hardin , Jesson & Terry, PLC, by: *J. Rodney Mills*, for appellee.

ANDREE LAYTON ROAF, Judge. Tonya and William Smith appeal from orders denying their motions for summary judgment and granting appellee Farm Bureau Mutual Insurance Company of Arkansas, Inc.'s (Farm Bureau) motion for summary judgment. Farm Bureau had sought a declaratory judgment that there was no coverage or duty to defend a claim the Smiths brought against a third party for personal injuries resulting from an explosion in a camper trailer. On appeal, the Smiths assert that (1) the trial court erred in denying their motion for summary judgment because an exclusionary clause contained in Farm Bureau's insurance policy was inapplicable since the camper trailer was not subject to registration; and (2) the trial court erred in granting Farm Bureau's motion for summary judgment because the camper trailer was not subject to registration, there existed a genuine issue of material fact regarding whether or not the camper trailer was subject to registration, and, in the alternative, the language in the exclusion is ambiguous and creates a jury question. We reverse and remand.

Appellant Tonya Smith was injured when a propane tank exploded in the camper trailer she and her husband William were using as a residence. The camper is non-motorized, but has wheels and a tongue, which can be used for towing. It was located on the property of Elmer and Edna Partain, one of the Smith's grandparents, when the explosion occurred. The Smiths had received the camper from William's father, Richard Smith, and it was moved a short distance to the Partain residence by a pickup truck. According to Tonya Smith, she was not sure whether the camper trailer was designed for travel, but the record indicates that it had been previously used for camping trips, and had been towed behind a pickup truck on the public roadway to the camping site. The camper had not been used for two years prior to the Smiths' using it as a residence. It was not registered in Arkansas, but bore Missouri tags.

On October 11, 2000, Elmer Partain attempted to repair a butane heater inside the camper, and directed Tonya Smith to light the heater. An explosion occurred and Tonya sustained personal injuries. The Smiths sued Elmer Partain, asserting negligence. The Partains' homeowner's insurance policy is issued by Farm Bureau. Section II of the policy addresses coverage for "Personal Liability Protection." It provides

> Subject to the limits of liability shown on your declaration, [Farm Bureau] will pay all sums, except punitive damages, arising out of any loss which [the insured, Elmer Partain] become(s) legally obligated to pay as damages because of bodily injury or property damage covered by this policy.
>
> If a claim is made or a suit is brought against you for damages because of bodily injury and/or property damage covered by this policy we, will defend you at our expense, using the lawyers of our choice. We are not obligated to defend you after we have paid an amount equal to the limit of our liability. We may investigate or settle any claim or suit as we think appropriate.

The policy also provides that each person who sustains bodily injury is entitled to protection when that person is "on an insured premises with your permission." Section II also contains "Exclusion" provisions, which provides in pertinent part:

> Unless special permission for coverage is granted by endorsement, certain types of losses are not covered by your policy. Under Personal Liability Coverage and Medical Payments to Others Coverage, we do not cover:
>
> 1. bodily injury or property damage arising out of the ownership, maintenance, or use of:
>
> * * *
>
> (b) a motor vehicle. This exclusion does not apply to golf carts while used for golfing purposes, or motorized lawnmowers when used to service your residence premises;

The policy defines "motor vehicle" as:

> a. a motorized land or amphibious vehicle designed for travel on or off public roads *or* subject to motor vehicle registration;

b. a trailer or semi-trailer designed for travel on public roads *and* subject to motor vehicle registration. It does not include a boat or utility trailer not being towed by or carried on a motorized vehicle;

* * *

e. any vehicle *while being towed* by or carried on a motorized vehicle;

(Emphasis added.)

Relying on the exclusionary provisions of the policy, Farm Bureau filed a complaint against both the Partains and the Smiths for declaratory judgment, requesting that the circuit court declare that there existed no coverage or duty to defend under the policy. Farm Bureau then filed a motion for summary judgment, and the Smiths filed a response to the motion and a cross-motion for summary judgment.

In its motion for summary judgment, Farm Bureau stated that it had denied Tonya Smith's claim for bodily injury because the insurance policy "explicitly excludes coverage for bodily injury or property damage arising out of the ownership, maintenance or use of a motor vehicle." Farm Bureau asserted that the "1978 Holiday Rambler was a motor vehicle designed for travel on public roads and was subject to motor vehicle registration as set forth in the policy." Therefore, Farm Bureau concluded, no genuine issue of material fact existed. Farm Bureau provided as exhibits to its motion, the policy, the negligence complaint filed by Tonya Smith against Elmer Partain, the Smiths' and Partains' answers to interrogatories and requests for admissions, and depositions of Richard Smith and Tonya Smith.

In his deposition, Richard Smith testified that Tonya and William were to use the camper as a residence until they bought a house. The camper did not have a motor and was not capable of self-propulsion. When it was transported for the Smiths, the camper was pulled approximately three-quarters of a mile on a public road. It was not registered, and had not been used for several years. Richard Smith stated that he could not say whether or not the camper had ever been registered, but that it had a Missouri license on it. He also stated that the previous owner, his wife's ex-husband, never indicated that the camper had been used in transportation or on any highway.

Tonya Smith also testified that the trailer had not been used in several years; that she and her husband were using the camper temporarily; that it did not have an engine; that it appeared to be capable of travel because it had a tongue where it could be hooked to a hitch; and that she did not know whether it had been registered.

The Smiths asserted in their response and cross-motion for summary judgment that the "non-motorized residential camper trailer in this case is not 'designed for travel on public roads *and* subject to motor vehicle registration.' Therefore, it falls outside the policy exclusion." They argued that as a matter of law, Farm Bureau's motion should be denied and that their motion should be granted. The Smiths argued that because the camper was not driven along a highway and was being used as a residence, it is not subject to registration. They further argued that any transportation of the camper on the public highways was incidental to its intended use.

In support of their cross-motion, the Smiths attached the affidavit of Fred Porter. Porter, the Administrator of the Office of Motor Vehicles, Arkansas Department of Finance and Administration, stated, "If a camper is not driven or moved on a highway in the State of Arkansas, and if it is used on a piece of property as a residence, it is not required to be registered or licensed by the State of Arkansas."

Farm Bureau denied that the camper was not subject to registration. It argued that Porter's affidavit was insufficient because it did not specifically identify the camper at issue in this case. Farm Bureau also asserted in its response to the Smiths' motion for summary judgment that if the camper was not a motor vehicle, but rather a residence, there would still be no coverage because the camper was not "an insured residence" under the policy, an alternative argument that it did not raise in its motions for summary judgment and does not make on appeal.

The trial court first denied both motions for summary judgment. Subsequently, the Smiths filed a second motion for summary judgment. They argued that the policy excluded coverage if the camper trailer was both "designed for travel on public roads and subject to motor vehicle registration," that the camper was not subject to registration, and that the policy exclusion thus did not apply. They argued that Porter testified that the camper was not subject to registration unless it was being towed, and noted

that the camper was being used as a residence. They further argued that, because the policy did not specifically address when the "subject to registration" requirement applied, it should be construed against Farm Bureau, with all doubts and inferences given to the insured. The Smiths attached a copy of the policy, a copy of Porter's deposition, excerpts from Tonya Smith's deposition, and incorporated by reference the parties' previous motions for summary judgment and exhibits attached thereto.

In Porter's deposition, he stated that one of his job duties involved making a determination of whether a motor vehicle or trailer must be registered. "The phrase 'subject to registration' means a vehicle that must be registered under the Arkansas vehicle registration laws." According to Porter's deposition, a non-motorized camper trailer that is being used as a residence on a parcel of land is not subject to registration because it is not being used on the roads and highways in the state of Arkansas. He stated that a camper sitting on a piece of property is not subject to registration until it is put on the roads. Even then the camper would only be subject to registration during the time in which it was being towed, after which the registration can be transferred away.

Porter admitted in his deposition that he had not seen the camper in question, but stated that based on the information provided by the Smiths' counsel, the camper would qualify as a "semi-trailer." A semi-trailer is a trailer that has some of its weight carried on a towing unit, and some of the weight carried on the vehicle itself. Porter concluded that the camper in this case would be subject to registration while being towed, but not subject to registration while it was placed on the property in question.

Farm Bureau responded to the Smiths' second motion for summary judgment and renewed its motion for summary judgment. The motion essentially denied the Smiths' assertion that the camper was not subject to registration and was not a motor vehicle designed for travel on the public roads. Farm Bureau further contended that the language at issue was clear and unambiguous; that there existed no genuine issue of material fact in regard to whether it owed any coverage or duty to defend; and that it was entitled to summary judgment as a matter of law.

The trial court issued orders denying the Smiths' motion for summary judgment and granting the motion as to Farm Bureau. The court found that the policy did not provide coverage for

Smith's injuries or a duty to defend; that there was no genuine issue of material fact in this regard; and that Farm Bureau was entitled to summary judgment as a matter of law. The Smiths appeal the orders denying their motion for summary judgment and granting Farm Bureau's motion for summary judgment.[1]

On appeal, the Smiths argue that the trial court erred in both denying their motions for summary judgment and in granting summary judgment to Farm Bureau. Summary judgment should be granted only when it is clear that there are no genuine issues of material fact, and the party is entitled to judgment as a matter of law. *Spears v. City of Fordyce*, 351 Ark. 305, 92 S.W.3d 38 (2002).

Once the moving party has established a *prima facie* entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On review, we must determine whether there are any genuine issues of material fact. *Id.* In our review, we consider whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* All proof is viewed in the light most favorable to the party resisting the motion, with all doubts and inferences resolved against the moving party. *Walker v. Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981).

The law regarding construction of insurance policies is well settled. *Castaneda v. Progressive Classic Ins. Co.*, 357 Ark. 345, 166 S.W.3d 556 (2004). Once it is determined that there is coverage, it must be determined whether the exclusionary provisions in the policy eliminate coverage. *Id.* Exclusionary endorsements must adhere to the general requirements that the insurance terms must be expressed in clear and unambiguous language. *Id.* If the language is unambiguous, we give effect to the plain language of the policy. *Id.* If the language is ambiguous, then we resort to the rules of construction. *Id.* The construction and legal effect of a written contract are matters to be determined by the court. *Smith v. Prudential Property and Casualty Ins. Co.*, 340 Ark. 335, 10 S.W.3d 846 (2000). Provisions of an insurance policy are construed most strongly against the insurance company, which prepared it. *Id.* If reasonable construction can be given to the policy, which would justify recovery, it is the court's duty to do so. *Id.* If the language

[1] Although the Partains were parties to the declaratory-judgment action, they do not appeal from the trial court's granting of summary judgment.

of the policy is susceptible to two interpretations — one favorable to the insured and one favorable to the insurer, then the interpretation most favorable to the insured must be adopted. *Id.*

Ordinarily, the question of whether the language of an insurance policy is ambiguous is one of law to be resolved by the court. *Nichols v. Farmer*, 83 Ark. App. 324, 128 S.W.3d 1 (2003) (citing *Elam v. First Unum Life Ins. Co.*, 346 Ark. 291, 57 S.W.3d 165 (2001)). Where, however, parol evidence has been admitted to explain the meaning of the language, the determination becomes one of fact for the jury to determine. *Id.* Where there is a dispute as to the meaning of a contract term or provision, be it an insurance or other contract, the trial court must initially perform the role of gatekeeper, determining first whether the dispute may be resolved by looking solely to the contract or whether the parties rely on disputed extrinsic evidence to support their proposed interpretation. *Id.* As Justice George Rose Smith explained, "[t]he construction and legal effect of written contracts are matters to be determined by the court, not by the jury, *except when the meaning of the language depends upon disputed extrinsic evidence.*" (Emphasis added.) *Southhall v. Farm Bureau Mut. Ins. Co.*, 276 Ark. 58, 632 S.W.2d 420 (1982). Thus, where the issue of ambiguity may be resolved by reviewing the language of the contract itself, it is the trial court's duty to make such a determination as a matter of law. *Elam v. First Unum Life Ins. Co.*, 346 Ark. 291, 57 S.W.3d 165 (2001). On the other hand, where the parties go beyond the contract and submit disputed extrinsic evidence to support their proffered definitions of the term, this is a question of fact for the jury. *Id.* In the latter situation, summary judgment is not proper. *Id.*

An order denying a motion for summary judgment is only an interlocutory order and is not appealable. *City of North Little Rock v. Garner*, 256 Ark. 1025, 511 S.W.2d 656 (1974). Review of certain interlocutory orders is allowed in conjunction with the appeal of a final judgment. *Id.* Thus, an order denying summary judgment may be reviewable in conjunction with an appeal of an order granting summary judgment. *See id.*

In *Wilson v. McDaniel*, 247 Ark. 1036, 449 S.W.2d 944 (1970), the supreme court stated, "certain interlocutory orders are reviewable in conjunction with a final judgment; an order granting summary judgment is a final order, and therefore is appealable." In

Wilson, supra, both parties had filed motions for summary judgment, and the trial court granted summary judgment to the appellees, which effectually denied summary judgment to the appellants. The supreme court stated that, although the denial of the appellant's motion for summary judgment was interlocutory, it was necessary to discuss the appellant's alleged grounds for summary judgment in order to show that there were unresolved material issues, which could only be disposed of after a trial. Accordingly, we will consider both the Smiths' and Farm Bureau's grounds for summary judgment in deciding if summary judgment was proper in this case.

With these principles in mind, we consider the Smiths' arguments regarding the grant of summary judgment to Farm Bureau. The relevant provision of the Farm Bureau policy at issue excludes from liability and medical-payment coverage bodily injury arising from use of a "motor vehicle." Farm Bureau's definition of "motor vehicle" includes definitions for both motorized and nonmotorized vehicles. Unlike the motorized vehicle definition, a trailer or semi-trailer must be both designed for travel on public roads *and* subject to motor vehicle registration to be excluded. (Emphasis added.) However, one must further examine the relevant Arkansas statutory provisions to determine whether and under what conditions a vehicle or other object is "subject to" motor vehicle registration. In this regard, Ark. Code Ann. § 27-14-703 (Repl. 2004) provides in pertinent part:

> Every motor vehicle, trailer, semitrailer, and pole trailer *when driven or moved upon a highway* and every mobile home shall be subject to the provisions of this chapter except:
>
> * * *
>
> (2) Any vehicle which is driven or moved upon a highway only for the purpose of crossing such a highway from one (1) property to another[.]

(Emphasis added.) "Semitrailer" means every vehicle with or without motive power, other than a pole trailer, designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that some part of its weight and that of its load rests upon or is carried by another vehicle. Ark. Code Ann. § 27-14-210 (b) (Repl. 2004).

The camper trailer in this case is best categorized as a semi-trailer. It meets the definition of Ark. Code Ann. § 27-14-

210(b), and Porter testified that the camper trailer would be classified as a semi-trailer. Richard Smith explained that when moved, the camper trailer was attached to the back of a pickup truck and towed to its destination. Tonya Smith described a tongue on the camper trailer that could be "hitched" to another vehicle for towing. Porter also explained that based on the information he received, the camper trailer would be classified as a semi-trailer because only part of its weight rests on the towing vehicle.

Thus, under the plain language of Farm Bureau's policy, coverage for injuries arising out of operation or use of a nonmotorized semitrailer is excluded when the semi-trailer is "designed for travel on the public roads *and* is subject to registration." The phrase is conjunctive and requires proof of both clauses. However, on appeal, the Smiths argue against the effectiveness of the exclusionary clause only with regard to the "subject to registration" language.

■ We agree with the Smiths that the policy language, when coupled with the relevant statutory provisions, does not clearly exclude liability coverage for a semitrailer used solely as a residence. Farm Bureau in essence contends that the exclusion clause be broadly construed to include the "type of" trailer that is "capable of" being registered pursuant to Arkansas motor vehicle laws. However, the definition employed, in contrast with that for motorized vehicles, which encompasses vehicles designed for travel *on or off* public roads, *or* subject to motor vehicle registration, is not so clear and explicit as Farm Bureau would suggest. (Emphasis added.)

The Smiths also provided the opinion testimony of the Administrator of the State Office of Motor Vehicles in support of their defense to Farm Bureau's motions and their own motions for summary judgment, who unequivocally stated that the camper trailer in question was not subject to registration based upon its use as a residence. Moreover, the relevant Arkansas statute states that a semitrailer shall be "subject to registration" only "when driven or moved upon a highway," providing a temporal aspect to the term in question that is absent from the interpretation put forth by Farm Bureau.

■ Here, although both parties went beyond the four corners of the policy, and relied upon some extrinsic evidence to

support their respective interpretations, this extrinsic evidence was not in conflict. Accordingly, it was the trial court's duty to determine whether the policy language was ambiguous, and we agree that the trial court erred in failing to find that it was ambiguous.

Reversed and remanded for further proceedings to determine damages.

PITTMAN, HART, and ROBBINS, JJ., agree.

BAKER, J., concurs.

VAUGHT, J., dissents.

KAREN R. BAKER, Judge, concurring. I agree with the majority that we must reverse and remand the trial court's grant of summary judgment in this case. I also agree that the construction and legal effect of a written contract are matters to be determined by the court. *Smith v. Prudential Property and Casualty Insur. Co.*, 340 Ark. 335, 10 S.W.3d 846 (2000). Moreover, where the meaning of a contract does not depend on disputed extrinsic evidence, the construction and legal effect of the policy are questions of law. *Tunnel v. Progressive Northern Ins. Co.*, 80 Ark. App. 215, 95 S.W.3d 1 (2003). Here, the primary issue does not involve a question of fact concerning the camper trailer, but rather the construction and legal effect of the terms of the insurance policy, specifically the meaning of the term "subject to registration" and whether under the undisputed facts the camper trailer was subject to registration. *See e.g., Nichols v. Farmers Ins. Co.*, 83 Ark. App. 324, 128 S.W.3d 1 (2003).

The facts regarding the camper trailer are not in dispute. Therefore, determining whether the trailer was "subject to registration" is a question of law. The majority is correct in concluding that the policy language does not clearly exclude liability coverage for the camper trailer. It was therefore the trial court's duty to construe the policy language to find that the camper trailer was not subject to registration at the time of the accident. *See Castaneda v. Progressive Insurance Classis Insur. Co.*, 357 Ark. 345, 166 S.W.3d 556 (2004). Because the camper trailer was not subject to registration, the trial court erred not only in granting summary judgment to Farm Bureau, but also in denying the Smiths' motion for summary judgment.

Accordingly, I concur.

LARRY D. VAUGHT, Judge, dissenting. I dissent because I believe that the trial judge was correct and should be affirmed. The majority misconstrues the decision below by holding that the policy must be ambiguous because the parties relied on extrinsic evidence to support their arguments. While evidence was presented in support of cross-motions for summary judgment, there is no indication that the trial court considered anything other than the policy itself in ruling that the trailer was covered by the exclusion. Because the policy was not ambiguous, and the trailer was "designed for travel on the public roads and is subject to registration," I would affirm.

The facts are set forth in the majority opinion and are not in issue. No one disputes the nature of the vehicle in question; it is a camper trailer and fits the policy definition of a semi-trailer, which is excluded if designed for travel on the public roads and subject to registration. When the character of a vehicle is in question, courts must consider "(1) the vehicle's actual use, (2) the design and intended use by the manufacturer[,] and (3) how it is commonly used." *Nationwide Mut. Ins. Co. v. Worthey,* 314 Ark. 185, 189, 861 S.W.2d 307, 309 (1993). The undisputed facts available to the trial court were sufficient to conclude that the trailer was used on the road, was designed to be used on the road, and was commonly used on the road.

The deposition testimony of Mr. Porter of the DFA is not dispositive of the issue of whether the vehicle is subject to registration. His testimony only indicates that DFA would not have cited the vehicle's owner for failure to register when the vehicle was being used as a residence. It does not mean that the vehicle was not subject to registration if used on the road. If the appellants' interpretation of Mr. Porter's testimony were accepted, then there could never be a vehicle subject to registration and excluded from policy coverage unless the accident actually occurred while the vehicle was being used on the road, and that is not the nature of the exclusion. The decision of the trial court did not refer to Mr. Porter's testimony, and the testimony was not necessary to the court's ruling. The court interpreted the policy as a matter of law and correctly held that the vehicle was excluded as a motor vehicle. Therefore, I would affirm.

SOUTHWESTERN BELL TELEPHONE, L.P. *v.*
DIRECTOR of Arkansas Employment Security Department
and Stephen E. Barkley

E 03-405 194 S.W.3d 790

Court of Appeals of Arkansas
Division III
Opinion delivered September 29, 2004

Laney Gossett McConnell, John Herman Ivestar, Cynthia A. Barton, and *W. Edward Skinner,* for appellant.

Allan Franklin Pruitt, for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Southwestern Bell Telephone ("Southwestern Bell") appeals from the Board of Review's ("Board") decision granting unemployment benefits under Ark. Code Ann. § 11-10-513(c) (Supp. 2003) to employee Stephen Barkley, who voluntarily participated in a work force reduction process initiated by Southwestern Bell. On appeal, Southwestern Bell argues that the Board's decision that Barkley left his employment after it requested volunteers for a permanent work force reduction is not supported by substantial evidence and amounts to an erroneous construction of section 11-10-513(c). We reverse and remand for the Board to make further findings of fact.

Barkley, who began working for Southwestern Bell in 1974, ended his employment as a cable-splicing technician on July 8, 2003, after participating in Southwestern Bell's Voluntary Sever-

ance Program ("VSP"). Under this program, when Southwestern Bell determines that there is a surplus of employees in a certain area and that a work force reduction will be necessary, it is required by its collective bargaining agreement to offer eligible employees the opportunity to sign up for a voluntary severance package. Participation in the VSP is based on seniority, and the most senior employees are allowed to participate until the workgroup that contains a surplus is reduced by the required number of employees. The surplus will only be resolved by layoffs if there are not enough eligible participants in the VSP. Layoffs are determined by reverse seniority, so that the least senior employee is laid off first.

In the summer of 2003, a surplus was announced in Paragould, which is within Barkley's "Force Adjustment Area" ("FAA"). Barkley testified that there was not a surplus within his particular workgroup, in Jonesboro, but that he was eligible to be considered in the VSP because there was a surplus within his FAA. He requested a "Voluntary Candidate Request Form" from his manager and filled it out on May 9, 2003, stating that he was requesting to be offered a voluntary severance payment. Barkley then received a "Voluntary Severance Candidate Request Conditional Offer," which stated that his form had been received by the Placement Bureau, that the company was trying to establish a "pool" of voluntary severance candidates, and that it was trying to determine if Barkley would be willing to accept an offer should a match be made for his position. The letter stated that if Barkley accepted the offer, his decision was irrevocable.

Barkley signed this document on June 30, 2003. He testified that he had applied for the VSP and had been made conditional offers on prior occasions, but that he did not accept the offers at those times because he was not "ready to go." On this occasion, after Barkley was offered a voluntary severance payment of $46,700, he decided to accept the offer. Barkley testified that he was matched with another employee in Paragould, who would have lost his job had he not accepted the voluntary severance offer. Barkley acknowledged that his job was not in jeopardy at that time and that he could have continued to work at Southwestern Bell if he had not participated in the VSP. He testified that it was "general knowledge" within the company that the VSP was available once there was an announced surplus and that "the word just gets out." He stated that no one at Southwestern Bell approached him and asked him to volunteer.

Barkley's workgroup manager, Allen Jay Simmons, testified that Barkley was one of ten employees in his workgroup and that he asked to fill out the Voluntary Candidate Request Form after the surplus was announced within their FAA. Simmons stated that no one in his particular workgroup was going to be affected by the surplus and that Barkley's job was not at risk. Simmons testified that the VSP forms are kept on his desk and that the employee makes the choice to fill out the form and send it in. He stated that the employee from Paragould who was matched with Barkley had taken over Barkley's position in Jonesboro.

After leaving his employment with Southwestern Bell, Barkley was denied unemployment compensation by the Arkansas Employment Security Department ("ESD") on the basis that he voluntarily and without good cause left his work. Barkley appealed to the Appeal Tribunal, which reversed the ESD's determination and awarded him unemployment benefits under Ark. Code Ann. § 11-10-514(a) (Supp. 2003) on the finding that he was discharged from his last work for reasons other than misconduct in connection with the work. Southwestern Bell then appealed to the Board of Review, which affirmed and modified the Appeal Tribunal's decision, finding that Barkley was entitled to benefits under section 11-10-513(c) because he voluntarily participated in a permanent reduction in the employer's work force after the employer had announced a pending reduction and asked for volunteers. Southwestern Bell now appeals the Board's decision.

Southwestern Bell argues that the Board's decision that Barkley left his employment after Southwestern Bell requested volunteers for a permanent work force reduction is not supported by substantial evidence and amounts to an erroneous construction of Ark. Code Ann. § 11-10-513(c).

On appeal, the findings of the Board of Review are affirmed if they are supported by substantial evidence. *Billings v. Director*, 84 Ark. App. 79, 133 S.W.3d 399 (2003). Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* We review the evidence and all reasonable inferences therefrom in the light most favorable to the Board's findings. *Id.* Even where there is evidence upon which the Board might have reached a different conclusion, appellate review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

Section 11-10-513(a)(1) (Supp. 2003) states that "an individual shall be disqualified for benefits if he or she voluntarily and

without good cause connected with the work left his or her last work." However, in an amendment that became effective on April 11, 2003, the legislature added a new subsection to this statute, which states:

> (c)(1) No individual shall be disqualified under this section if he or she left his or last work because he or she voluntarily participated in a permanent reduction in the employer's work force after the employer announced a pending reduction in its work force and *asked for volunteers.*
>
> (2) Such actions initiated by the employer shall be considered layoffs regardless of any incentives offered by the employer to induce its employees to volunteer.
>
> (3) Any incentives received shall be reported under § 11-10-517.

(Emphasis added.)

While Southwestern Bell admits that there was a surplus in its work force that was announced, it contends that there was no evidence that it "asked for volunteers" for the VSP, as is required under subsection (c) of the statute. According to Southwestern Bell, Barkley voluntarily chose to apply for the VSP, without being asked to volunteer, and the Board's "implicit" finding that Southwestern Bell "asked for volunteers" merely by the availability of its VSP is an erroneous construction of the statute.

We are unable to address this argument and must reverse and remand to the Board for it to make further findings. As Southwestern Bell recognizes in its argument, the Board never explicitly made a finding as to whether, and if so, in what manner, the company "asked for volunteers" pursuant to the requirements of section 11-10-513(c). Under the Board's "Findings of Fact and Conclusions of Law," it stated that, "[b]ased on the evidence, the Board of Review finds that the claimant voluntarily participated in a permanent reduction in the employer's work force after the employer announced a pending reduction in its work force, and asked for volunteers; under the law this is a non-disqualifying separation from work." However, the Board does not set forth any factual basis for this conclusion. Although the Board includes some of the relevant facts in its "Summary of Evidence" section, it does not make findings as to which facts it relied upon in reaching its decision.

It is the responsibility of the state agency to make findings of fact, and this court cannot review an agency decision in

the absence of adequate and complete findings on all essential elements pertinent to the determination. *Sanders v. Director*, 80 Ark. App. 110, 91 S.W.3d 520 (2002); *Ferrin v. Director*, 59 Ark. App. 213, 956 S.W.2d 198 (1997). A conclusory statement by the Board that does not detail or analyze the facts upon which it is based is not sufficient. *Ferrin, supra*. Because we are unable to determine the facts upon which the Board relied in reaching its conclusion that Barkley was entitled to benefits under section 11-10-513(c) and because we are unable to do a *de novo* review of an agency decision, we reverse and remand for the Board to make further findings.

Reversed and remanded.

BIRD and CRABTREE, JJ., agree.

Tyrone Donald TURNER *v.* STATE of Arkansas

CA CR 03-1153 194 S.W.3d 225

Court of Appeals of Arkansas
Division III
Opinion delivered September 29, 2004

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

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

ANDREE LAYTON ROAF, Judge. Tyrone Turner appeals the revocation of his probation and sentence of ten years' imprisonment. On appeal, Turner argues that (1) the trial court lacked jurisdiction to revoke because of a prior modification of his sentence, and (2) the ten-year sentence recited in the judgment and commitment order is erroneous because the trial court pronounced sentence of only one year and because it is an illegal sentence for the count of first-degree terroristic threatening. We affirm the revocation as modified to correct the illegal sentence.

On May 10, 1999, Turner pled guilty to first-degree terroristic threatening, a class D felony, third degree domestic battery, a class A misdemeanor, and felon in possession of a firearm, a class B felony. The offenses were committed on December 3, 1998. Pursuant to the plea agreement, Turner was not charged with any prior convictions. He received a five-year sentence of probation, and was ordered to complete eighty hours of community service and attend domestic abuse classes. Turner was also ordered to pay court costs and $2,000 in fines.

On November 19, 2001, the State filed the first of a series of revocation petitions. A hearing was held on March 4, 2002, in which the State's petition was dismissed, and the trial court ordered that Turner's probation continue. However, the trial court ordered Turner committed to the Pulaski County jail on fines and court costs stemming from the 1999 convictions. On March 4, 2002, the Pulaski County circuit clerk sent a "speed letter" to the Pulaski County jail, advising the jailers that the revocation petition had been dismissed, and that the trial court had ordered Turner "committed on fines and court costs."

The State filed a second petition of revocation on June 28, 2002, and a hearing was held on October 21, 2002. Initially the trial court commented, "On a plea of guilty, it'll be the judgment and sentence of the court that you pay a fine of $200 plus costs and be returned to probation." The State cautioned that if the trial court wanted to continue Turner on probation it would not be able to modify the sentence at a later date if an additional fine was assessed. The State requested that the petition be dismissed so that

the probated sentence would be subject to modification at a later date. The trial court dismissed the petition and returned Turner to his sentence of probation.

A third revocation petition was filed on January 8, 2003. The State presented evidence that Turner had failed to meet with his probation officer, failed to pay his supervision fees, and failed to perform his community service. The trial court found Turner guilty and sentenced him as follows: "All right, I find you guilty as charged. Count one, that will be ten years in the Arkansas Department of Correction. Count two, one year concurrent. Count three, one year concurrent."

Turner first argues that the trial court lacked jurisdiction to revoke his probation pursuant to the petition filed in 2003 because the court had previously modified his probated sentence and fine in 2002. Prior to Act 1569 of 1999, a trial court lost subject matter jurisdiction to modify or amend an original sentence once it was put into execution. *Gates v. State,* 353 Ark. 333, 107 S.W.3d 868 (2003). A sentence is put into execution when the trial court issues a judgment of conviction or a commitment order. *Id.* A guilty plea, coupled with a fine and probation or a suspended imposition of a sentence, constitutes a conviction. *Id.* This conviction deprives the trial court of jurisdiction to amend or modify the executed sentence. *Id. See also* Ark. Code Ann. § 5-4-301 (Repl. 1997). Once a sentence is put into execution, an attempted modification of the original order is erroneous. *Gates, supra* (holding that the trial court lacked subject matter jurisdiction to modify the sentence originally imposed by imposing an additional term of fifteen years' suspended sentence).

In *Harmon v. State,* 317 Ark. 47, 876 S.W.2d 240 (1994), the appellant entered a guilty plea, and the trial court sentenced her to a suspended imposition of sentence of one year. The appellant was also ordered to pay a fine of $500 and court costs of $107.75 at the rate of $50 per month. Subsequently, the State filed a petition to revoke the appellant's suspended imposition of sentence. The trial court held that the appellant's suspended sentence would remain in effect, but modified the sentence by adding another $500 fine and two weeks' incarceration in the Crawford County Detention Center. On appeal, the supreme court held that the trial court lacked jurisdiction to modify the appellant's sentence once it was put into execution.

Turner's convictions arose from offenses committed in 1998, prior to the effective date of Act 1569 of 1999. Consequently, the supreme court's holding in *Gates, supra*, is controlling, and while the trial court had jurisdiction to revoke Turner's probation, it lacked jurisdiction to modify the original sentence with respect to any of the State's petitions to revoke. Thus, the issue that this court must resolve is whether the trial court's 2002 "commitment on fines and court costs" ordered at the time the 2001 revocation petition was dismissed constitutes a modification of Turner's original sentence.

In this regard, the State argues that the trial court's commitment of Turner at the March 2002 hearing was not a modification because the trial court could have been acting pursuant to Ark. Code Ann. § 5-4-203 (Repl. 1997). The State contends that the trial court did not enter a judgment and commitment order following the March 2002 hearing and that the trial court was merely imposing a "jail-for-dollar, failure-to-pay-fine commitment of [Turner] for his failure to pay his fine and court costs." The State concedes that Turner's failure to pay his fine could have been a basis on which to revoke his probation, but contends that, because the March 2002 proceeding resulted in neither a revocation nor an additional fine, the trial court retained jurisdiction to revoke Turner's probation pursuant to the State's 2003 petition.

Arkansas Code Annotated section 5-4-203 (Repl. 1997) provides in pertinent part:

> (a)(1) When a defendant sentenced to pay a fine or costs defaults in the payment thereof or of any installment, the court, upon its own motion or that of the prosecuting attorney, may require him to show cause why he should not be imprisoned for nonpayment.
>
> * * *
>
> (3)(A) Unless the defendant shows that his or her default was not attributable to a purposeful refusal to obey the sentence of the court or to a failure on his or her part to make a good faith effort to obtain the funds required for payment, the court may order the defendant imprisoned in the county jail or other authorized institution designated by the court *until the fine or costs or specified part thereof is paid.*
>
> (B) The period of imprisonment shall not exceed whichever is the shorter period:

(i) *One (1) day for each forty dollars ($40.00) of the fine or costs;*

(ii) Thirty (30) days if the fine or costs were imposed upon conviction of a misdemeanor; or

(iii) One (1) year if the fine or costs were imposed upon conviction of a felony.

(Emphasis added.)

We agree that Turner's sentence had been placed into execution when the judgment and commitment order was entered in 1999. However, we conclude that the trial court neither revoked Turner's probation nor modified his sentence by the "commitment on fines order" in the March 2002 proceeding. The proceeding was not brought pursuant to a show-cause order, and there is no evidence that the commitment was not in lieu of payment for fines assessed in connection with Turner's 1999 guilty plea, or that he did not receive credit on his fine for the days of commitment. Nor does Turner argue that he was assessed an additional fine. This case is thus readily distinguished from *Harmon, supra,* in which the trial court clearly modified the appellant's sentence by both adding an additional fine and imposing two weeks incarceration. Moreover, the record reflects that both of the first two petitions for revocation were dismissed prior to the third revocation proceeding in which Turner's probation was revoked.

Turner also argues that the judgment and commitment order reflects an illegal sentence on the terroristic threatening conviction. 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).

In order to construe judgments, we look for the trial court's intention, which is derived from the judgment and the record. *Timmons v. State*, 81 Ark. App. 219, 100 S.W.3d 52 (2003). Inconsistencies between the judgments entered and the record of the proceeding are resolved in favor of the trial record. *Id.* When there is a conflict between the trial court's oral pronouncement and the recitation on the face of the judgment, the oral pronouncement governs. *Carmichael v. State*, 296 Ark. 479, 757 S.W.2d 944 (1988).

Sentencing is entirely a matter for the Legislature. *State v. Pinell*, 353 Ark. 129, 114 S.W.3d 175 (2003). Our courts are strictly bound by the terms and sentences enacted by the General Assembly. *Id.* A trial court has jurisdiction to correct an illegal sentence even if it has been placed into execution. *Harness, supra.* However, if this court finds that a trial court's sentence was illegal and that the court's error is not related to guilt, but only relates to the illegal sentence, this court can correct the sentence in lieu of remanding. *Id.*

In this case, the judgment and commitment order of June 30, 2003, provides for a ten-year sentence of imprisonment for the felon in possession of a firearm conviction, a class B felony.[1] It also reflects a ten-year sentence of imprisonment for the first-degree terroristic threatening conviction, a Class D felony.[2] Arkansas Code Annotated section 5-4-401 outlines sentencing ranges, and provides that the authorized sentence range for a class B felony is five to twenty years. Ark. Code Ann. § 5-4-401 (Repl. 1997). The authorized sentence range for a class D felony is up to six years. *Id.*

The trial court was not authorized to impose a ten year sentence for the first-degree terroristic-threatening conviction, which is a class D felony and punishable by a maximum sentence of six years' imprisonment,[3] and Turner thus received an illegal

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[1] *See* Ark. Code Ann. § 5-73-103 (Repl. 1997).

[2] *See* Ark. Code Ann. § 5-13-301 (Repl. 1997).

[3] Turner's conviction was not subject to the sentence enhancement provision of Ark. Code Ann. § 5-4-401 because his plea agreement indicates that he is not being charged with having any prior convictions.

sentence. Moreover, a review of the trial record shows that the trial court pronounced a one-year sentence for the first-degree terroristic threatening conviction. At the conclusion of the revocation hearing the trial court stated that as to count two,[4] Turner was sentenced to "one year concurrent." The oral pronouncement of the trial court governs. Because the error in the judgment and commitment order constitutes an illegal sentence, we correct the error to reflect a sentence of one year for the terroristic-threatening conviction, to be served concurrently with the ten-year sentence imposed for the felon-in-possession conviction.

Affirmed as modified.

BIRD and CRABTREE, JJ., agree.

James TAYLOR *v.* CITY of NORTH LITTLE ROCK and Travelers Indemnity Company

CA 04-58 194 S.W.3d 797

Court of Appeals of Arkansas
Opinion delivered October 6, 2004

[4] Apparently, the trial court was referring to the State's information. Count one is listed as felon in possession. Count two is listed as terroristic threatening, and count three is listed as domestic battery. Count four charges that Turner is a habitual offender, but the plea agreement specifically stated that Turner was not being charged as a habitual offender.

Gary Eubanks & Associates, by: *Mary A. Earl* and *Robert S. Tschiemer*, for appellant/cross-appellee.

Colette D. Honorable, for appellee/cross-appellant.

JOHN F. STROUD, Chief Judge. This appeal is brought from the trial court's denial of the City of North Little Rock's motion to dismiss and the trial court's grant of summary judgment to Travelers Indemnity Company. We reverse and remand for further proceedings consistent with this opinion.

On November 29, 1999, appellant, who was driving a vehicle owned by his employer, was struck by a vehicle driven by Louis Storke and owned by the City of North Little Rock ("the City"). At the time of the accident, the City vehicle was insured under a motor-vehicle policy issued by Reliance Insurance Company, and appellant's vehicle was insured under a policy issued by appellee Travelers Indemnity Company. The Travelers policy provided uninsured and underinsured motorist benefits (UM/UIM) in the amount of $300,000.

On August 2, 2000, appellant sued Storke and the City for negligence. A little more than one year after suit was filed, the City's insurance carrier, Reliance, was declared insolvent. Thereafter, the City asked to be dismissed from the lawsuit on the grounds that it was immune from liability, under the statutory grant of immunity found in Ark. Code Ann. § 21-9-301(a) (Repl. 2004). Appellant responded that the City was not immune because it had failed to comply with the dictates of Ark. Code Ann. § 21-9-303(a) (Repl. 2004), which provides that municipalities must carry liability insurance on their motor vehicles or become self-insurers for the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act.[1] According to appellant, because Reliance had become insolvent, the City no longer had motor-vehicle insurance and was therefore a self-insurer. The trial court entered an order denying the City's motion to dismiss and finding that the City had become a self-insurer.

In reliance on that ruling, Travelers Indemnity Company, which appellant had brought into the lawsuit for the purpose of seeking UM/UIM benefits, moved for summary judgment based on the following policy language that excluded self-insured vehicles from UM and UIM coverage:

> "Uninsured motor vehicle" does not include any vehicle:
>
> (1) Owned or operated by a self-insurer under any applicable motor vehicle law . . .
>
> . . . .
>
> "Underinsured motor vehicle" does not include any vehicle:
>
> a. Owned or operated by a self-insurer under any applicable motor vehicle law.

[1] The minimum amount required for personal injury liability coverage is $25,000 per individual and $50,000 per accident. Ark. Code Ann. § 27-19-713(b)(2) (Repl. 2004).

Based on its previous order that the City was a self-insurer, the trial court ruled that Travelers was entitled to summary judgment in light of the above-quoted policy language.

Appellant now appeals from the trial court's grant of summary judgment to Travelers, and the City cross-appeals from the trial court's finding that it was a self-insurer. We address the cross-appeal first, as our appellate courts have done in several cases in which the issue on cross-appeal contained the central issue to be decided. *See Leonards v. E.A. Martin Mach. Co.*, 321 Ark. 239, 900 S.W.2d 546 (1995); *McElroy v. Grisham*, 306 Ark. 4, 810 S.W.2d 933 (1991). In this case, the issue on cross-appeal is dispositive of the entire appeal.

The City argues in its cross-appeal that the trial court erred in declaring the City to be a self-insurer under Ark. Code Ann. § 21-9-303(a) because, at the time of the accident, the City had in full force and effect a motor-vehicle liability insurance policy, as required by that statute. We agree.

Arkansas Code Annotated section 21-9-303 requires that all municipalities "shall carry liability insurance on their vehicles or shall become self-insurers." The statute does not require a municipality to guarantee the solvency of its insurer. In this case, the City did what was required of it by law, *i.e.*, procured motor-vehicle liability coverage in the statutorily-required amounts. The coverage was in effect when the accident occurred, and there is no evidence that the City could have anticipated that its carrier would become insolvent. Further, it is so clear as to be axiomatic that, once the City's insurer became insolvent, the City could not acquire insurance that would cover an accident that had already happened. Thus, the City should not be relegated to the status of a self-insurer, as our supreme court has indicated should be done with political subdivisions who simply fail to procure the required insurance coverage. *See King v. Little Rock Sch. Dist.*, 301 Ark. 148, 782 S.W.2d 574 (1990); *Thompson v. Sanford*, 281 Ark. 365, 663 S.W.2d 932 (1984); *Sturdivant v. City of Farmington*, 255 Ark. 415, 500 S.W.2d 769 (1973).

In light of the foregoing, we reverse and remand this case to the trial court for further proceedings consistent with this opinion. As for the grant of summary judgment to Travelers, the trial court granted Travelers' motion based on the faulty premise that the City was a self-insurer. Thus, the summary judgment,

which was based on language in the Travelers policy that excluded self-insured vehicles from UM/UIM coverage, had its genesis in the trial court's incorrect conclusion that the City was a self-insurer. Therefore, the summary judgment is likewise reversed.[2]

Reversed and remanded.

HART and VAUGHT, JJ., agree.

May MORGAN *v.* SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY

CA 04-95 200 S.W.3d 469

Court of Appeals of Arkansas
Substituted Opinion on Grant of Rehearing
December 15, 2004*

* Original opinion delivered October 6, 2004. STROUD, C.J., and HART, J., would deny rehearing.

Phil Stratton, for appellant.

Andy Lee Turner, for appellee.

SAM BIRD, Judge. In a previous opinion, *May Morgan v. Farm Bureau Mutual Ins. Co. of Arkansas*, 88 Ark. App. 52 (2004), we considered Morgan's appeal from the Faulkner County Circuit Court, which had granted summary judgment in favor of the appellee. We reversed the trial court, concluding that summary judgment was inappropriate because there was a fact issue remaining as to whether the appellant, May Morgan, had a criminal record. Appellee has now filed a petition for rehearing, in which it makes an argument that our original decision was erroneous. After carefully reconsidering the issues, we find that appellee's argument is persuasive. Therefore, we grant the petition for rehearing and issue this substituted opinion affirming the trial court's grant of summary judgment.

As a preliminary matter, although appellant's notice of appeal and the record filed with the clerk of this court show that

the appellee is Farm Bureau Mutual Insurance Company of Arkansas (Farm Bureau Mutual), it is obvious from the parties' pleadings and the court's orders filed in the case, and it appears to be agreed by the parties, that the intended appellee is Southern Farm Bureau Casualty Insurance Company (Southern Farm Bureau), a fact also recognized in this court's previous opinion. To briefly explain, this action was originally commenced by May Morgan to recover benefits under an automobile insurance policy alleged to have been issued to her by Farm Bureau Mutual. When Farm Bureau Mutual answered, alleging that it did not issue the subject policy, but that it was issued, instead, by Southern Farm Bureau, Morgan amended her complaint to make Southern Farm Bureau the defendant and, simultaneously, moved to dismiss her complaint against Farm Bureau Mutual. Thereafter, Southern Farm Bureau filed its motion for summary judgment, and the court eventually entered its order granting summary judgment in favor of Southern Farm Bureau. Morgan appeals from that order. Therefore, in this substituted opinion, we take this opportunity to correct the style of the case to be "*May Morgan v. Southern Farm Bureau Cas. Ins. Co.*" and to delete the name Farm Bureau Mutual Insurance Company of Arkansas as a party to this appeal. In this opinion, reference will be made to Southern Farm Bureau as the sole appellee, regardless of what name formerly identified the appellee.

In *Cox v. Keahey*, 84 Ark. App. 121, 128, 133 S.W.3d 140, 143 (2003), we recounted the well-settled standard of review for summary-judgment cases:

> The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. [*Alberson v. Automobile Club Interins. Exch.*, 71 Ark. App. 162, 27 S.W.3d 447 (2000)]. All proof submitted with a motion for summary judgment must be viewed in the light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *McWilliams v. Schmidt*, 76 Ark. App. 173, 61 S.W.3d 898 (2001). Summary judgment is not appropriate where evidence, although in no material dispute as to actuality, reveals aspects

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

The facts giving rise to this appeal are that on September 25, 2002, May Morgan made application to Southern Farm Bureau for a policy of automobile insurance, insuring an automobile owned by her.[1] The application contained questions asking whether the applicant or any member of her household had ever been arrested or convicted of a felony. Morgan answered both of those questions "No." Several months later, when Morgan made a claim for damages to the automobile resulting from a single-car collision, Southern Farm Bureau notified her that, because of her "misrepresentation of a material fact," the policy for which she applied would not be issued. Southern Farm Bureau also tendered to Morgan a check for the premium she had paid with her application. Morgan filed suit alleging a cause of action under the policy for damages to her car and a cause of action for damages on account of Southern Farm Bureau's bad faith in refusing to issue the insurance policy.

Southern Farm Bureau answered the complaint, alleging that Morgan had made material misrepresentations in her application for the insurance policy. Thereafter, Southern Farm Bureau filed its motion for summary judgment to which it attached, as exhibits, the depositions of May and Tommy Morgan and the affidavit of its underwriter.

The Morgans' depositions established that May knew that Tommy had an extensive criminal record, including a number of arrests, and at least one felony conviction for which he served a term in prison. In her deposition, Morgan admitted that she knew about Tommy's record when she completed the insurance application, but she stated that she "wasn't thinking about it." Tommy

[1] Simultaneously with May Morgan's application for the automobile insurance policy with Southern Farm Bureau, an application to Farm Bureau Mutual was being completed by her husband, Tommy Morgan, for a homeowner's insurance policy on their home. However, this appeal relates only to the automobile policy.

Morgan was more succinct in his deposition, stating that his felony record was "none of their business," and that it was "something we don't go around telling" because it presented problems that he eliminated by "just keep[ing] it to myself." The underwriter's affidavit stated that questions posed to applicants for insurance policies seek information that Southern Farm Bureau considers highly significant to the risk, that Southern Farm Bureau relies upon the answers given by the applicants in evaluating whether to accept the risk, and that Southern Farm Bureau would not have issued the policy "had the truth of the criminal records of Tommy and May Morgan been revealed."

Morgan's response to the motion alleged that because the underwriter was not a disinterested witness, his affidavit could be considered disputed, and that the materiality of the alleged misrepresentation was a genuine issue of material fact.

The trial court granted Southern Farm Bureau's motion for summary judgment, finding that Morgan intentionally and falsely misrepresented that she and her husband, Tommy Morgan, had never been arrested and that her husband had never been convicted of a felony, whereas their depositions revealed that both had been previously arrested and that Tommy Morgan had "an extensive criminal record which included several felony convictions." The court relied on *Ferrell v. Columbia Mut. Casualty Ins. Co.*, 306 Ark. 533, 816 S.W.2d 593 (1991) (an applicant's misrepresentations about an authorized driver's record of moving traffic violations were material to the issuance of an automobile insurance policy) as authority for the proposition that misrepresentations about one's arrest or criminal records are material to the risk.

Morgan appeals the trial court's grant of summary judgment, raising two points: (1) the trial court erred in accepting the affidavit of appellee's employee as uncontroverted; and (2) the trial court erred in finding a material misrepresentation of fact in the absence of proof of materiality.

■ ■ Morgan is clearly wrong on her first point for reversal, that the trial court erred in accepting the agent's affidavit

as uncontroverted. It is well settled that uncontroverted affidavits filed in support of a motion for summary judgment are accepted as true for purposes of the motion. *Alexander v. Flake*, 322 Ark. 239, 910 S.W.2d 190 (1995); *Inge v. Walker*, 70 Ark. App. 114, 15 S.W.3d 348 (2000). Morgan cites two cases, *Motors Ins. Corp. v. Tinkle*, 253 Ark. 620, 488 S.W.2d 23 (1972) and *Old Republic Ins. Co. v. Alexander*, 245 Ark. 1029, 436 S.W.2d 829 (1969), for the proposition that the testimony of an interested witness is never considered to be uncontroverted. Those cases are distinguishable, however, because there the supreme court was considering the weight to be given to the testimony of an interested witness *at trial* and not in the context of an affidavit in support of a motion for summary judgment.

We also disagree with Morgan on her second point, that the trial court erred in finding a material misrepresentation of fact in the absence of proof of materiality. As already noted, the underwriter's affidavit established that, in assessing the risk and deciding whether to issue a policy, Southern Farm Bureau relied upon the information provided by applicants in their responses to questions about their arrest and criminal records. Except for her unsupported assertion that there exists a genuine issue as to a material fact, Morgan presented to the trial court neither a contradictory affidavit nor authority for her argument that such misrepresentations are not material.

Morgan cites *Brooks v. Town & Country Mut. Ins. Co.*, 294 Ark. 173, 741 S.W.2d 264 (1987), in arguing that the materiality of a misrepresentation is a question of fact. However, Morgan's reliance on *Brooks* is misplaced. In *Brooks*, the supreme court held that the trial court, sitting as fact-finder, had erred in finding, in the absence of any evidence, that a material misrepresentation of fact had occurred when Mrs. Brooks failed to reveal in her homeowner policy application that she had experienced a previous fire loss. Unlike the case now before us, *Brooks* involved an appeal from a verdict after trial and was not an appeal from a grant of summary judgment. But more importantly, in the case at bar, which is a summary-judgment case, there was proof before the

court in the form of the underwriter's affidavit that the false information that Morgan provided was significant to Southern Farm Bureau in its assessment of the risk to be assumed, and material to its decision of whether to issue the policy.

Finding no merit in either of appellant's points on appeal, we hold that the trial court's grant of summary judgment was appropriate.

Affirmed.

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

STROUD, C.J., and HART, J., would deny the petition for rehearing.

TERRAVISTA LANDSCAPE *v.* DIRECTOR, EMPLOYMENT SECURITY DEPARTMENT and Wilfredo Morales

E 04-132 194 S.W.3d 800

Court of Appeals of Arkansas
Opinion delivered October 6, 2004

Appellant, pro se.

Phyllis A. Edwards, for appellees.

SAM BIRD, Judge. Terravista Landscape & Maintenance appeals the Board of Review's award of employment-security benefits to Wilfredo Morales, who was discharged from his employment as a crew leader on Terravista's landscaping jobs. The Board reversed the Appeal Tribunal's denial of benefits and its finding that Morales was discharged from last work for misconduct connected

with the work, finding instead that Morales was discharged for reasons that did not constitute misconduct connected with the work. We hold that there is insufficient evidence to support this finding by the Board; therefore, we reverse the award of benefits.

The initial determination in this case was made by the Arkansas Employment Security Department, which found that Morales was discharged for failure to meet the work standards of the employer but that he had made reasonable efforts to meet those standards. Noting that inability to perform the work does not constitute misconduct in connection with the work, the Department determined that Morales was not disqualified from receiving unemployment benefits. Terravista appealed the agency's determination to the Appeal Tribunal, challenging the finding that Morales made reasonable efforts to perform his job duties. Terravista asserted in its appeal, "If reasonable effort was extended on his part, he would not have *continually* ignored and disregarded company policy and his supervisor's instructions."

The evidence presented at a hearing conducted before the Appeal Tribunal included testimony by Terravista's president, William Gernen, and by Morales; both Terravista's and Morales's statements concerning discharge; and pages from the employee handbook. A list of Terravista's reasons for dismissal was also admitted into evidence:

> 1) Wilfredo had a blatant disregard for equipment care, contrary to company policy — written and verbal. Wilfredo was instructed to place equipment (various hand tools) in the back of the truck and secure. He would "throw" them in the truck which resulted in breakage and damaged tools.
>
> 2) As a Crew Leader, one of his job responsibilities was to regularly perform maintenance on the equipment. He did not perform this task or even leave the equipment prepared for the next business day, such as leaving a tractor with no fuel or keys for operation.
>
> 3) Wilfredo was responsible for cleaning out his truck, which is in the manual as well as verbally instructed. He ignored this instruction and left truck "trashed out" and did not perform maintenance on the vehicle, i.e., check oil, etc.
>
> 4) As a Crew Leader, he was to be prepared for the work day with proper tools. He often would leave the shop without the proper

> items to perform the necessary work and would have to come back to procure them causing much inefficiency in the work day.
>
> 5) Wilfredo would play the radio loudly at the job site (customers' homes) which is against employee policy. All employees must treat the client's property with respect. He was warned to keep the volume down; however, he ignored the Supervisor's warning and continued to play music too loud in the residential areas. We had several complaints from customers.
>
> 6) Wilfredo never improved in his work ethics or performance. He was never able to complete a job in a timely manner to Terravista standards. When instructed how to do a job, he would ignore the instruction and seem to purposely do the job slower.
>
> He was released because of continually working contrary to company policy and instruction.

Geren testified at the hearing that Morales had been discharged for breaking company policy and for blatant disregard of policy. Geren testified that there were "several things day after day" leading to the dismissal rather than a single incident, but that the final thing had been Morales's playing the radio loudly at clients' residences, contrary to the handbook policy that employees be responsible and professional to customers and clients. Geren stated that the manager of the landscape crew, Gabe Morris, heard the radio playing loudly and that the company received phone calls and complaints from clients about it. Geren said that this had occurred five or six times over several months, that Morales was told to turn the radio down, but that he would turn it up when the manager left a job site.

Geren also testified regarding Morales's disregard for the company policy of keeping the trucks clean and taking care of equipment. He said that company policy required that all personal trash be cleaned out of the trucks daily and the tools be put away, that Morales was warned several times by Morris that the trash was to be cleaned out, but that Morales neglected this policy just as he did the radio policy, leaving his truck in the afternoon with all the trash in it and all the tools on it. Geren testified that Morales had been warned six times for failure to clean his truck and for not putting up tools and equipment, but that his response was just to acknowledge it with a shrug and then ask for more money.

Geren testified that company policy also directed that equipment be properly cared for and maintained, but that oftentimes

Morales and laborers under his supervision threw heavy pieces of equipment on top of hand tools in the truck, breaking and cracking handles of shovels and rakes, and that this went on over a period of several months. Geren testified that Morales was instructed to use a tractor to load mulch and other materials, that company policy required an employee to be responsible for his tools, that Morales would nearly run the tractor out of fuel and leave it for someone else to fill up, and that he would not clean the mulch from the air filter in the radiator's grill. Geren testified that Morales was warned several times but would just seem to shrug each time. Geren stated, "If he wasn't going to be paid more that's the way he was going to treat the equipment. That he didn't care." Geren said that this was hearsay from other employees who, like Morales, spoke Spanish, but that Morales's attitude was personified by his actions.

Geren also said that Morales had been warned at least a dozen times to load his truck at day's end to be ready for the next day. Geren said Morris finally gave up on instructing Morales because he wouldn't cooperate, and that the decision for termination was made after all the complaints and problems. Geren testified that it was Morris who had direct knowledge of the incidents mentioned above; and that, once, after Geren had been on a job site and had instructed Morales how pipe was to be glued, Morris told him that Morales resumed doing the pipe the way he wanted to rather than the way he had been shown. Geren stated that Morales was discharged not for specific incidents, but for his general attitude of not being willing to improve in his work abilities, and not following company directives but continually asking for more money.

Morales, testifying through an interpreter, said that he had been fired. He acknowledged receiving a copy of the company handbook. He said that the reasons Geren gave for firing him were working too slowly and not cleaning up the truck properly. Morales said that workers were told they could play the radio but not too loudly. He said that he was never warned that he was playing his radio too loudly, and he denied doing so. He said that he had been instructed to clean his truck on a daily basis, and he said that he always cleaned it and got the bottles and cans out. He said that the tools were always put back in their places and were never thrown around, that broken handles and other things occurred because of the old age of the tools, and that once a handle might have been replaced because it wasn't good any more. He said that he never failed to refuel the tractor, or to put air filters and

radiators filters into the tractor. He said variously that he forgot to do the oil, that this was a job for a mechanic, that one or two times he was told to change the oil and he did, and that "we changed the oil every day."

Geren asked that the record reflect, because Morales had brought up the subject, that he had been instructed to change the oil in the skid loader and the tractor, that Morales had neglected to do so, and that someone else had to do it. Geren asked Morales why the tractor's air filter and radiator filter guards were caked with mulch several times when Geren checked the equipment after Morales had been loading mulch and had left work. Morales responded, "He knows that I wasn't the only one or only group to have those vehicles. Other groups had them, too. Why is he blaming me?"

At the conclusion of the hearing, each party was given an opportunity to discuss anything not previously brought to the attention of the hearing officer. Morales commented, "I said before if I was not doing something right, why wasn't I told in nine months of working for that company?" Geren responded that on three occasions Morales had come to Geren's office asking for more money, and that he had been told the things he needed to do to improve his work: keep the truck cleaned better and do a better job following instructions from Morris.

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. Ark. Code Ann. § 11-10-514(a)(1) (Repl. 2002). In *Willis Johnson Co. v. Daniels*, 269 Ark. 795, 601 S.W.2d 890 (Ark. App. 1980), we explained that "misconduct," for purposes of unemployment compensation cases, must be:

> an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his employees, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.
>
> Mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertencies, ordinary negligence or good faith errors in judgment or discretion are not considered misconduct for unemployment insurance pur-

> poses unless it is of such a degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of an employer's interests or an employee's duties and obligations.

Willis, 269 Ark. at 800, 601 S.W.2d at 892–93 (citations omitted).

In order for misconduct to occur, there must be an element of intent. *See id.* Whether the employee's acts are willful or merely the result of unsatisfactory conduct or unintentional failure of performance is a fact question for the Board to decide. *George's, Inc. v. Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995). On appeal, the findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. *Greenberg v. Director*, 53 Ark. App. 295, 922 S.W.2d 5 (1996). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

The Board noted that shortcomings in Morales's work had been going on for months prior to the discharge. The Board's opinion included the following analysis:

> The employer never provided a written warning to the claimant. The testimony of the president indicates that the claimant was verbally warned about his conduct but other testimony indicates that the president may have been referring to the fact that he mentioned the shortcomings when he was being denied a requested raise. If so, this would not put the claimant on notice that his failures were so great that if such conduct continued, he might be discharged.

The Board noted that Morales was discharged for a variety of reasons. It found that Terravista's president witnessed "incidents of the claimant failing to clean the truck of trash and put away equipment and apparently of heavy items being found stored on top of hand tools," but that this had gone on for months without the employer taking any adverse action against Morales. Additionally, the Board noted that the president "was a direct witness to the filters being filled with mulch at the end of the claimant's shift, indicating that the claimant had failed to clean them or that he had not done a very good job of cleaning them," but that this problem also had gone on for months with no apparent adverse action being taken. The Board concluded:

> The claimant's job performance was frequently poor in that he failed to properly clean equipment and put up tools over a period of

> several months. This might constitute a good business reason to discharge the claimant but it does not necessarily mean that the claimant's conduct amounted to misconduct. As the claimant's conduct does not appear to be worse than the conduct in *Greenberg* [*v. Director*, 53 Ark. App. 295, 922 S.W.2d 5 (1996)], the Board is unable to conclude that the claimant's conduct rises to a level to constitute a willful disregard of the interests of the employer.

Contending that the Board's findings and conclusions were not based on the evidence presented, Terravista states that its rules and consequences for breaking them are clearly explained in the company handbook that Morales acknowledged receiving. Terravista argues that Morales did not meet his obligations as a crew leader or as a trustworthy employee, and that he ignored job responsibilities and direct instruction from his supervisor. It characterizes that as a case of termination after all "chances" had been exhausted: it argues that verbal correction of shortcomings in behavior that continued off and on for several months indicated the company's patience with Morales and its optimism that he would eventually and consistently improve.

The company handbook includes directives that all personal trash must be cleaned out of company trucks at day's end, that associates must be responsible and professional to the clients, and that each associate must exhibit responsibility for tools, equipment, vehicles, and properties. The handbook also states the following:

> To be successful, a business requires associates who use their working hours in the most productive and efficient way. When an associate does not cooperate in this group effort, it may be necessary to apply disciplinary action in the form of a warning, a suspension without pay, or even discharge. For cases of minor misconduct, the associate will first be given an oral warning. *Repeated misconduct will result in a written warning, time off without pay or termination*, depending on the seriousness of the action.

(Emphasis added.)

The company handbook describes a general standard of proficiency expected of employees and sets out specific tasks to be performed by employees. The handbook provides that employees whose performance does not conform to the standard will be subject to disciplinary action, which may be "in the form of a warning, suspension without pay, or even discharge." The hand-

book provides that while "minor misconduct" will result in an oral warning, "repeated misconduct will result in a written warning, time off without pay, or termination." Clearly, the handbook does not mandate that either an oral or written warning be given to employees before their termination, and does not require that a claimant be put on notice that his failures were so great that if such conduct continued, he might be discharged. We hold that substantial evidence does not support the Board's conclusion that Morales was entitled to written notice before discharge for repeated shortcomings on the job.

We now must examine the shortcomings in Morales's job performance to determine whether they constituted misconduct within the meaning of our employment-security law. In *Greenberg, supra,* cited by the Board in its decision, the claimant was a legal secretary discharged for poor job performance. The evidence showed that she had failed to properly spell-check various documents, had repeatedly failed to follow the direct instructions of the supervisor to mark important dates on a calendar, and had failed to include important documents in a letter after having been instructed to do so. We held that this evidence proved that the claimant was an incompetent legal secretary. We reversed the Board's finding of misconduct, however, holding that reasonable minds would not accept this evidence of incompetence as adequate to support a conclusion that the appellant's conduct was of such a degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of her employer's interests or duties and obligations. *Id.* at 298, 922 S.W.2d at 7.

The Board in the present case found that Morales's conduct was not worse than the conduct in *Greenberg, id.*, and thus the Board was unable to conclude that the claimant's conduct rose to a level to constitute a willful disregard of the interests of the employer. The Board has misread *Greenberg*, and its attempted analogy with the present case must fail: the evidence in *Greenberg*, rather than showing a disregard for company rules or policy, merely showed the claimant's incompetence as a legal secretary. The determination of misconduct depends on whether the acts were willful or whether they merely resulted from unsatisfactory conduct or unintentional failure of performance: it is not dependent on how poorly the job was performed. *See id.*; *George's, Inc. v. Director, supra.*

In *Greenberg, supra,* there was not evidence regarding company policy or specifying what tasks the employee was required to perform. Although the Board acknowledged that Morales's job performance was frequently faulty in that he failed to properly clean equipment and put up tools over a period of several months, the Board failed to consider that these were essential tasks outlined in the company rule book. As mentioned previously, substantial evidence does not support the Board's conclusion that Morales was entitled to written notice that the company would not tolerate his repeated shortcomings in performing tasks that he was required to do. We also hold that reasonable minds could not agree with the Board's findings that Morales's conduct did not rise to a level constituting a willful disregard of the interests of the employer, and that he was discharged for reasons that did not constitute misconduct connected with the work. The award of benefits is reversed.

Reversed and remanded for proceedings in keeping with this opinion.

CRABTREE and ROAF, JJ., agree.

Arthur JOHNSON, M.D. *v.*
Renita COTTON-JOHNSON, M.D.

CA 03-1224 194 S.W.3d 806

Court of Appeals of Arkansas
Opinion delivered October 6, 2004

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

Wilson, Engstrom, Corum & Coulter, by: *Stephen Engstrom*, for appellee.

OLLY NEAL, Judge. Arthur Johnson and Renita Cotton-Johnson, both practicing physicians, were divorced by a decree entered on July 9, 2003.[1] The decree, in relevant part, established Arthur's annual income for child-support purposes, divided certain accounts receivable as marital property, awarded alimony to Renita, and ordered Arthur to reimburse Renita for one-half of the money that he spent on gifts to other women during the marriage. Arthur contends that the trial court erred in its resolution of each of the above matters. We affirm but with modifications that we will explain hereafter.

Calculation of Income for Child-Support Purposes

The trial court ordered Arthur to pay $9,413 per month as child support for the couple's two minor sons, of whom Renita had custody. The order was based on a trial exhibit, prepared by Renita's expert, CPA Cheryl Shuffield, that calculated Arthur's annual income as $894,433. Arthur argues that the computation of his income was erroneous. We disagree.

Arthur has been a neurosurgeon with the River Valley Musculoskeletal Center (hereafter "the Clinic") since August 2001. He joined the Clinic after leaving his previous employment at Sparks Regional Medical Center. Clinic administrator Edward Hickman testified that the Clinic pays Arthur monthly in an amount that varies, depending on Arthur's collected billings.[2] To explain the payment system in the simplest manner possible, from the collection of fees attributable to Arthur, amounts are deducted

[1] Because both parties are "Dr. Johnson," we will refer to them as Arthur and Renita for the sake of clarity.

[2] As described by Hickman, Arthur "eats what he kills."

for a percentage of the Clinic's overhead expenses and Arthur's individual expenses. The net result is paid to Arthur as though he were an employee, with federal and state tax, FICA, and Medicare withheld. Arthur receives a W-2 from the Clinic each year reflecting his salary and showing the amount of federal tax, FICA, Medicare, and state tax withheld.

In 2001, Arthur's gross yearly salary was $1,056,906, which included his income from Sparks Regional Medical Center before leaving there; income from the Clinic after having joined the Clinic; and "tail" income that he continued to receive from Sparks Regional Medical Center after leaving his employment there. In 2002, his gross salary, which was totally attributable to the Clinic, was $830,499. His 2003 earnings, which were only a few months old at the time of the May 2003 divorce hearing, were annualized by Cheryl Shuffield to project a 2003 salary of $729,346. Shuffield averaged Arthur's annual earnings for 2001, 2002, and 2003, along with other outside income, to establish Arthur's gross annual income for child-support purposes as $894,433. The trial court adopted the $894,433 figure and ordered Arthur to pay $9,413 per month as child support, based on the family support chart percentage for payors whose income exceeds chart amounts.

Arthur's first argument is that, by averaging his income over a three-year period, the trial court erroneously treated him as a self-employed payor rather than an employee whose income should be calculated based on his current earnings. Child-support cases are reviewed *de novo* on the record. *Delacey v. Delacey*, 85 Ark. App. 419, 155 S.W.3d 701 (2004). As a rule, when the amount of child support is at issue, the appellate court will not reverse the trial judge absent an abuse of discretion. *Id.*

It is the ultimate task of the trial judge to determine the expendable income of a child-support payor. *Cole v. Cole*, 82 Ark. App. 47, 110 S.W.3d 310 (2003). *Administrative Order No. 10: Arkansas Child Support Guidelines*, 347 Ark. Appx. 1064 (2002), provides that all orders granting child support shall contain the court's determination of the payor's income. *See Order No. 10, Section I.* Section II of Order No. 10 defines income as:

> any form of payment, periodic or otherwise, due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers' compensation, disability, payments pursuant to a pension or retirement program, and interest, less proper deductions for:

1. Federal and state income tax;

2. Withholding for Social Security (FICA), Medicare, and railroad retirement;

3. Medical insurance paid for dependent children; and

4. Presently paid support for other dependents by court order.

Section III(c) of the Order contains special provisions for calculating the income of "nonsalaried payors," such as disability and unemployment-compensation recipients, members of the military, commissioned workers, or the self-employed. The provision regarding self-employed workers states in pertinent part: "For self-employed payors, support shall be calculated based on the last two years' federal and state income tax returns and the quarterly estimates for the current year."

In calculating Arthur's income, the trial court determined that Arthur was in essence self-employed. The court cited such indicia of self-employment as the fact that Arthur's paycheck varied from month to month and that, rather than being paid immediately upon starting work at the Clinic, Arthur received no income when he first began working there in order to allow his collections to begin accumulating. The court also observed that Administrative Order No. 10 distinguishes not so much between employees and self-employed payors as between payors whose income is steady and those whose income varies.

We believe that the trial court's reasoning is correct and falls in line with our recent decision in *Delacey v. Delacey, supra*, which involved a physician who was compensated under a formula similar to the one in this case. In *Delacey*, we noted that, although Order No. 10 does not address the situation of a non-self-employed payor whose earnings fluctuate from month to month, in the case of such a payor, his income should be calculated by averaging his earnings over a period of time to give an accurate picture of his income for child-support purposes. Therefore, even if Arthur is considered an employee rather than self-employed, his income should be calculated based on an average over a period of time, given the variable nature of his earnings. Thus, the trial court did not abuse its discretion by employing an averaging method in this case.

Arthur argues further that his 2001 earnings of $1.056 million should not have been considered in calculating his income because, in 2003, he projected earnings of approximately $250,000 less than his 2001 income. He further argues that his income from 2001 was inflated because, for a period of time, he was receiving income from both the Clinic and from Sparks Regional Medical Center.

Even though Arthur's 2001 income was much greater than his projected 2003 income, that disparity is taken into account by the very nature of the averaging method. Arthur's ultimate income of $894,433, as calculated by the court, is an average of the higher-earning years of 2001 and 2002 and the lower-earning year of 2003. As for whether the 2001 income was atypical, the evidence showed that, for a period of time in 2001, Arthur was indeed receiving income from both his old employer, Sparks, and his new employer, the Clinic. However, the evidence also showed that, when Arthur first began working for the Clinic, he did not receive a paycheck for three months. Therefore, the 2001 income figure is not quite so inflated as it would initially appear.

Finally on this point, Arthur appears to argue that the trial court should have reduced the child-support award and given him credit for the fact that he has procured a $1.2 million life insurance policy with his children as beneficiaries and that he contributes $1,833 per month to an educational fund for the two boys. The trial court addressed this argument as follows:

> The court is appreciative of [Arthur] taking seriously his responsibility to his children, and it is certainly aware that he is not legally obligated to pay for the life insurance or to pay for the education fund. However, [Arthur] is a fortunate man in that through his hard work, expertise, and the backing of [Renita] he has become quite wealthy. The court is convinced that [Arthur] is capable financially of doing what the court has ordered him to do while at the same time being able to do additional things of his choosing for the children and still have enough left over for a very comfortable lifestyle for himself.

The court's decision is not a abuse of discretion. There is a rebuttable presumption that the amount contained in the family-support chart is the correct amount to be awarded. *See*

Ark. Code Ann. § 9-12-312(a)(2) (Repl. 2002); *see also Administrative Order No. 10, supra, Section I.* However, a court is not precluded from adjusting the amount of child support if warranted by the facts of a particular case. *See Mearns v. Mearns*, 58 Ark. App. 42, 946 S.W.2d 188 (1997); *McJunkins v. Lemons*, 52 Ark. App. 1, 913 S.W.2d 306 (1996). Section V of Order No. 10 deals with "Deviation Considerations." Among the factors that "*may* warrant adjustment to the child support obligation" are the procurement or maintenance of life insurance and the creation or maintenance of a trust fund for the children. The use of the word "may" indicates that such an adjustment is discretionary. The trial court in this case thoughtfully considered Arthur's request for a deviation and correctly pointed out that Arthur could easily afford to make provisions for his children above and beyond the chart amount, if he chose to do so. *See generally Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003).

In light of the foregoing, we affirm the trial court's calculation of Arthur's income for child-support purposes.

Accounts Receivable as Marital Property

This issue concerns Renita's entitlement to a portion of the accounts receivable attributable to Arthur's production at the Clinic. The record shows that, as of March 31, 2003, Arthur had work in progress of $58,800 and had billed $527,136 that was not yet collected, for total accounts receivable of $585,936. There was historically a forty-percent collection rate on Arthur's accounts, so when $585,936 was reduced accordingly and Arthur's income taxes were deducted, $128,906 remained. After assessment of a fifteen-percent collection fee, the value of the accounts was $109,570. Based on the above calculations, CPA Cheryl Shuffield valued the accounts receivable at $109,570, and Renita was awarded one-half that amount, or $54,785, as a division of marital property. Arthur argues that the accounts were not marital property because the accounts did not belong to him but to the Clinic. We disagree, but we modify the value placed on the accounts.

We review a trial judge's division of property in a divorce case under the clearly erroneous standard. *Cole v. Cole, supra.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake

has been committed. *See id.* When the evidence in a case is conflicting or evenly poised or nearly so, the judgment of the trial court is persuasive. *Henslee v. Ratliff*, 66 Ark. App. 109, 989 S.W.2d 161 (1999). Accounts receivable are an asset subject to division upon divorce, with their net present value to be divided between the spouses. *See Meeks v. Meeks*, 290 Ark. 563, 721 S.W.2d 653 (1986).

The question on appeal is whether the accounts were owned by Arthur or by the Clinic. There was no written employment contract or other agreement between Arthur and the Clinic that fixed the ownership of accounts receivable. Further, there was no provision in the Clinic's bylaws that addressed ownership of accounts receivable. So, this dispute must be resolved by the oral testimony adduced at trial. There was evidence on both sides of the question. Arthur testified that he was not a shareholder in the Clinic and did not own an interest in the accounts receivable. Edward Hickman, the Clinic's administrator, testified that, in his opinion, Arthur had no ownership interest in the receivables, either as an individual or as a shareholder of the Clinic. Hickman stated that the Clinic owned the accounts receivable and offered as proof the fact that the Clinic had pledged the accounts as security on a note. He further stated that the Clinic's bylaws required a physician to be with the Clinic for two years before becoming a shareholder and that, at the time of the May 2003 hearing, Arthur had been with the Clinic for only one year and ten months.

On the other side of the issue, Hickman testified that the Clinic hoped that Arthur would continue his association with it. He further confirmed that Arthur had signed as a guarantor on the Clinic's $2.7 million loan to purchase a new facility and that Arthur had invested over $100,000 of his own money in the new facility. Hickman also acknowledged that there were no rules as to whether or not Arthur would be entitled to his accounts receivable. Finally, he acknowledged that he had once described the Clinic as owning no assets and as a "pass-through" entity. Arthur admitted that he had submitted financial statements to banks in which he listed the accounts receivable as his own assets. Further, there was testimony by both Hickman and Arthur that another clinic physician, who had not yet attained shareholder status, had left the Clinic and was allowed to keep his accounts receivable, less a fifteen-percent collection fee and conditioned upon payment of his share of the Clinic's business loan.

The trial court ruled that it was "convinced [that Arthur's] accounts receivable belonged to him rather than the clinic, and, as such, are marital property." The court relied on the fact that Arthur represented the accounts as his own in the financial statements and that the Clinic allowed another physician to retain his accounts upon leaving the Clinic even though he had not been with the clinic for two years. The court also relied on the fact that Arthur would become a member of the clinic within two months of trial and that Arthur was already obligated to pay a share of the construction costs of a new clinic facility.

We cannot say that the trial court's decision that the accounts were marital property was clearly erroneous in this case. Arthur apparently considered the accounts to be his own property because he made representations on financial statements that he owned the accounts. Further, another physician who had not been with the Clinic for two years was allowed to keep his accounts receivable upon leaving, which is some evidence that the Clinic considered its physicians as having an ownership interest in the accounts, even if they had not been with the Clinic long enough to become a shareholder. Additionally, Arthur acted and was being treated as though he were a shareholder because he was an obligor on a note to construct a new clinic facility. Moreover, Hickman described the Clinic as a pass-through entity with no assets, which is further indication that Arthur, rather than the Clinic, owned the accounts. In light of these considerations, the trial court did not clearly err in awarding Renita a share of the accounts receivable.

However, despite our agreement that the accounts were marital assets, we must modify the calculation of their value. Arthur points out that, when the departing physician left the Clinic and received a portion of his accounts receivable, he was required to pay his share of the Clinic's business loan. Arthur argues that, because the other doctor was required to pay his share of the loan as a condition of acquiring the receivables, Arthur's share of the loan should also be deducted to arrive at the accounts' value. We agree that consistency would require this, and we consequently reduce the value of the accounts receivable by Arthur's share of the loan — $32,900 — for a final value of $76,670. The award of accounts receivable to Renita is therefore modified to one-half of $76,670, or $38,335.

Alimony

The trial court awarded Renita alimony of $3,500 per month for seven years and $2,000 per month thereafter until she dies, remarries, or cohabits. Arthur argues that the award was in error.

The decision whether to award alimony lies within the trial judge's sound discretion, and we will not reverse a trial judge's decision to award alimony absent an abuse of that discretion. *Cole v. Cole, supra.* 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. *Id.* The primary factors that a court should consider in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. *Id.* In fixing the amount of alimony, the courts consider many factors, including: (1) the financial circumstances of both parties; (2) the couple's past standard of living; (3) the value of jointly owned property; (4) the amount and nature of the parties' income, both current and anticipated; (5) the extent and nature of the resources and assets of each of the parties; (6) the amount of income of each that is spendable; (7) the earning ability and capacity of each party; (8) the property awarded or given to one of the parties, either by the court or the other party; (9) the disposition made of the homestead or jointly owned property; (10) the condition of health and medical needs of both husband and wife; (11) the duration of the marriage; (12) the amount of child support. *Id.*

In the case at bar, the trial court ruled that the alimony award would allow Renita to maintain a lifestyle fairly close to the one to which she had become accustomed and helped create; that it would be inequitable for Arthur to continue living his lifestyle but for Renita to be forced to accept a diminished lifestyle; that the parties were married for twenty-two years and started out with almost nothing; that Renita worked as hard in medical school as Arthur did but that they both made a decision for her career to be subordinated; that, when Arthur became associated with the Clinic, he began making almost a million dollars a year; that Renita played a vital part in Arthur achieving the means to afford the family's present lifestyle; and that the amount of support would not unreasonably burden Arthur because he would still have $31,910 per month on which to live after alimony, taxes, and child support were paid.

Arthur argues first that Renita should not have been awarded alimony because she has the potential to earn $157,000 per year. He is referring to the fact that Renita has been working two days per week as a family-practice physician at the rate of $75 per hour and has been offered full-time employment. Renita testified that she would not accept full-time employment because it was important to her to stay home with her children.

In *Delacey v. Delacey, supra,* we considered a similar argument and held that no error occurred in awarding alimony because the wife "testified that she preferred to work part-time so that she could raise her children." We also noted in that case that, even if the wife had been capable of earning the amount that the husband suggested, the husband's earning potential would far exceed hers. Likewise, here, even if Renita were to earn gross wages of $157,000 per year, Arthur's gross income would far exceed hers.

Arthur also argues that Renita's monthly budget, which shows monthly expenses of $17,939, contains frivolous and excessive items. He complains that two of the largest expenses on her list — the $6,000-per-month mortgage payment and $1,400-per-month utility payments — have been paid by him during the separation. While that may be true, the divorce decree placed responsibility for those expenses on Renita. Arthur also complains about Renita's charitable gifts of $1,400 per month; however, his own expense sheet lists tithes of $3,000 per month. Further, Renita testified that tithing and charitable giving were things that the couple traditionally did. As for the other items on Renita's list, it appears that some of them may be overstated but not to the extent that it would call the entire $3,500 alimony award into question, given the totality of the circumstances in this case.

Finally, Arthur asserts that the trial court's finding that he is going to have $31,910 per month on which to live does not account for the fact that he will owe "$25,000 per month on marital debts." However, Arthur mischaracterizes his situation. The trial exhibit to which he refers in his argument reflects Arthur as having $25,000 in monthly living expenses, only some of which includes debt payments. Further, the expense list includes the $6,000 mortgage payment on the marital home, for which Arthur is no longer responsible. We find no error on this point.

Given the overall circumstances in this case, and considering that our ruling on the accounts-receivable issue means that Renita will lose $16,450 in assets, we find no abuse of discretion in the alimony award.

Repayment of One-Half of Value of Gifts to Other Women

Prior to trial, the parties stipulated that, during the marriage, Arthur had spent $13,400 buying gifts for two women, Verna Bell and Angela Ward. The trial court found that Arthur gave a total of $14,020 in gifts[3] and ordered him to reimburse Renita for one-half that amount. Arthur argues that this award was in error. We agree in part and modify the award accordingly.

The trial judge's findings as to the circumstances warranting a property division will not be reversed unless they are clearly erroneous. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003). We have upheld an unequal division of property when a spouse diverts marital assets to a paramour. In *Williams v. Williams, supra*, where the husband spent marital funds on other women after the parties separated, we upheld the trial court's unequal division of the couple's property and debts that took the husband's gifts into account.

Here, we are asked not to uphold an unequal division of property but to uphold a direct reimbursement to the marital estate of funds that were spent for improper purposes. In the case of the gifts to one of the women, this distinction is meaningful. Arthur testified that his gifts to Verna, which totaled about $3,200, were given between October or November 1998 and May 1999 when he and Renita were separated. He said that he and Renita reconciled thereafter and that he discussed the gifts with her. There was no testimony by Renita to the contrary.

We hold that the reimbursement to Renita for one-half the value of these gifts was in error. At the time the complaint for divorce was filed in 2002, a significant period of time had passed since the 1998-99 gifts were made. Further, the parties reconciled after the gifts were made and, according to Arthur, he and Renita discussed the gifts at the time of reconciliation. While

[3] The discrepancy in amount is not explained, but Arthur does not object to the $14,020 figure.

we certainly would not go so far as to say that Renita sanctioned the gifts or approved of Arthur's behavior by reconciling with him, a reconciliation under these circumstances is tantamount to a forgiveness of the manner in which marital funds were spent during the separation, such that Renita should be precluded at a later time from seeking reimbursement of those funds to the marital estate. We therefore reduce the trial court's award to Renita by $1,600, which is one-half of the $3,200 in gifts to Verna.

The same reasoning does not apply, however, to Arthur's gifts to Angela. Those gifts were made in January 2002, just a few months before the divorce complaint was filed, and there was no evidence that Renita reconciled with Arthur while knowing of those gifts. We therefore conclude that the trial court's award to Renita of one-half the value of the gifts to Angela was not clearly erroneous. *See Williams v. Williams, supra.* Arthur argues that one of his gifts to Angela resulted in a $3,300 charge on a Visa card and, because the divorce decree orders him to pay the Visa balance, he is paying twice for the gift. However, because the gift was made in April 2002, we have no way of knowing whether the card's $14,199 balance as of the May 2003 trial still contained the gift amount or whether Arthur had reduced the balance or paid the gift off entirely. Therefore, we cannot say that the trial court clearly erred on this particular point.

Conclusion

Based on the foregoing, we affirm the trial court's calculation of Arthur's income for child-support purposes; affirm as modified the trial court's finding that the accounts receivable were marital assets; affirm the alimony award; and affirm as modified the reimbursement to Renita of one-half of the value of gifts that Arthur made to other women.

Affirmed as modified.

STROUD, C.J., and HART, ROBBINS, and VAUGHT, JJ., agree.

BAKER, J., dissents in part.

KAREN R. BAKER, Judge, dissenting. I agree with all parts of the majority's decision except the $1,600 reduction in the trial court's award to Renita that resulted from Arthur's gifts to Verna Bell during the marriage. As the majority acknowledges, we have

found the unequal division of property justified by a spouse's diversion of marital assets to a paramour. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003). However, the majority distinguishes that case by stating that "we are asked not to uphold an unequal division of property but to uphold a direct reimbursement to the marital estate of funds that were spent for improper purposes." The fact that the trial judge in this case refers to the unequal distribution as a reimbursement to the marital estate, rather than awarding an unequal distribution of marital property pursuant to Ark. Code Ann. § 9-12-315 (Repl. 2002), should make no difference in our analysis.

The majority first determines that the reduction was warranted because the gifts were made to Miss Bell before the parties reconciled. However, the majority's decision on that point invades the province of the trial court. On appeal, we do not reverse a trial court's determination as to the division of marital property unless that decision is clearly erroneous. *Williams v. Williams, supra.* That standard dictates that it is the trial court's place to determine whether improper gifts are so remote in time that they should not be considered in the division of marital property. The trial court in this case obviously concluded that these gifts, made less than four years before the divorce complaint was filed, should be reimbursed to the marital estate. The majority fails to give the trial court the deference to which it is entitled on this point.

The other basis for the majority's reduction of the trial court's award is the fact that when Renita reconciled with Arthur she was aware of his nefarious expenditures. A marital reconciliation, which may occur for any number of reasons, does not equate with a ratification of the financial expenditures made by a spouse to purchase gifts for a paramour. A reconciliation does not change the fact that marital funds were misused in a manner that did not benefit the marriage. Thus, the trial court was correct in finding that the funds should be returned to the marital estate for division.

Additionally, there is nothing in the record to indicate that Renita expressly approved, sanctioned, or consented to the gifts Arthur made to his paramour. The majority appears to liken the reconciliation to condonation as a defense in a divorce action. While the doctrine of condonation is not applicable to the division of marital property, even applying the doctrine by analogy would require this court to affirm the trial court. Condonation is a conditional, rather than an absolute remission of the offense, the implied condition being that the offense will not be repeated and

that the guilty party shall not in the future commit any marital offense but will treat the injured party with kindness. If the forgiven party resumes the prior conduct, the doctrine does not apply. *Bell v. Bell*, 15 Ark. App. 196, 691 S.W.2d 184 (1985). *See also Coffey v. Coffey*, 223 Ark. 607, 267 S.W.2d 499 (1954). To constitute a revival of the condoned offense, the offending spouse need not be guilty of the same character of offense as that condoned; any misconduct is sufficient which indicates that the condonation was not accepted in good faith and upon the reasonable conditions implied. *Longinotti v. Longinotti*, 169 Ark. 1001, 277 S.W. 41 (1925).

Therefore, applying the analogy in this case, Arthur repeated the offense of gifting to other women. But even cohabitation after marital misconduct, while evidence of condonation, is not conclusive evidence of condonation, standing alone. *See Hodges v. Hodges*, 27 Ark. App. 250, 770 S.W.2d 164 (1989). Likewise, the reconciliation alone in this case should not be conclusive evidence of Renita's approval of Arthur's gifting marital property to other women.

Under the facts of this case, had the trial court determined that an equal distribution of marital assets was equitable, I would have voted to affirm the court's ruling out of deference to the clearly erroneous standard. However, the court did not so find, and therefore, I would apply the clearly erroneous standard with equal effect to affirm the trial court's order that Arthur reimburse the marital estate for the amounts he spent on gifts to his girlfriends during the marriage

I respectfully dissent.

Robert COOK *v.*
ABF FREIGHT SYSTEMS, INC., Self-insured Employer

CA 04-266 194 S.W.3d 794

Court of Appeals of Arkansas
Opinion delivered October 6, 2004

[Rehearing denied November 10, 2004.]

Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd., by: *David M. Fuqua* and *Patrick L. Spivey*, for appellant.

Wright, Lindsey & Jennings, LLP, by: *John D. Davis*, for appellee.

ANDREE LAYTON ROAF, Judge. Appellant, Robert Cook, appeals from the Workers' Compensation Commission's

order denying his claim for benefits based on a finding that he was not injured while performing employment services. We affirm.

Cook suffered an electrical shock as he entered a Dallas, Texas, motel bathroom. The bathroom had a leaking light fixture, and Cook stepped in a puddle of water while turning on the light. Cook, an overnight bid driver, drove a fixed route for ABF from Little Rock, Arkansas to Dallas, Texas, dropping off and picking up freight at various VIA points. Cook would leave Little Rock at 6:00 p.m. and arrive in Dallas at approximately 1:00 or 1:30 a.m. After arriving in Dallas, he would continue to the dispatch office where he would gather his personal belongings, record the time in his logbook, and sign in. Because the Department of Transportation mandates that drivers take an eight-hour rest break, Cook was not permitted to return to Little Rock until the next day. Pursuant to DOT regulations, ABF required its drivers to take an eight-hour rest break and provided them with hotel rooms at the Days Inn Motel in Irving, Texas. Drivers were not on the clock during their rest breaks and were not being paid. However, they were expected to be "on call" at the motel. ABF made all of the arrangements and paid for the rooms. ABF also arranged transportation from the dispatch office to the hotel. If the hotel shuttle had not arrived in thirty minutes to pick up a driver, the driver punched back in.

Upon arriving at the hotel, the drivers would sign in, indicating their name and their company. ABF drivers would then wait to be called back to work. Because of his seniority, Cook had a regular route and generally did not have to wait to be called back to work. Occasionally, ABF would call him in thirty minutes before the end of his rest period. When this happened, Cook would be transported back to the dispatch office, prepare his truck for the drive back to Little Rock, and when his eight-hour rest period ended, he would clock in and begin his trip. ABF did not prohibit the drivers from leaving the hotel during their eight-hour rest period nor were they required to stay there. They were free to do as they pleased. ABF would contact the hotel and arrange for the hotel van to transport drivers back to the dispatch office. If ABF had not contacted a driver after twelve hours, then the driver would automatically go back on the clock.

On June 28, 2002, at 7:30 a.m., Cook received his scheduled wake-up call from the hotel front desk. He got up and went to the bathroom. His injury occurred as he stepped into the bathroom and reached for the light switch. Cook stepped in a puddle of water

as he reached for the light switch and suffered an electric shock. He was transported to the emergency room.

The ALJ found that Cook's injury was compensable, but the Commission reversed, finding that Cook was not performing employment services at the time of his injury. Cook brings this appeal.

When reviewing a decision of the Workers' Compensation Commission, the Court of Appeals views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission. *Sapp v. Phelps Trucking, Inc.*, 64 Ark. App. 221, 984 S.W.2d 817 (1998). 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. *General Electric Railcar Repair Servs. v. Hardin*, 62 Ark. App. 120, 969 S.W.2d 667 (1998). 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 & Manuf. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

Act 796 of 1993 defines a compensable injury as "[a]n accidental injury . . . arising out of and in the course of employment. . . ." Ark. Code Ann. § 11-9-102(4)(A)(i) (Repl. 2002). A compensable injury does not include an "[i]njury which was inflicted upon the employee at a time when *employment services* were not being performed. . . ." Ark. Code Ann. § 11-9-102(4)(B)(iii) (Repl. 2002) (emphasis added). Act 796 does not define the phrase "in the course of employment" or the term "employment services." *Pifer v. Single Source Transp.*, 347 Ark. 851, 856, 69 S.W.3d 1, 3 (2002) (citing *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997)). Therefore, the supreme court has interpreted the term "employment services" as performance of something that is generally required by an employer. *Pifer, supra.* Our courts use the same test to determine whether an employee is performing "employment services" as they do when determining whether an employee is acting within "the course of employment." *Pifer*, 347 Ark. at 857, 69 S.W.3d at 4. "The test is whether the injury occurred 'within the time and

space boundaries of the employment, when the employee [was] carrying out the employer's interest directly or indirectly.' " *Id.*

In *Pifer, supra,* the supreme court noted that the activity of seeking toilet facilities, although personal in nature, has been generally recognized as a necessity such that accidents occurring while the employee is on the way to or from toilet facilities or engaged in relieving herself arise within the course of employment. Employers provide bathrooms because work interruptions would occur if the employees were forced to leave the premises to find a public restroom. The employee in *Pifer, supra,* was injured while returning to work from an employer-provided restroom. The court held that Pifer's restroom break was a necessary function and directly or indirectly advanced his employer's interest. The record showed that Pifer's conduct was permitted, if not authorized, and that the employer provided the restroom. The court concluded that Pifer's injury was compensable because it occurred while he was performing employment services. *See also Collins v. Excel Specialty Prods,* 347 Ark. 811, 69 S.W.3d 14 (2000) (holding that the employee was performing employment services when she was injured after returning from a restroom break in the employer-provided restroom).

However, in *Kinnebrew v. Little John's Truck, Inc.,* 66 Ark. App. 90, 989 S.W.2d 541 (1999), this court affirmed the Commission's decision that a shower is not inherently necessary for the performance of the job a trucker was hired to do. In *Kinnebrew, supra,* the appellant, a truck driver, had stopped over at a rest stop for his eight-hour rest. While at the truck stop, the appellant cleaned his truck, washed laundry, and took a number for the shower facility. When a shower became available, he entered the stall, slipped and fell onto a slippery substance. The court held that the appellant was not performing employment services when he was injured while taking a shower while off duty. The court stated that showering is not inherently necessary for the job he was hired to do, and that the performance of such personal tasks, even while on the employer's premises, was not performing employment services under Act 796 of 1993.

■■ In this instance, there was no evidence that Cook's entry into the bathroom was for any reason other than to attend to his own personal needs. While the supreme court held in *Pifer* that the use of "toilet" facilities while at work is a necessity and that an employee who is injured while using the toilet during working hours is performing employment services, the case before us is

readily distinguishable from *Pifer, supra.* Here, Cook was "off the clock" and taking a mandated eight-hour overnight rest break when the accident occurred. There is no suggestion in the record that his planned use of the bathroom upon arising at 7:30 a.m. in the morning in question was in any respect different from his routine morning preparations, whether he was on the road or at home. We thus conclude that the facts of this case are most analogous to *Kinnnebrew, supra,* and that the performance of routine personal grooming and related tasks upon arising in the morning, even under the circumstances present in this case, is not the performance of employment services for the purposes of compensability.

Affirmed.

BIRD and CRABTREE, JJ., agree.

Earl W. LOY *v.* STATE of Arkansas

CA CR 03-205 195 S.W.3d 370

Court of Appeals of Arkansas
Opinion delivered October 13, 2004

[Rehearing denied November 17, 2004.[1]]

[1] GRIFFEN and NEAL, JJ., would grant rehearing.

Kathy L. Hall, for appellant.

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

JOHN F. STROUD, Chief Judge. Appellant, Earl Loy, was convicted in a bench trial of possession of drug paraphernalia with intent to manufacture methamphetamine. He was sentenced to ninety months in the Arkansas Department of Correction, with sixty months suspended, and he was assessed $160 for court costs. On appeal, he argues that the trial court erred (1) when it denied his motion to suppress evidence in what he characterized as an illegal search and (2) in finding that there was sufficient evidence to support his conviction. We affirm appellant's conviction.

On the evening of October 29, 2001, Officers Samuel Spenser and Mark Willis of the Hot Springs Police Department went to 109 Boaz in Hot Springs to attempt to serve two misdemeanor arrest warrants on appellant. A U.S. Park Ranger had advised the officers that he had followed appellant to that address. Officer Spenser testified that he approached the residence, a mobile home, and knocked on the door inside the carport area. When he knocked on the door, a male voice just inside the door asked, "Who is it?" When Spenser identified himself as the police,

the voice inside told him "just a minute," and Spenser heard footsteps inside running toward the back of the trailer. Spenser advised Willis that he thought appellant was going to abscond, and Willis went to the back of the trailer.

Spenser knocked again, and when he was told "just a minute" a second time, he told the person inside that if he did not come out, he would bring the police dog out. At that time, appellant, whom Spenser recognized from a photo, opened the door, looked around, told the officer "just a minute" again, and closed the door. Spenser heard more footsteps inside, knocked again, and appellant answered the door again.

Spenser said that when appellant opened the door, a smell hit him immediately, his eyes and nose began to burn, and his lips and tongue began to go numb. He saw a large trash bag on the floor right inside the door with a lot of matches pouring out of it and some gloves lying on the floor, and he said that the air-conditioner was blowing full blast even though it was cold outside and the windows were open. Spenser testified that he turned to Willis and said, "meth," to which appellant replied, "You got a search warrant? You need a search warrant for that."

Spenser asked appellant who he was, and appellant told them that his name was Steve; however, both officers recognized appellant as the person for whom they had the arrest warrants, and they took him into custody. Spenser said that when they removed appellant, he also saw a syringe lying on the coffee table. The officers saw a female sitting at a table by the door who was identified as Nancy Lyon, and she told them that there was a female in the back. Willis did a sweep of the residence at that time.

On cross-examination, Spenser said that there was a door frame to the carport, but that he went inside that area and knocked on the trailer door. He said that the door on the outside of the carport was not a secure door.

Officer Willis's testimony corroborated that of Officer Spenser regarding how the officers approached the door and what appellant did as they were attempting to get him to open the door. After taking appellant into custody, Willis said that he noticed the female sitting at the kitchen table to the right of the door, and he saw the large bag of matches with the striker plates missing, a syringe on the coffee table, a large bag, and gloves in front of the bag. Due to the female's response that she thought someone else was in the residence, Willis walked through the trailer and found a man, Dana Ecker, in the bathroom, and another man, Michael

Howell, asleep in the bedroom, and he took those individuals outside, along with Nancy Lyon. Willis denied that he opened any cabinets or drawers.

Richard Norris, an investigator on the drug task force, testified that he arrived at the residence after Spenser and Willis had taken several people out of the residence. He noticed strong odors when he arrived that were a culmination of the odors he associated with meth labs. He also saw sitting on the front porch a large glass jar containing a red liquid and a dark sediment and a bucket that had a cloth filter on top containing gray crystals that appeared to him to be iodine crystals. He also saw the books of matches inside the front door.

Norris entered the residence to make sure that there were no items that could cause an explosion and to ventilate the residence by opening more windows. Norris also turned off the air conditioning; made sure that there were no open chemicals; and made sure that there were no open flames, open fires, or open heaters burning. When he walked to the back bedroom, he saw what appeared to be a hydrogen gas generator protruding from under the bed that was still putting off an acid vapor. He also found a female hiding under the bed, later identified as Paula George. After removing George, the residence was secured, and Norris applied for a nighttime search warrant, which was granted. The basis for it being a nighttime search warrant was, "The Affiant [Norris] states that the residence cannot be properly secured so as to not pose a danger to the community or anyone who might enter. The Affiant believes that exigent circumstances exist to warrant conducting the search during nighttime hours." The warrant was executed, and numerous items related to the manufacture of methamphetamine were found inside and outside the residence, as well as in the garbage of the residence.

Dana Ecker, the man found in the bathroom of the residence, testified that he knew appellant lived at the residence, but he did not know if appellant's landlord, Terry Floyd, was still living there at the time of appellant's arrest. He said that when he went to the residence that night, he did not knock on the carport door, but instead knocked on the trailer door. He said that he was there when Michael and Paula came in, but that he did not notice anything in their hands. He said that he was drinking that night, but that he did not smell anything unusual in the trailer, and he did not see anyone doing anything that he thought was illegal.

Jacqueline Reynolds testified that the residence had been her mother's, but that after she died, her brother, Terry Floyd, lived there. However, she said that Floyd had moved out in the summer of 2001, and that appellant was allowed to live there because he was working on some cars. She described the carport as a breezeway and said that it had not been screened in for over a year. She said that when she approached the trailer, she would go to the metal door on the trailer, not the one outside, because you could not knock on that one.

Carla Veazey testified that appellant lived at her deceased grandmother's house and that she had been there several days prior to appellant's arrest and found him cooking meth. She said that appellant promised to quit if she did not call the police, and she agreed.

The State rested, and appellant rested without calling any witnesses. Appellant made his arguments for his motion to suppress and his motion for directed verdict. The trial court took the issues under advisement and later issued a letter ruling denying appellant's motion to suppress and finding him guilty. Appellant now brings this appeal.

Appellant contends that the trial judge erred in denying his motion for directed verdict. A directed-verdict motion is a challenge to the sufficiency of the evidence. *Fields v. State*, 349 Ark. 122, 76 S.W.3d 868 (2002). Although appellant's argument regarding the sufficiency of the evidence to support his conviction is his second point of appeal, preservation of his right against double jeopardy requires that the appellate court consider the challenge to the sufficiency of the evidence before alleged trial error is considered, even though the issue was not presented as the first issue on appeal. *Davis v. State*, 350 Ark. 22, 86 S.W.3d 872 (2002). When the sufficiency of the evidence is challenged, we consider only the evidence that supports the verdict, viewing the evidence in the light most favorable to the State. *Harris v. State*, 72 Ark. App. 227, 35 S.W.3d 819 (2000). The test is whether there is substantial evidence to support the verdict, which is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Id.* Resolution of conflicts in testimony and assessment of witness credibility is for the fact-finder. *Id.*

Appellant contends that there was no evidence presented at trial that connected him with the drug paraphernalia found in the

residence, and therefore the State failed to prove that he exercised care, control, and management over the contraband or that he knew that it was in fact contraband. He argues that there was no testimony that he purchased any of the items seized, that he was seen holding or using any of the items seized, that his hands were stained, or that he appeared to be under the influence of methamphetamine. He further points to the fact that Investigator Norris, when asked what evidence connected appellant to the items in the home other than the fact that he lived there, replied that there was nothing.

In order to prove possession, it is not necessary to prove literal physical possession of contraband. *See Dodson v. State*, 341 Ark. 41, 14 S.W.3d 489 (2000). Contraband is deemed to be constructively possessed if the location of the contraband was under the dominion and control of the accused. *See Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998). Although constructive possession may be implied when contraband is in the joint control of the accused and another person, joint occupancy, standing alone, is not sufficient to establish possession or joint possession. *Abshure v. State*, 79 Ark. App. 317, 87 S.W.3d 822 (2002). The State is also required to establish that (1) the accused exercised care, control, and management over the contraband, and (2) the accused knew the matter possessed was contraband. *Id.*

In the present case, appellant was unquestionably living in the residence at 109 Boaz. Although the landlord, Terry Floyd, had also lived in the trailer with appellant, the evidence indicated that Floyd had not been living at the residence for several weeks before appellant was arrested. When the officers arrived at the residence on the night of October 29, appellant was the person who repeatedly answered the door. When appellant finally opened the door, Officer Spenser smelled a strong chemical odor, his eyes and nose began to burn, and his lips and tongue started to go numb. Items associated with the manufacture of methamphetamine were found throughout the residence, outside the residence, and in the garbage outside the residence, and there were various stages of manufacturing occurring in different rooms of the residence. Furthermore, appellant acted in a suspicious manner when answering the officer's knock, opening and closing the door several times and looking around furtively. We hold that all of this evidence supports the finding by the trial court that appellant

possessed drug paraphernalia with the intent to manufacture methamphetamine, and we affirm on this point.

Appellant also contends that the trial court erred in denying his motion to suppress the evidence found in the house where he was residing. In his brief, appellant first argues that he had standing to contest the search. We hold that this is a moot point because the trial court determined that appellant had standing to contest the search. Additionally, appellant also argues (1) that Officers Spenser and Willis did not have probable cause to enter his home absent a valid search warrant; (2) that no exigent circumstances existed that would permit Officers Spenser or Willis or Investigator Norris to enter the house without a warrant; and (3) that the nighttime search did not comply with Rule 13.2 of the Arkansas Rules of Criminal Procedure.

In reviewing the denial of a motion to suppress, the appellate court conducts 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).

Appellant first argues that Officers Spenser and Willis improperly crossed the threshold of what the officers described as a carport to serve the valid arrest warrants because that was part of his residence and he had an expectation of privacy in that area. Appellant attempts to make much of the facts that there was an outside door, that there were posts at the corners, and that there was plywood on one end of that area. However, the testimony at trial was that the door could not be locked, that there was no longer screening around the area, and that you could walk between the wooden posts. Furthermore, both Dana Ecker and Jacqueline Reynolds testified that the trailer door, not the door on the outside of what the officers described as the carport, was the door that was approached and knocked upon when desiring entry into the trailer.

However, as the State points out, our supreme court, in *Benevidez v. State,* 352 Ark. 374, 379, 101 S.W.3d 242, 246 (2003) (*citing Payton v. New York*, 445 U.S. 573, 603 (1980)), held, "For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited

authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." Although our supreme court has not explicitly held that a misdemeanor arrest warrant is sufficient for an officer's entrance into a home, the Eighth Circuit Court of Appeals, in *United States v. Clayton*, 210 F.3d 841, 843 (8th Cir. 2000), has held that this principle is applicable to both felony and misdemeanor arrest warrants. Furthermore, *Benevidez* explicitly allows officers to enter a dwelling if they have a valid arrest warrant and reason to believe that the suspect lives in the dwelling and is within it. Appellant makes no argument that the arrest warrants were not valid, and the officers testified that they had received information that appellant was inside the residence from a U.S. Park Ranger who had followed appellant to the residence. We hold that the officers' approach to the front door of the trailer was proper.

Appellant also contends that Officers Spenser and Willis, and later Investigator Norris, had no probable cause to enter the residence without a search warrant, and that no exigent circumstances existed that would have allowed them to enter the residence without a warrant. Rule 14.3 of the Arkansas Rules of Criminal Procedure provides:

> An officer who has reasonable cause to believe that premises or a vehicle contain:
>
> (a) individuals in imminent danger of death or serious bodily harm; or
>
> (b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or
>
> (c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed;
>
> may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.

Under this emergency exception, a warrantless entry into a residence may be upheld if the State proves that the officer had reasonable cause to believe that someone inside was in imminent danger of death or serious bodily harm. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997).

We hold that the initial entry of Officers Spenser and Willis was justified under subsection (a) of Rule 14.3 of the Arkansas Rules of Criminal Procedure. Based upon what the officers saw and smelled when appellant opened the door, they believed that methamphetamine was being manufactured, which, based upon their knowledge of meth labs, would pose a threat of immediate serious bodily harm to anyone in the residence. The officers also had reason to believe that there were other persons in the residence based upon the footsteps that they heard when they first arrived and the fact that there was a female sitting at the table who said that she thought there was a female in the back of the house. We hold that this was proper in light of the circumstances.

With regard to Investigator Norris, under subsection (b) of Arkansas Rule of Criminal Procedure 14.3, entry into a residence is allowed where there is reasonable cause to believe that there are things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property. As the State points out, Norris was a member of the drug task force and was an expert in the field of clandestine meth labs, and he entered the residence to further secure the scene and ensure that there was no flame burning that could cause an explosion. In *United States v. Walsh*, 299 F.3d 729 (8th Cir. 2002), a second search by someone who had special training in meth labs was upheld when that search was for heat sources that could ignite. The Eighth Circuit held, "The potential hazards of methamphetamine manufacture are well documented, and numerous cases have upheld limited warrantless searches by police officers who had probable cause to believe they had uncovered an on-going methamphetamine manufacturing operation." *Id.* at 734. We hold that *Walsh* is instructive in the present case. Here, there was not only an odor, but the officers had seen evidence of meth production, and Investigator Norris was better-equipped as a member of the drug task force to insure that all possible sources of danger associated with the meth lab were contained. We find no error on this point.

Appellant's last point is that the nighttime search warrant did not comply with Rule 13.2 of the Arkansas Rules of Criminal Procedure. We must first note that based upon the trial judge's ruling contained in the abstract, which is the record on appeal, it did not appear that the trial judge ruled on the specific issue of the nighttime search. In *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750

(2004), the supreme court held that when multiple issues were raised in a motion to suppress, the appellate court would not reach the merits of any argument not ruled upon by the trial court. However, upon reviewing the record, which this court can do to affirm, *see Turner v. State*, 59 Ark. App. 249, 956 S.W.2d 870 (1997), we discovered that after the trial judge issued his initial letter ruling, the public defender wrote back inquiring specifically about the nighttime search, and the trial judge then ruled upon that issue in an additional letter ruling denying appellant's motion to suppress on that basis as well.

A factual basis for a nighttime search is required. *Stivers v. State*, 76 Ark. App. 117, 61 S.W.3d 204 (2001). A nighttime search warrant may only be granted under specific circumstances: the place to be searched is difficult of speedy access; the objects to be seized are in imminent danger of removal; the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy. Ark. R. Crim. P. 13.2(c). We hold that none of these exceptions are present here. The trailer was not difficult to access; with appellant arrested and the house secured, there was no imminent danger of removal; and there were no circumstances requiring the warrant to be executed at night.

However, in *Crain v. State*, 78 Ark. App. 153, 79 S.W.3d 406 (2002), this court held that although there was no justification for a nighttime search, the search was permissible under the good-faith exception to the exclusionary rule. *See United States v. Leon*, 468 U.S. 897 (1984). Although this exception is not absolute, in that case it was applied because there was no evidence that the sheriff made material false statements or misrepresentations in his affidavit; there was no evidence that the judge issuing the warrant abandoned his neutral role; and the affidavit contained more than conclusory and boilerplate language. In determining whether the good-faith exception is applicable, this court must decide whether it "was objectively reasonable for a 'well-trained police officer' to conclude that the nighttime search was supported by probable cause." *Crain*, 78 Ark. App. at 157, 79 S.W.3d at 410. In *Crain*, this court, quoting *United States v. Martin*, 833 F.2d 752 (8th Cir. 1987), held:

> Although a police officer may not rely entirely on the magistrate's finding of probable cause, in cases where, as here, the courts cannot

> agree on whether the affidavit is sufficient, it would be unfair to characterize the conduct of the executing officers as bad faith, particularly where there has been no material false statements or misrepresentations in the affidavit and where the officer is acting in good faith. When judges can look at the same affidavit and come to differing conclusions, a police officer's reliance on that affidavit must, therefore, be reasonable.

Crain, 78 Ark. App. at 158, 79 S.W.3d at 410.

In accordance with *Crain*, we must look to the totality of the circumstances, including what the affiant, Investigator Norris, knew but did not include in his affidavit. The affidavit included the following information in support of Norris's request for a nighttime search: there was a strong chemical odor emanating from the residence; there was a syringe lying on the coffee table; there was a bag of book matches with the striker plates removed just inside the front door; there was a glass jar on the front porch containing a red liquid with a gray sediment; there was a bucket on the front porch with a filter on top that contained suspected iodine crystals; and Norris observed an acetone bottle under the kitchen table, as well as the syringe on the coffee table, the book matches, and some coffee filters. In addition to the information contained in the affidavit, there was also evidence of evasive behavior by appellant when the officers first arrived at the residence to serve the arrest warrants; the air conditioner was on even though it was cold outside and the windows were open; and Norris found a hydrogen chloride gas generator protruding from under a bed that was still putting off an acid vapor.

As in *Crain*, in the present case there was no evidence that Investigator Norris made any material false statements or misrepresentations in his affidavit; there was no evidence that the judicial officer who signed the search warrant abandoned his detached and neutral role; and the affidavit provided evidence which could create disagreement among judges as to the existence of probable cause. Although we hold that a lack of manpower to secure the residence overnight to prevent a danger to anyone who entered is not a sound basis for a nighttime search warrant, nevertheless, we hold that the good-faith exception to the exclusionary rule is applicable in the present case because as in *Crain*, we believe that a reasonable, well-trained officer could have believed that a nighttime search was justified under the facts of this case.

Affirmed.

GLADWIN, BIRD, and CRABTREE, JJ., agree.

GRIFFEN and NEAL, JJ., dissent.

WENDELL L. GRIFFIN, Judge, dissenting. I, like the majority, agree that there were no circumstances in this case that justified a nighttime search. However, I join Judge Neal's dissenting opinion because I wholeheartedly disagree with the majority view that the search in this case was permissible under the good-faith exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897 (1984).

The testimony by Investigator Richard Norris, which is cited in Judge Neal's dissenting opinion, demonstrates that the police knew they had no justification for conducting a nighttime search. Norris testified that *"to pay someone overtime to sit over there 'til the next day would have been a burden that we just—that we couldn't do at that time."*

In the face of that testimony, and absent any authority citing administrative convenience as a basis for allowing a search under the good-faith exception, the majority opinion declares that:

> Although we hold that a lack of manpower to secure the residence overnight to prevent a danger to anyone who entered is not a sound basis for a nighttime search warrant, nevertheless, we hold that the good-faith exception to the exclusionary rule is applicable in the present case because as in *Crain*, we believe that a reasonable, well-trained officer could have believed that a nighttime search was justified under the facts of this case.

The majority relies upon our court's decision in *Crain v. State*, 78 Ark. App. 153, 79 S.W.3d 406 (2002), in affirming the trial court, but this case is a far cry from even what was upheld in *Crain*. In that case, there was at least pre-search information above what we held was the "bare-bones" or boilerplate language of the affidavit submitted with the application for the search warrant. This case contains no similar proof. As I wrote in my dissenting opinion in *Crain*, *supra*, "our courts have resisted the temptation to lower the threshold for nighttime searches. This decision flies in the face of that reluctance." *Id.* at 162, 79 S.W.3d at 413.

The majority's rationale mocks the fundamental purpose of the Fourth Amendment and would leave the constitutional guarantee of freedom from unreasonable governmental intrusions

entirely dependent upon such factors as administrative convenience and the budget of law enforcement agencies, when it should turn on objective facts related to the challenged search. Our federal courts, and the United States Supreme Court in particular, recognize that the Fourth Amendment does not exist for the convenience of the government. *See McDonald v. U.S.*, 335 U.S. 451 (1948) (reversing conviction on Fourth Amendment grounds where no reason, except the inconvenience of the officers and delay in preparing papers and getting before a magistrate, explained the officer's failure to seek a search warrant). *See also United States v. Taylor*, 934 F.2d 218 (9th Cir. 1991) (noting that an individual's interest outranks government convenience in balancing Fourth Amendment interests).

Further, the right of privacy guaranteed by the Fourth Amendment is one of the fundamental values of our civilization, which means that it can neither be treated lightly nor trod upon. *Guzman v. State*, 283 Ark. 112, 117, 672 S.W.2d 656 (1984). It follows, then, that the protections guaranteed by the Fourth Amendment cannot be made to depend upon the changing standards of administrative convenience or fiscal solvency of law enforcement agencies. The danger with today's decision is that it appears to give judicial license for law enforcement officers to conduct a nighttime search based on an after-the-fact assertion that waiting for daylight "would have been a burden." The very idea runs counter to the notion of the Fourth Amendment guarantee as a "fundamental" guarantee.

Whatever else the good-faith exception to the exclusionary rule was intended to do, I categorically reject the idea that it justifies nighttime searches for reasons of administrative convenience. By affirming, the majority has used the good-faith exception to excuse conduct plainly prohibited by the Fourth Amendment. My respect for the civil liberties enshrined in the Bill of Rights compels me to respectfully dissent from this decision and the mischief that it will cause. Our decision in *Crain*, *supra*, went too far; I certainly am unwilling to extend it.

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

OLLY NEAL, Judge, dissenting. I respectfully dissent from the decision affirming the denial of appellant's motion to suppress because I do not believe that the good-faith exception applied. We use an objective standard when evaluating whether an officer acted in good faith. *See Carpenter v. State*, 36 Ark. App. 211,

821 S.W.2d 51 (1991). It has been said that "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion stands at the very core of the Fourth Amendment." *Groh v. Ramirez*, 540 U.S. 551, 124 S. Ct. 1284, 1290 (2004) (quoting *Kyllo v. United States*, 533 U.S. 27 (2001)). Furthermore, it is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachment thereon. *Boyd v. United States*, 116 U.S. 616, 635 (1886).

When asked why he did not wait to execute the search warrant between the hours of six a.m. and eight p.m., Investigator Norris replied:

> From the way that we were operating at that time, it wouldn't have been possible to — either a police officer or to pay someone overtime to sit over there 'til the next day would have been a burden that we just — that we couldn't do at that time. And without actually having somebody sitting there at the residence, you know, I can't [guarantee] security from anybody that comes up to want [sic] to get in there, to break in the residence, or anything like that.

The police department's lack of man power is not one of the enumerated reasons that justify a nighttime search. If I were to agree that the officers acted in good faith, I would be disregarding my duty to safe guard against the encroachment on the constitutional rights of our citizens. I am authorized to state that Judge Griffen joins in this dissent.

Alexander STEWART *v.* STATE of Arkansas

CA CR 03-1388 195 S.W.3d 385

Court of Appeals of Arkansas
Opinion delivered October 13, 2004

[redacted]

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[redacted]

Stuart Vess, for appellant.

Mike Beebe, Att'y Gen., by: *Jeffrey A. Weber*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case pled guilty to sexual abuse in the first degree in 1999 and was sentenced to five years' probation. On March 12, 2003, the State filed a petition to revoke, alleging that he violated the terms of his probation by committing the offense of rape on November 11, 2002. After a jury trial, appellant was convicted of rape and sentenced to twelve years' imprisonment. Following a revocation hearing held after the jury trial, the appellant was found to have violated the conditions of his probation by committing the offense of rape, and was sentenced to five years' imprisonment for violating the conditions of his probation. From those decisions, comes this appeal.

For reversal, appellant contends that the evidence identifying him as the rapist is insufficient to support either his conviction of rape or the revocation of his probation. We affirm.

We first address appellant's contention that the identification evidence is insufficient to support his conviction. Our standard of review is well-settled:

> 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. We do not reweigh the evidence but determine instead whether the evidence supporting the verdict is substantial. We affirm a conviction if substantial evidence exists to support it. Evidence, whether direct or circumstantial, is sufficient to support a conviction if it is forceful enough to compel reasonable minds to reach a conclusion without having to resort to speculation or conjecture. We do not, however, weigh the evidence presented at trial, as that is a matter for a factfinder. Nor will we weigh the credibility of the witnesses.

Clem v. State, 351 Ark. 112, 116, 90 S.W.3d 428, 429-30 (2002) (internal citations omitted).

The thrust of appellant's argument is that the evidence is insufficient because the victim was unable to recognize and identify him at trial. Appellant cites *Synoground v. State*, 260 Ark. 756, 543 S.W.2d 935 (1976), for the proposition that a conviction must be reversed if a victim is unable to identify the accused in court. However, *Synoground* does not stand for that proposition, but merely held that patently unreliable identification testimony should be excluded. To the contrary, *Synoground* states that the reliability of eyewitness identification of a defendant is normally a question for the jury, and that, if it is not argued that the procedures leading to the identification were constitutionally infirm, it is up to the jury to determine whether the eyewitness identification is reliable. *Id.*; *Phillips v. State*, 344 Ark. 453, 40 S.W.3d 778 (2001).

Here, it cannot be said that the victim's identification of appellant was unreliable. The record shows that the victim was employed as a night-shift medical records secretary at a hospital. Access to the medical records room required a key or a key card. On the day that the victim commenced her employment, she was introduced to and spoke with Alexander Stewart, who said that he

needed to meet her because he was the supervisor on her shift. Approximately one week after commencing work at the hospital, the victim was working alone during the night shift when she received a telephone call from her supervisor, who identified himself as Alex and stated that he was coming over to the medical records room to explain her duties to her. The victim's supervisor arrived shortly thereafter and, after engaging in conversation with the victim for some time, pushed her to the ground and raped her. The victim reported the rape to the hospital human resources officer, and then to the police department.

Although the victim, when asked at trial if the rapist was in the courtroom, was initially unable to recognize appellant, she did state positively that the man who raped her was the person she met on her first day at work who identified himself as Alex. In addition, Adrian Hollaway, a medical director for the hospital, did recognize appellant in the courtroom. Mr. Hollaway positively identified appellant as the Alexander Stewart who was the victim's supervisor on the night the rape occurred.

Although the identification of the defendant as the perpetrator of the crime is an element of every criminal case, there is no requirement that the identification must be provided by the victim, and identity has been held to have been sufficiently proven where the evidence was many times more sparse and circumstantial than the evidence in the present case. *See, e.g., Womack v. State*, 301 Ark. 193, 783 S.W.2d 33 (1990); *Becker v. State*, 298 Ark. 438, 768 S.W.2d 527 (1989). Here, although the victim was unable to identify appellant as the rapist at trial, she testified that she *did* recognize the rapist at the time of the rape, and that the rapist was her supervisor. Given that there was other evidence to show that appellant was in fact the victim's supervisor at the time in question, we hold that the jury was not required to find that the identification of appellant was patently unreliable, and that there is substantial evidence identifying appellant as the rapist. *See Green v. State*, 310 Ark. 16, 832 S.W.2d 494 (1992). Appellant's conviction is affirmed.

Appellant also argues that the evidence is insufficient to support a finding that he violated the terms of his probation by committing the rape for which he was convicted. We do not agree. During the revocation proceeding that followed the trial, the victim did in fact positively identify appellant as the rapist, explaining her earlier difficulty in identification as the result of appellant

having changed his hairstyle, adding facial hair, and gaining weight since the time of the rape. In light of this testimony, and the evidence discussed in our foregoing analysis of his rape conviction, we cannot say that the trial court's finding that appellant raped the victim is clearly erroneous. *See Lewis v. State,* 295 Ark. 499, 749 S.W.2d 672 (1988). The revocation of appellant's probation is therefore affirmed.

Affirmed.

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

NEAL, J., dissents.

OLLY NEAL, Judge, dissenting. I respectfully dissent from the decision affirming appellant's rape conviction because I do not believe that the evidence identifying him as the rapist is sufficient.

During her testimony, the victim said that the "Alexander Stewart" that raped her was the same man that she met on November 2 when she started working. However, when asked if she saw "Alexander Stewart" in the courtroom, the victim replied, "I do not see 'Alexander Stewart' in the courtroom today. I don't think I see him. I met him on the second." When asked during redirect if she saw "Alexander Stewart" in the courtroom, the victim testified as follows:

> I think I may see Alexander Stewart. I don't know for sure what he looks like now. I knew what he looked like at that time, but I may see him when I happen to look over there. Well now, I just looked over there where she's sitting at not long ago and that could be him sitting there. He looked different at the time.

The uncorroborated testimony of a rape victim may constitute substantial evidence to sustain a conviction of rape. *Hall v. State,* 329 Ark. 567, 951 S.W.2d 557 (1997). This is especially true when the victim testifies as to the details of the rape and is able to identify the perpetrator. *See Maulding v. State,* 296 Ark. 328, 757 S.W.2d 916 (1988). Furthermore, when a witness makes a positive identification of a suspect, any challenge to the reliability of the identification becomes a matter of credibility for the factfinder to determine, and the factfinder's decision will not be disturbed on appeal when there is substantial evidence to support it. *Bowman v. State,* 83 Ark. App. 223, 125 S.W.3d 833 (2003) (quoting *Stipes v. State,* 315 Ark. 719, 870 S.W.2d 388 (1994)).

Here, the victim was unable to positively identify the perpetrator. The only person that was able to identify appellant as "Alexander Stewart" was Adrian Holloway. During her testimony, Ms. Holloway acknowledged that appellant was the victim's immediate supervisor but said that appellant was not working at the time of the rape. I believe that without a positive identification or testimony placing the appellant on the scene at the time of the incident, the jury had to resort to speculation and conjecture. Therefore, I would reverse appellant's rape conviction.

However, I agree that due to the lesser burden of proof and the victim's enhanced identification during the revocation hearing, the revocation of appellant's probation was supported by substantial evidence. Thus, I would reverse appellant's rape conviction and affirm the revocation of appellant's probation.

Sheryll Denise ASWELL *v.* Mickey Lane ASWELL

CA 03-1428 195 S.W.3d 365

Court of Appeals of Arkansas
Opinion delivered October 13, 2004

Boyer, Schrantz, Rhoads & Teague, P.A., by: *Johnnie Emberton Rhoads*, for appellant.

Clark & Spence, by: *George R. Spence*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Sheryll Denise Aswell appeals the order of the Benton County Circuit Court that granted appellee Mickey Lane Aswell's petition to hold her in contempt for failure to reimburse him for one-half of the college expenses incurred for their son, Chalin, and that granted attorney's fees to appellee. We reverse and dismiss.

The parties divorced in January 1991. Appellant was awarded custody of the parties' children, and appellee was ordered to pay child support. In the order settling all of their domestic

issues, which was approved by the trial court granting the divorce, the parties agreed to the following provision:

> Husband shall pay half of the children's college tuition and expenses, and Wife shall pay the other half of children's college tuition and expenses.

By the summer of 2002, two of their three children had reached the age of majority. The oldest child, Myia, did not attend college. However, the middle child, Chalin, chose to attend Davidson College, beginning in the fall of 2002. On May 12, 2003, after Chalin had completed his first year, appellee filed a petition seeking to hold appellant in contempt for her failure to reimburse him for her half of Chalin's college expenses. Appellee did not disclose the amount he was demanding of appellant, $3,991.22, until May 25, 2003.

In her response to the petition, appellant asserted that it was inequitable for her to have to pay these expenses because she was financially unable to do so. The response further asserted that her inability to pay was complicated by (1) the special needs of the parties' youngest and oldest children, both of whom she raised single handedly, (2) her own physical limitations, and (3) appellee choosing an expensive private college for their son instead of a less expensive in-state college or university.

At the August 18, 2003, hearing, appellant acknowledged that she voluntarily agreed to the paragraph dividing college expenses and was represented by counsel at the time they divorced in 1991. Appellant said that she thought it was "standard" for divorces and that if she did not have the money when the children entered college, the children could take advantage of scholarships, grants, and loans. Appellant said that if she were forced to pay one-half of the Davidson College expenses, it would compromise her ability to care for their eleven-year-old son remaining in her home, who had a congenital heart defect, Tourette's syndrome, and seizures. Appellant testified that as a junior high school study-hall teacher she earned only $13,500 annually, an amount far less than appellee's income.

Appellant added that she had surgery scheduled to take place in the near future to remove a rare non-malignant brain tumor. The brain tumor causes her to suffer fatigue, headaches, and dizziness. She expected that after surgery she would not be able to work for at least six to eight weeks and, if the surgery was

successful, she would not suffer paralysis. Nevertheless, she would lose hearing in her left ear. While off work, her disability insurance policy would provide her income of only 60% of her usual pay.

Appellant said that her monthly expenses of over $1800 exceeded her income, which included the child support appellee was paying for the youngest child in her custody. Appellant explained that she used credit cards to finance the cost of their youngest child's orthodontic braces, the remaining balance due on her car loan, medical charges, and other payments. Appellant said that she did not have the ability to pay the current request for college expenses or her half of the next year's expected cost of over $35,000. Appellant testified, "I have no idea how I'm going to make it financially."

In a proffer of testimony, which was not considered by the trial judge, appellant's counsel stated that appellant would have testified that appellee focused all of his parental attention on Chalin, exercising no visitation and extending no interest in a relationship with the parties' other two children. Further, appellant would have explained that their adult daughter Myia had been diagnosed manic-depressive and suicidal and had been hospitalized for several months. Consequently, appellant had been left to care for Myia's four-year-old daughter (the parties' granddaughter) and had been requested to be financially responsible to a limited extent with regard to this granddaughter.

Appellee testified that he and his son Chalin conferred about which college he should attend, but that Chalin made the final decision. Appellee testified that he and appellant had conversations about Chalin's education costs prior to the fall of 2002, but he said that appellant refused to assist with those expenses. For his first year of attendance, Chalin was awarded a sizable grant and football scholarship that covered most of the cost. Appellee admitted that he did not provide any information to appellant about how much she owed until May 25, 2003, after Chalin completed his first year of college and after appellee had filed the petition for contempt. Whether Chalin would have a grant for his second year of college beginning in the fall of 2003 was uncertain, but appellee said that Chalin would not be playing football. Appellee anticipated that the cost for tuition, room, and board per year would be approximately $35,000 without financial aid. Appellee stated that his annual income for the previous three years varied, ranging from $44,800 to $65,700.

After considering the proof, the trial judge found that the parties freely, voluntarily, and intelligently entered into this college-expense agreement; that it was a reasonable and rational provision; and that appellant's pending health problems and surgery were not a defense to the petition for contempt.[1] The trial judge held appellant in contempt for failure to pay the amounts to which she agreed, giving her thirty days in which to pay appellee or face incarceration until that obligation was fulfilled. The trial judge also ordered appellant to pay $350 to appellee for his attorney's fees. This appeal followed, and appellant asserts on appeal that the trial judge erred by holding her in contempt, by awarding an attorney's fee in the absence of a request, by imposing incarceration if she did not pay the college expenses within thirty days, and by refusing to consider the additional responsibilities that the other children's needs placed on her.

In cases involving child custody and related matters such as support, we review the case 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. *Deluca v. Stapleton*, 79 Ark. App. 138, 84 S.W.3d 892 (2002). Specific to an appeal of a trial court's finding of civil contempt, we will not reverse that finding unless it is against the preponderance of the evidence. *See Brown v. Brown*, 305 Ark. 493, 809 S.W.2d 808 (1991). Although there is evidence to support it, a finding is clearly erroneous when 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).

A parent can contract and bind himself to support a child past the age of majority, and such a contract is just as binding and enforceable as any other contract. *Worthington v. Worthington*, 207 Ark. 185, 179 S.W.2d 648 (1944). Disobedience of any valid order of a court having jurisdiction to enter it may constitute contempt, punishment for which is an inherent power of the court. *Gatlin v. Gatlin*, 306 Ark. 146, 811 S.W.2d 761 (1991). However, inability to pay is a defense to a contempt citation, unless the inability is due to action or inaction on the part of the appellant. *See Brown v. Brown, supra.*

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[1] While these findings would clearly support an award of monetary damages, appellee's petition only sought that appellant be held in contempt.

Appellant agrees that she did not pay her half of Chalin's first year of college expenses, but she defended herself on the basis that she simply could not afford it and would be even less able to do so in the coming months. To conclude that this was willful disobedience on her part is clearly erroneous, clearly against a preponderance of the evidence, and therefore we reverse and dismiss the contempt citation.

A trial court's power to institute civil contempt in order to acquire compliance with its orders is a long-standing rule of law, but it may not be exercised where the alleged contemnor is without the ability to comply. The practice of imprisoning people for debts was abolished by the Debtor's Act of 1869. *See Black's Law Dictionary* 412 (7th ed.1999) (defining "Debtor's Act of 1869"). Moreover, our own constitution provides: "No person shall be imprisoned for debt in any civil action, or mense or final process, unless in cases of fraud." Ark. Const. art. 2, § 16. Our supreme court has said, in the civil contempt context, that "lack of ability to pay is a complete defense against enforcing payment from the defendant by imprisonment." *Griffith v. Griffith*, 225 Ark. 487, 490, 283 S.W.2d 340 (1955). The *Griffith* court further said: "[t]he court is empowered to punish the defendant by imprisonment for willful obstinacy where it shall appear that he had the means with which to comply with the decree, but it should not imprison him where he shows that he has not the pecuniary ability to comply with the decree and is in such ill health that he cannot earn enough money to do so." *Id.* at 491, 283 S.W.2d at 342.

We hold that the trial judge herein erred because appellant demonstrated by more than a preponderance of the evidence that her failure to reimburse appellee for half of Chalin's college expenses was not due to "willful obstinacy" but instead financial inability coupled with ill health. Further demonstrating the lack of willful disobedience, appellant was not provided information about the sum appellee was demanding until *after* he filed his motion for contempt, and the motion was heard within three months of his demand. In addition, on de novo review, we deem it relevant that appellant bore additional responsibilities that affected her ability to pay. In sum, the trial judge's finding of contempt is clearly against the preponderance of the evidence. *See also Feazell v. Feazell*, 225 Ark. 611, 284 S.W.2d 117 (1955) (reversing contempt against divorced husband charged with con-

tempt of court for failing to comply with order directing payment of $50 monthly for support of son; a preponderance of the evidence established that divorced husband's failure to pay arrearage arose from his financial inability and was not in willful disobedience of court order and that therefore imprisonment of divorced husband was not justified).

Appellant argues additionally that her defense to the contempt petition was hampered by the trial court's exclusion of her proffered testimony. In that proffer, appellant averred (1) that appellee did not participate whatsoever in the care of either of the other two children; (2) that appellee gave gifts and attention only to the middle child, Chalin; and (3) that appellant was the sole person left to assist in the care of their mentally ill daughter and minor granddaughter over whom she carried some financial responsibility. The trial judge ruled this particular line of questioning irrelevant and immaterial to the issue of whether appellant had willfully failed to pay her portion of college expenses. Evidentiary rulings are a matter of discretion, and are reviewed only for abuse of that discretion. *See Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222 (2001); *Ozark Auto Transp., Inc. v. Starkey*, 327 Ark. 227, 937 S.W.2d 175 (1997).

We agree that it was irrelevant to these proceedings whether appellant ever exercised visitation with the other two children or gave them any attention. However, relevant and material were the assertions that their daughter's illness required appellant to take care of their granddaughter, including assuming some financial responsibilities. The trial judge's exclusion of this evidence unfairly interfered with appellant's defense in this matter and constituted an abuse of discretion.

Appellant also appeals the order to pay attorney's fees to appellee, in light of the lack of a request for fees and a lack of any proof on the matter. Appellee responds that the trial court has the inherent power to grant these fees and that no abuse is demonstrated. Based upon our holding that the contempt citation was error, we consequently reverse the award of attorney's fees. Even had the contempt citation been upheld, we would have reversed this award as an abuse of discretion. There was no request by appellee for such fees, there was no evidence regarding the amount of attorney fees incurred in filing and pursuing the contempt petition, and on the facts in this case, it is unduly harsh.

The order on appeal is reversed and dismissed.

GLADWIN and VAUGHT, JJ., agree.

Keith TENNER *v.* STATE of Arkansas

CA CR 03-1364 195 S.W.3d 383

Court of Appeals of Arkansas
Opinion delivered October 13, 2004

John B. Gibson, Jr., for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Keith Tenner was convicted of reckless driving and driving while intoxicated, and was ordered to pay fines and costs totaling $800.00. He appeals from his DWI conviction, arguing that the trial court erred in denying his challenge to the admissibility of the result of the chemical test, which indicated a positive urine screen for cannabinoids. Mr. Tenner argues now, as he did below, that the test result was inadmissible because there was no proof that the test was performed according to a method approved by Arkansas Department of Health, or by an individual possessing a valid permit from the Health Department. We agree, and therefore we reverse and remand.

Pursuant to Ark. Code Ann. § 5-65-204(b) (Supp. 2003), a provision of our Omnibus DWI Act, "Chemical analyses of the person's blood, urine, or breath to be considered valid under the provisions of this act shall have been performed according to methods approved by the Department of Health or by an individual possessing a valid permit issued by the Department of Health for this purpose." When a defendant challenges the admissibility of evidence under this section, it is the State's burden to establish the validity of the chemical analysis. *See Caffey v. State*, 43 Ark. App. 160, 862 S.W.2d 293 (1993).

This case was submitted to the trial court on stipulations by the parties. Mr. Tenner was arrested on December 14, 2001, and charged with reckless driving and DWI. The State introduced a report signed by toxicologist Don Riddle of the Arkansas State Crime Lab, which indicated that Mr. Tenner's urine tested positive for cannabinoids. In response to Mr. Tenner's challenge to the admissibility of the report, the State cited *Arkansas Dep't of Health, Arkansas Regulations for Blood Alcohol Testing*, § 1.21(b), which provides, "It is not required that the state medical examiner, his staff, or the State Crime Laboratory be certified, nor shall they be limited by these Regulations." Because the test at issue was conducted by the State Crime Lab, the State argued that Ark. Code Ann. § 5-65-204(b) was inapplicable. In denying Mr. Ten-

ner's objection to the admission of the report, the trial court found that "the State Crime Lab has a valid permit to conduct such analysis."

We agree with Mr. Tenner's argument that the State failed to establish admissibility of the report. The exclusion referenced by the State is limited to the Health Department's regulations for alcohol testing. In this case, the chemical analysis was for an intoxicant other than alcohol, and the State failed to identify any applicable exclusion pertaining to the State Crime Lab or its staff. Thus, it was incumbent on the State to show, pursuant to Ark. Code Ann. § 5-65-204(b), that the chemical analysis was performed according to methods approved by the Department of Health or by an individual possessing a valid permit issued by the Department. The State proved neither, and we thus hold that the trial court erred in finding the test to be admissible.

Reversed and remanded.

GLADWIN and VAUGHT, JJ., agree.

A.G. EDWARDS & SONS, INC., Stanley Zunick, Jr. *v.* Richard Dale MYRICK

CA 03-1344 195 S.W.3d 388

Court of Appeals of Arkansas
Opinion delivered October 13, 2004

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

The Wright Law Firm, by: *K. Leanne Daniel*, for appellee.

SAM BIRD, Judge. A.G. Edwards & Sons, Inc. (Edwards), and Stanley Zunick, Jr. (Zunick), appeal from an order of the Garland County Circuit Court denying their motion to arbitrate appellee Richard Myrick's claims against them. The primary issue on appeal is whether appellee's agreement to arbitrate "any controversy" with Edwards, which was contained within a 1986 customer's agreement signed by appellee and his former wife, Kathryn Myrick, in reference to a joint account, applied to a dispute involving three custodial accounts that appellee opened for his daughters in 1995. We hold that it did apply and that the trial court erred in denying appellants' motion for arbitration.

In 1986, in conjunction with the opening of a joint account with Edwards, the Myricks signed a customer agreement that began with the following statement:

> In consideration of A.G. Edwards & Sons, Inc., or any successor thereof (hereinafter referred to as "Edwards") accepting one or more accounts of the undersigned (whether designated by name, number or otherwise) for the purchase, sale or carrying of securities, commodities and options, or contracts relating thereto, and other property (hereinafter collectively referred to as property), the undersigned agrees as follows:

In Paragraph 14, the agreement stated that it would cover "individually and collectively all accounts which the undersigned may at any time maintain with Edwards" and that it would "continue in effect until written notice of revocation is received by the Director of Operations of Edwards from the undersigned."

The agreement also contained the following arbitration provision, which provided in relevant part:

> The following agreement to arbitrate may not apply to any controversy or claim or issue in any controversy with a public customer for which a remedy may exist pursuant to a right of action under the federal securities laws, or to any controversy with a public customer involving transactions in commodity futures contracts or options thereon unless agreed to by the undersigned in a separate endorsement:
>
> ANY CONTROVERSY BETWEEN THE UNDERSIGNED AND EDWARDS OR ANY OF EDWARDS' OFFICERS, DIRECTORS, AGENTS OR EMPLOYEES ARISING OUT OF THIS AGREEMENT OR THE PERFORMANCE OR BREACH OF THIS AGREEMENT, OR ANY ACCOUNT WITH EDWARDS, OR ANY TRANSACTION BY THE UNDERSIGNED WITH OR THROUGH EDWARDS, OR ANY OTHER CAUSE WHATSOEVER, SHALL BE SETTLED BY ARBITRATION IN ACCORDANCE WITH THE APPLICABLE STATE OR FEDERAL ARBITRATION STATUTES and in accordance with the rules of The American Arbitration Association, the National Association of Securities Dealers, Inc., or such securities exchange as the undersigned may elect. . . . The award of any arbitrators appointed pursuant hereto shall be final, and judgment upon the award rendered may be entered in any court having jurisdiction.

In 1995, appellee opened custodial accounts for the parties' three children, using funds from the Myricks' joint account. Zunick was the investment broker who opened these accounts. Appellee did not sign a new customer's agreement. The Myricks were subsequently involved in a contentious divorce, and Kathryn was awarded custody of their children. Although the litigation continued, the couple was divorced in late 1997. In 1998, appellee asked Edwards to transfer the three custodial accounts from its Hot Springs, Arkansas branch to its Gulfport, Mississippi branch. After Edwards did so, appellee withdrew the balances from the three

custodial accounts and allegedly deposited those funds into one of his mother's accounts. In February 2001, in the divorce case, Kathryn served a subpoena on Edwards's home office in St. Louis, Missouri, requesting all documents relating to the custodial accounts in its possession. Edwards produced the requested documents. In April 2001, Kathryn sued appellee and his mother for restitution and an accounting. Zunick also provided an affidavit concerning the custodial accounts.

In April 2003, appellee filed a counterclaim naming Kathryn, Edwards, and Zunick as defendants. Requesting damages in the amount of $10,000,000, he alleged invasion of privacy, violation of federal privacy law, breach of fiduciary duty, abuse of process, and violation of the Arkansas Civil Rights Act in Edwards's and Zunick's release of information to Kathryn. Edwards and Zunick moved to compel arbitration. They relied upon the 1986 arbitration provision quoted above and alleged that, because interstate commerce was involved, the Federal Arbitration Act applied. After a hearing, the circuit court entered an order denying the motion to compel arbitration. This appeal followed.

■ Our review of a trial court's denial of a motion to compel arbitration, which is available as a permissible interlocutory appeal, is *de novo*. *IGF Ins. Co. v. Hat Creek P'ship*, 349 Ark. 133, 76 S.W.3d 859 (2002); *Walton v. Lewis*, 337 Ark. 45, 987 S.W.2d 262 (1999).

■ On appeal, appellants assert, and it is undisputed by appellee, that the Federal Arbitration Act (FAA) applies to this case. The FAA provides that a written provision in a contract evidencing a transaction involving commerce to arbitrate a controversy arising out of that contract is valid and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000). The FAA, instead of the Arkansas Uniform Arbitration Act, applies when the underlying dispute involves interstate commerce. *Walton v. Lewis*, *supra*. Section 1 of the FAA defines "commerce" as "commerce among the several States. . . ." 9 U.S.C. § 1 (2000). State and federal courts have concurrent jurisdiction to enforce an arbitration agreement pursuant to the terms of the FAA. *Walton v. Lewis*, *supra*.

Appellants contend that the arbitration provision in the 1986 agreement was so broad that it covered any controversy and all claims relating to all of appellee's accounts with Edwards, regardless of when they were opened. They point out that the customer's

agreement was not limited to a particular account or to accounts opened by appellee in any particular capacity. In response, appellee notes that the account cards created by Edwards in 1995 for the custodial accounts did not reflect that those accounts were subject to arbitration and did not refer to the 1986 agreement; that the "customer agreement" boxes were not checked on the 1995 account cards; and that he signed the 1986 agreement as an individual and opened the 1995 accounts as a custodian. Appellee, however, did not sign the account cards maintained by Edwards for the custodial accounts; in this case, there is only one contract to construe — the 1986 customer's agreement.

Because the duty to arbitrate is a contractual obligation, we must first determine from the language of the arbitration agreement whether the parties intended to arbitrate the particular dispute in question. *Walton v. Lewis, supra.* In addressing whether a party has entered into an agreement to arbitrate under the FAA, courts are to apply general state law principles, giving due regard to the federal policy favoring arbitration. *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). The same rules of construction and interpretation apply to arbitration agreements as apply to agreements generally. *Neosho Constr. Co. v. Weaver-Bailey Contractors*, 69 Ark. App. 137, 10 S.W.3d 463 (2000). A contract is unambiguous and its construction and legal effect are questions of law when its terms are not susceptible to more than one equally reasonable construction. *Fryer v. Boyett*, 64 Ark. App. 7, 978 S.W.2d 304 (1998). When contracting parties express their intention in a written instrument in clear and unambiguous language, it is the court's duty to construe the writing in accordance with the plain meaning of the language employed. *Id.*

We believe that the arbitration agreement is unambiguous and that it required the arbitration of any controversy between appellants and appellee arising from *any* account with Edwards. The agreement expressly stated that it was made in consideration of Edwards's accepting "one or more accounts" of appellee, and its scope was broad and expansive, covering "any controversy" between the parties "arising out of this agreement or the performance or breach of this agreement, or any account with Edwards, or any transaction" by appellee with Edwards, "or any other cause whatsoever. . . ." The agreement did not limit its application to accounts that appellee opened in any particular

capacity or to accounts then in existence. Also, the parties did not later create any document that expressly or by implication excepted the custodial accounts from the terms of the arbitration agreement, nor did they revoke the 1986 agreement. We therefore conclude that the parties had a valid arbitration agreement that included appellee's claims against appellants and that the circuit court erred in refusing to compel arbitration.

Reversed and Remanded.

HART and BAKER, JJ., agree.

Terry JONES *v.* Barbara BILLINGSLEY

CA 04-153 195 S.W.3d 380

Court of Appeals of Arkansas
Opinion delivered October 13, 2004

Chris Taylor, Jr., for appellant.

Tom Allen, for appellee.

LARRY VAUGHT, Judge. This is an appeal from an order granting appellee Barbara Billingsley a judgment for past-due child support owed by appellant Terry Jones. On appeal, appellant argues that the trial court erred (1) in denying a motion to transfer to the proper court where there was a previous order of transfer in effect, and (2) in granting a judgment against appellant for past-due child support where his sole source of income was supplemental security income (SSI) from the Social Security Administration. We affirm.

On July 10, 1995, Judge Stephen Choate of the Independence County Chancery Court ordered that appellant pay $112.70 per month in child support to appellee, beginning in July 1995. The child support was based on appellant's monthly $451 SSI check. Appellant filed a timely motion to vacate that order on the ground that the order violated federal law and was inconsistent with Arkansas guidelines. We assume that the motion was deemed denied because no order appears in the record, and appellant did not file an appeal.

On April 29, 2003, appellee filed a petition for judgment alleging that appellant had not paid any child support and was in arrears in the amount of $10,593.80. The case was assigned to Judge Harkey's court. On June 6, 2003, appellant filed a motion to transfer the case to Judge Choate's court on the basis that the parties had been before Judge Choate on numerous occasions, that he was familiar with the parties, and that a transfer would be in the

interest of judicial economy. Appellee responded that the action was a civil action for a money judgment, that transfer would not be in the interest of judicial economy, that the issue was simple, and that there was no reason to transfer the case. On August 29, 2003, appellant filed a counter-complaint, alleging that SSI is not subject to collection of child support and that he was entitled to reimbursement of any funds taken from him since the date that he was approved for SSI.

The trial court entered an order granting appellee judgment for $10,816 past-due child support, plus interest in the amount of $4,867.20. The court found that appellant's defense that "[SSI] income is not subject to the collection of support" was "untenable." The trial court also ordered that appellant was liable for July 2003 and August 2003 child support, which amounted to $225.40. The total amount of child-support arrearages and interest was $15,908.60. The court also awarded appellee an attorney's fee in the amount of $1500. The court noted that although the case was submitted on appellee's motion for judgment on the pleadings, appellant had the opportunity to offer evidence in court, but declined to do so. In addition, the trial court denied appellant's motion to transfer and his counterclaim. Appellant filed a timely notice of appeal.

Appellant first contends that the trial court erred in denying the motion to transfer the case from Judge Harkey's division to Judge Choate's division. This argument is based on the fact that "Chancellor Carl McSpadden entered an order on December 5, 1991, transferring this case to . . . the court of Judge Stephen Choate." Therefore, appellant suggests that the present case was improperly before Judge Harkey, and thus the motion to transfer should have been granted.

The transfer order to which appellant refers is not in the addendum. The order is, however, contained in the record, and it merely states, "Comes now the court and for good cause shown transfers this case to the court of Honorable Stephen Choate where all matters of custody may be decided as to the child of the marriage, subject to Judge Choate's approval to transfer." At the hearing below, appellant's counsel argued that the case should be transferred because of this order and because Judge Choate had handled the case for twelve years and was familiar with the parties. Appellee's counsel responded that it was a simple case with one issue—whether appellant owed child support pursuant to a court order. Counsel for appellee further added that appellant admitted

in request for admissions that he had paid no support. Judge Harkey apparently agreed with appellee and denied the motion to transfer.

The standard of review on appeal of a denial of a case-transfer request is the same as in cases of judicial disqualification, which is whether the trial judge abused his discretion. *Osborne v. Power*, 318 Ark. 858, 865 S.W.2d 635 (1994) (setting forth the standard of review in a judicial disqualification case). Because this was a one-issue case, which was tried on the pleadings and did not involve child custody, we cannot say that the trial judge abused his discretion in denying the motion to transfer.

For his second point, appellant contends that the trial court erred in awarding appellee a judgment for past-due child support because his sole source of income was SSI benefits. In support of this argument he cites *Davis v. Office of Child Support Enforcement*, 341 Ark. 349, 20 S.W.3d 273 (2000). The *Davis* case involved an appeal from the trial court's order of child support that was based on appellant's SSI income. The supreme court reversed the court of appeals decision holding that appellant's SSI income was income for purposes of child-support and subject to child-support payments. The supreme court stated that although SSI falls within the definition of income for child-support purposes, it is not subject to state court jurisdiction. Ultimately, the supreme court held that Arkansas courts cannot order child-support payments based on income from federal SSI-disability benefits.

Here, the order of support was made in 1995 and entered in 1996, prior to the ruling in *Davis, supra*. Appellee argues that appellant made no motion to modify the child-support order and that Ark. Code Ann. § 9-14-234 (Repl. 2002) provides that a support order shall be a final judgment subject to writ of garnishment or execution as to any payment accrued until the time either party moves to alter or modify the order. Here, appellant has filed no motion to modify the 1995/1996 order on the basis that *Davis, supra*, prohibits child-support payments based upon income from SSI.

Before a child-support obligation can be modified, it is the burden of the party seeking the modification to show that there has been a change in circumstances. *Woodson v. Johnson*, 63 Ark. App. 192, 975 S.W.2d 880 (1998). One of the considerations in determining whether a modification is warranted is a change in income of a party. *Id.* Because Ark. Code Ann. §§ 9-12-314 (Repl.

2002) and 9-14-234 specifically provide that a child-support decree shall be a final judgment until either party files a motion to modify such decree, *see Burnett v. Burnett*, 313 Ark. 599, 855 S.W.2d 952 (1993), the child-support order at issue remained in effect at the time of the hearing because there had been no filing of a motion to modify. Accordingly, we hold that the trial court did not err in awarding appellee the judgment for past-due child support.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.

Mark GEORGE *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES,
Roy Jeffus, Director

CA 03-1416 195 S.W.3d 399

Court of Appeals of Arkansas
Opinion delivered October 13, 2004

Martin W. Bowen, for appellant.

Richard Neil Rosen, for appellee.

KAREN R. BAKER, Judge. This is an appeal from an order denying costs and attorney fees to a party who successfully obtained judicial enforcement of rights pursuant to the Arkansas Freedom of Information Act. While we affirm the denial of expenses as explained below, we first address the fact on May 12, 2004 that the Arkansas Department of Human Services ("the Department") submitted a motion to dismiss this appeal, based upon appellant's failure to file trial transcripts as part of the record on appeal. This court by letter order passed on the motion until the case was submitted. The Department resubmitted that motion on September 27, 2004, and the case was submitted to us on September 29, 2004. Appellant responded that none of the testimony adduced at the hearing concerned the legal issue on appeal. If the Department believes a record to be insufficient, the appropriate remedy is to supplement the appeal record, not to request dismissal of the appeal. *See Cobbs v. Arkansas Dep't of Human Servs*, 87 Ark. App. 188, 189 S.W.3d 487 (2004); Ark. R. App. P.—Civil 3, 6.

Appellant, Mark George, filed a lawsuit to obtain public records from the Arkansas Department of Human Services pursuant to the Arkansas Freedom of Information Act. A hearing was held on April 25, 2003, and the trial court found appellant to be the prevailing party, but refused to award attorney fees, finding that it had no authority to do so. On that same day, but after trial, appellant amended his complaint to specifically name Roy Jeffus as a party in both his individual capacity and as Interim Director of the Division of Medical Services of the Department and served Roy Jeffus with the amended complaint on April 29, 2003. The Department and Mr. Jeffus answered the amended complaint on

April 30, 2003, in a joint answer signed as submitted by the Department by Chief Deputy Counsel.

The answer affirmatively pled that the parties rested and that the trial court announced its decision prior to the filing of the amended complaint, and that post-trial complaint amendments are to conform the pleadings to issues tried by express or implied consent. The answer asked that the amendment be struck, but no motion to strike was ever filed. The written order memorializing the court's ruling was filed on July 14, 2003, and lists only the Department as the defendant.

Motions for fees were filed July 25 with the amended title of the cause of action including Mr. Jeffus, with appellant asking the court to assess the fees against Mr. Jeffus and alleging that the FOIA does not exempt officers or employees of state agencies from its provision on costs and attorney fees. The Department answered with just the Department listed as a Defendant. On page three of its Brief in Support regarding fees at the trial level, the Department noted that the amendment was filed solely as a predicate to appellant's pending motion seeking costs and attorney fees, and since there was no proceeding or adjudication regarding Mr. Jeffus personally, there was no basis for an award against Mr. Jeffus.

The trial court itself prepared a precedent filed September 26, 2003, denying the Motion for Costs and Attorney Fees and citing Ark. Code Ann. § 25-19-107(d) and its prohibition that ". . . no expenses shall be assessed against the State of Arkansas or any of its agencies or departments." The trial court's precedent identified the Department and Roy Jeffus as "Respondent."

No order specifically accepted the amendment. No separate motion to strike was filed and no order striking the amended complaint and answer was ever entered.

The style of the appeals case identifies the appellee as Roy Jeffus, in his individual capacity and in his official capacity as Interim Director of the Division of Medical Services of the Department, and Chief Counsel of the Department submitted the Brief of Appellee. The Department is not an appellee, but submits the brief on behalf of appellee. Appellant's point on appeal is that the circuit court erred in concluding that a state officer is a state agency or department against whom reasonable attorney's fees and litigation expenses may not be awarded under the Arkansas Freedom of Information Act. The appellee argues that a suit against Mr. Jeffus in his individual capacity cannot be maintained because he was not individually included at the time of the trial.

Appellant amended his original complaint to include Mr. Jeffus, stating that Mr. Jeffus would have been named originally as a party but for an agreement between the counsel for the Department and counsel for appellant stating that it would not be necessary for appellant to sue Mr. Jeffus individually in order for appellant to recover attorney fees. Rule 15 of the Arkansas Rules of Civil Procedure permits amendments to conform to the pleadings "when issues not raised by the pleadings are tried by express or implied consent of the parties." In such a situation, those issues "shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment[.]" However, this Rule presupposes that these issues were "tried by express or implied consent of the parties." *See, e.g., Shinn v. First Nat'l Bank of Hope,* 270 Ark. 774, 606 S.W.2d 154 (Ark. App.1980) (noting that the rule has been interpreted as permitting a defendant to raise a counterclaim, even after judgment, so long as it was clear that all the relevant evidence was in the record or the issue was clearly one the parties contemplated as being before the court).It is unclear from the record whether the trial court acknowledged the amended complaint and accepted that the parties had expressly or impliedly tried the matter including Mr. Jeffus. However, we need not address the issue because even if Mr. Jeffus had been properly included as a party, appellant could not prevail.

Pursuant to Ark. Code Ann. § 25-19-107(a), any citizen who is denied the rights granted to him under the FOIA, may appeal from the denial to circuit court. In any such action to enforce the rights granted in the FOIA, the court shall assess against the defendant reasonable attorneys fees and other litigation expenses incurred by a plaintiff who has substantially prevailed. Ark. Code Ann. § 25-19-107(d). However, the statute specifically provides that "no such expenses may be assessed against the State of Arkansas, or any of its agencies or departments. *Id.*

The Arkansas Department of Human Services is a department of the State of Arkansas. Furthermore, a suit against a state official in his official capacity is not a suit against that person but is rather a suit against that official's office. *Fegans v. Norris,* 351 Ark. 200, 206, 89 S.W.3d 919, 924 (2002). Thus, no award of

attorney's fees may be assessed against a state official in his official capacity under Ark. Code Ann. § 25-19-107(d).

Neither could appellant prevail in an action against Mr. Jeffus in his individual capacity. In his individual capacity, Mr. Jeffus had no administrative control of the data elements from which any record responsive to appellant's FOIA request would be created or provided. Any request made to Mr. Jeffus as an individual would be outside the scope of the FOIA since the Act pertains to "public" documents and the "custodian" of the public records as "the person having administrative control of that record." As an individual, Mr. Jeffus would have no administrative control of the public records. He would have control of the public records only in his official capacity.

Consequently, the trial court did not err when it denied appellant's motion for costs and attorney fees. Accordingly, we affirm.

HART and BIRD, JJ., agree.

Paul Marcus SLATON *v.* Karen Elizabeth JONES

CA 03-1116 195 S.W.3d 392

Court of Appeals of Arkansas
Opinion delivered October 13, 2004

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David L. Dunagin, for appellant.

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

ANDREE LAYTON ROAF, Judge. Appellant Paul Slaton appeals the order of the Pope County Circuit Court finding a joint venture and dividing the business inventory between appellant and appellee Karen Jones, and imposing a constructive trust on the real property from which the businesses were conducted. Slaton argues that the trial court erred in finding a partnership between the parties and in imposing a constructive trust on the real property. We find no error and affirm.

Appellant and appellee cohabited for approximately twenty-six years but never married. During that time, the parties operated separate businesses out of the same location, known as the Emporium. The relationship ended when appellant changed the locks and asked appellee to leave. Appellee filed suit alleging conversion and seeking damages, dissolution of a partnership, replevin of her personal property, and the imposition of a constructive trust on the real property, titled in appellant's name, from which the businesses were conducted. Appellant failed to answer the complaint.

Appellee testified that she and appellant met and went into business in the mid-1970s. She stated that appellant started his business, Paul's Rare Coins and Books, as a small coin shop in the corner of another retail store. She stated that, after appellant moved to another location and changed the business name to Emporium, she started buying and selling jewelry through appellant's business, before she technically started her own business, Plantation Antiques & Jewelry (Plantation), in 1987. She stated that she received the money from the jewelry sales while appellant received the money from his items. She stated that the parties were not partners in business and that she always wanted everything to be separate. Appellee denied that money from Emporium was used to start her business. She stated that the 1987 inventory of $33,000 came from her previous sales, which were then applied back into the business. Appellee stated that she had her own money and occasionally received some from her father but that appellant never gave her any money.

Appellee testified that, for the first two or three years the parties were together, money for bills came from the sale of books and then she began depositing money into Emporium's purchase account to cover the bills. She stated that she paid the bills, although appellant may have paid a few bills. She described the account as a joint account. She stated that, if there was not enough money in the account, she deposited money from jewelry she sold. She also testified that she made jewelry purchases from that account in order to build appellant's standing in the jewelry trade. Appellee also admitted that appellant may have deposited funds from items he sold into this account but that this was not usually done because appellant had a separate account. She said that, after book sales declined, approximately ten years ago, there were not enough book sales to cover expenses and that she had to contribute funds to cover the cost of the books.

Appellee testified that, some years prior to trial, she discovered that, although she had believed the parties were purchasing the building together, appellant had actually purchased it and had it titled solely in his name. She stated further that, at that time, both parties were making the payments on the building.

Concerning the inventory in the building, appellee opined that she owned 95% of the jewelry and 70% of the antique furniture. She admitted that, although she owned a few sets of coins, approximately 95% to 98% of them belonged to appellant.

Mike Summers, a certified public accountant, testified that he had prepared appellee's tax returns for several years and that her returns included a schedule showing that Plantation Antiques & Jewelry was operated as a sole proprietorship. Summers stated that, if more than one person had owned the business, appellee would have filed partnership tax returns.

Patty Austin testified that she worked for the parties for approximately twenty years before she became employed as a clerk at another store. She testified that, although the general public assumed that the parties' businesses were owned together, they were actually operated as separate entities. Austin opined that appellee owned 70% of the merchandise that included the furniture and jewelry and that appellant owned 30%, and that this apportionment was maintained over the entire time of her employment. Austin stated that 85% of the jewelry belonged to appellee but that appellant limited his sales to coins, firearms, Civil War relics, and war relics in general. She stated that, while appellant had some jewelry and nice antique pieces, the coins were his mainstays. She also stated that appellee's jewelry business brought in the most money.

Austin testified that the parties placed different-colored tags on the merchandise to denote which item belonged to whom and that each party kept the money from the sales of his or her inventory. She testified that the parties maintained separate accounts. She stated that there was one cash register but that, if a specific item belonging to one party or the other was sold, the money was not placed in the register but was set aside and disbursed to the proper party. She stated that the money from the sales of books and magazines was placed into the cash register.

Austin testified that appellee wrote checks from and handled the books for an account that contained only appellant's money. She also testified that appellee paid the utility bills mostly out of

her separate account. She stated that appellant made arrangements for the purchase of the building several years prior to trial but that appellee usually made the monthly mortgage payment from the Emporium account.

Appellant stated that he owned a business known as the Emporium that sold jewelry, rare coins, and small antiques. He said that he started the business under the name of Paul's Rare Coins and Books, which changed locations as it grew. He described the jewelry as antique jewelry, coin rings, and diamond rings that he bought at gun or coin shows and at flea markets. Appellant stated that appellee owned only a few items of jewelry that she brought with her from California. He denied knowing that appellee had been selling jewelry for which she claimed ownership, stating that he had purchased *all* of the jewelry inventory. Appellant stated that, although appellee did have some minimal expertise in jewelry, hers was not as great as his own.

According to appellant, the parties started Plantation together using the money from Emporium. He testified that the assets were shifted from Emporium to Plantation but that he was the owner of 85% to 90% of the assets because the purchase money came from items he owned prior to the relationship between the parties. He later stated that 95% of the inventory was his and that he had provided all of the funds to purchase the antiques and furniture, the jewelry, and the coins. He denied that appellee used money from her personal account to pay bills on behalf of the store and stated that some of the profits from Emporium were used to pay bills. He denied that appellee had her separate business and asserted that he totally owned Plantation. He stated that, on the advice of a tax attorney, he and appellee had verbally agreed that she would claim Plantation for tax purposes.

Concerning the purchase of the real estate, appellant testified that he never told appellee that he would be the sole purchaser. He said that he told her that "we were purchasing it . . . and we were not going to be paying rent any more." He admitted that appellee was a party to the negotiations for the purchase of the real estate. He stated that he made all of the payments from his funds and that appellee did not make any payments from her funds. He stated that the money for the improvements to the real estate came from Emporium's profits, his inheritances, and from the proceeds of the sale of a jointly-owned home in Atkins. Appellant also stated that Emporium and the business property were solely in his name because of the parties'

receiving legal notices from the City of Atkins regarding acts of vandalism on another piece of property.

The trial court found that the parties were engaged in a joint venture by operating separate businesses from a common location and ordered the inventory located at the business sold and the proceeds divided unequally, 70% to appellee and 30% to appellant. The court also ordered the imposition of a constructive trust on the business real property, with the real property to be sold and the proceeds divided equally. The trial court also awarded each party his or her separate business and certain specified personal property. This appeal followed.

Appellant raises two points on appeal: that the trial court erred in the distribution of the partnership property and that the trial court erred in imposing a constructive trust on the real property.

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).

For his first point, appellant argues that the trial court erred in the division of the partnership property. Appellant's argument is that appellee failed to prove the elements of a partnership set out in the Uniform Partnership Act, codified at Ark. Code Ann. §§ 4-42-201, -202 (Repl. 2001), and, therefore, she cannot claim the real property as a partnership asset. However, the trial court did not find that a partnership existed between the parties; rather, the trial court found that the parties operated separate businesses in a single location in a joint venture. We first note that the supreme court has held that what is now Ark. Code Ann. § 4-42-202 is not controlling in determining whether there is a joint venture. *See Gammill v. Gammill*, 256 Ark. 671, 510 S.W.2d 66 (1974). To find that a joint enterprise existed, Arkansas

law requires only a showing of (1) a common object and purpose of the undertaking and (2) an equal right to direct and govern the movements and conduct of each other in respect to the common object and purpose of the undertaking. *Lovell v. Brock*, 330 Ark. 206, 952 S.W.2d 161 (1997); *RLI Ins. Co. v. Coe*, 306 Ark. 337, 813 S.W.2d 783 (1991). The existence of a joint enterprise is ordinarily a question for the fact-finder. *RLI Ins. Co. v. Coe, supra.*

Appellant's main complaint appears to be that the finding of a joint venture allowed appellee to be awarded an interest in the real property. It does not appear that he is otherwise challenging the division of the personal property or the fact that it was an unequal division in favor of appellee. Appellant's brief discusses the requirements for a partnership but does not discuss the distinctions between a partnership and a joint venture. A partnership is defined as "an association of two (2) or more persons to carry on as *co-owners a business for profit.*" Ark. Code. Ann. § 4-42-201(1) (Repl. 2001) (emphasis added). The primary test to determine whether there was a partnership between the parties is their actual intent to form and operate a partnership. *Boeckmann v. Mitchell,* 322 Ark. 198, 909 S.W.2d 308 (1995). Here, appellee testified that she did not intend to become business partners with appellant.

A joint venture exists when there is a special combination of two or more persons jointly seeking a profit in some specific venture without actual partnership or corporate designation. *Fulton v. Fulton*, 528 S.W.2d 146 (Mo. Ct. App. 1975). It has also been defined as "an association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge." *Id.* at 155 (citation omitted). A joint venture is a relationship founded entirely upon contract, and, when a contract exists, that document will be controlling as to what was the parties' intention. *McDermott v. Strauss*, 283 Ark. 444, 678 S.W.2d 334 (1984). Joint ventures and partnerships are governed by the same basic legal principles, *Denny v. Guyton*, 327 Mo. 1030, 40 S.W.2d 562 (1931); *Boles v. Akers*, 116 Okla. 266, 244 P. 182 (1925), but there are important differences, including the ad hoc nature of joint ventures, or their concern with a single transaction or isolated enterprise, plus the fact that loss-sharing is not as essential to joint ventures as it may be for partnerships. *See Hults v. Tillman*, 480 So. 2d 1134 (Miss. 1985).

In *National Bank of Commerce v. HCA Health Services of Midwest, Inc.*, 304 Ark. 55, 800 S.W.2d 694 (1990), the supreme court, citing *State ex rel. Attorney General v. Gus Blass Co.*, 193 Ark. 1159, 105 S.W.2d 853 (1937), stated that a joint venture must have the elements of a partnership. Earlier, the supreme court had clarified its holding in *Gus Blass* by stating:

> We did not say in the *Gus Blass Co.* case that a joint venture must contain every element of a partnership, for then there would be no difference between the two. What we said was that a joint adventure is "in the nature of a partnership of a limited character," and we then examined the agreement in question to determine whether it was sufficiently similar to a partnership to constitute a joint adventure.

Johnson v. Lion Oil Co., 216 Ark. 736, 739, 227 S.W.2d 162, 164 (1950); *see also Texas Oil & Gas Corp. v. Hawkins Oil & Gas, Inc.*, 282 Ark. 268, 668 S.W.2d 16 (1984).

In *Tackett v. Gilmer*, 254 Ark. 689, 496 S.W.2d 368 (1973), the supreme court added a third element for the determination of whether a business enterprise constituted a joint venture, an expressed or implied understanding that the participants are to share in the profits or losses of the venture. *See also First Nat'l Bank v. Adair*, 42 Ark. App. 84, 854 S.W.2d 358 (1993) (citing *Tackett, supra*). However, the parties' sharing of the net profits of an undertaking is also prima facie evidence that they were partners, unless the money received was paid as wages. Ark. Code Ann. § 4-42-202(4)(b) (Repl. 2001). The buying of chattels on joint account for sale at a profit is a common form of joint venture. *Wiseman v. Graham*, 178 Ark. 458, 10 S.W.2d 892 (1928); *Lobsitz v. E. Lissberger Co.*, 168 App. Div. 840, 154 N.Y.S. 556 (1915); *C.C. Roddy, Inc. v. Carlisle*, 391 S.W.2d 765, 768 (Tex. Ct. Civ. App. 1965).

In the present case, there was testimony that both parties bought and sold merchandise for the businesses and that both parties contributed funds for the payment of their common business expenses. Appellant relies on testimony by appellee, given at the hearing for temporary injunctive relief, prior to the trial on the merits, in which she stated that she does not know if she had an interest in appellant's business. He takes appellee's statement out of context by not indicating that it refers to the time period of 1975

or 1976 instead of when appellee started her own business in the late 1980s. This point is essentially a challenge to the trial court's credibility determinations, and we cannot say that the trial court's finding of a joint venture was clearly erroneous. We affirm on this point.

In appellant's second point, he argues that the trial court erred in imposing a constructive trust on the real property from which the parties operated their businesses. The argument is essentially that the trial court erred in finding that appellee had presented sufficient facts to justify the imposition of a constructive trust.

[redacted] It is well established that a constructive trust arises contrary to intention and *in invitum* (against an unwilling party) against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. *See Scollard v. Scollard*, 329 Ark. 83, 947 S.W.2d 345 (1997). In *Bramlett v. Selman*, 268 Ark. 457, 597 S.W.2d 80 (1980), our supreme court held that persons engaging in non-marital involvements may be determined to occupy a confidential relationship sufficient to support a constructive trust where the other elements are present.

[redacted] In *Nichols v. Wray*, 325 Ark. 326, 925 S.W.2d 785 (1996), the supreme court set forth the requirements necessary to impose a constructive trust:

> To impose a constructive trust, there must be full, clear, and convincing evidence leaving no doubt with respect to the necessary facts, and the burden is especially great when a title to real estate is sought to be overturned by parol evidence. The test on review is not whether the court is convinced that there is clear and convincing evidence to support the chancellor's finding but whether it can say the chancellor's finding is clearly erroneous, and we defer to the superior position of the chancellor to evaluate the evidence. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Id. at 333, 925 S.W.2d at 789 (citations omitted). The trial court in this case based its imposition of the constructive trust on its findings

that the parties were in a confidential relationship; that appellee believed that the parties were purchasing the property together; that appellee paid the mortgage payments and appellant did not deny this fact;[1] and that the proceeds from the sale of joint property were used to purchase the property. Appellant does not dispute the fact that the parties had a confidential relationship. He does point to evidence that he believes justifies not imposing a constructive trust. He also points to what he sees as inconsistencies in appellee's testimony. However, the trial judge specifically stated that its findings on the constructive trust issue were based upon the credibility of the witnesses, and we are bound by those determinations unless we find them to be clearly erroneous. *Id.* We cannot say that they are clearly erroneous based upon the record before us.

Affirmed.

GRIFFEN and NEAL, JJ., agree.

Gerald ROBINSON *v.* Karen FORD-ROBINSON

CA 04-370 196 S.W.3d 503

Court of Appeals of Arkansas
Opinion delivered October 27, 2004

[1] Appellant did deny that appellee made the mortgage payments on the business property, stating that he made all of the payments from his monies and that appellee did not make any payments from her funds.

Richard Worsham, for appellant.

Robert D. Wills, Jr., for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellant, Gerald Robinson, and appellee, Karen Ford-Robinson, were married January 28, 2000, separated on May 7, 2003, and a decree of divorce was entered on November 4, 2003. The parties had lived together since August 1997. Gerald had custody of his son, Austin, who was eighteen to twenty months old at the time Karen moved in with them; Austin's birth-mother's parental rights had been terminated by a divorce decree entered in the State of New York. At the time she filed for divorce, Karen initially alleged that Gerald was an unfit parent and asked that she be awarded custody of Austin; in a second amended complaint, she subsequently revised that request and instead asked that she be awarded visitation with Austin because of the mother-child relationship that she and Austin had developed since August 1997 and because it would be in Austin's best interest for her to have visitation with him. The trial judge found that Karen had stood *in loco parentis* to Austin since he was eighteen months old, that he recognized her as his mother, and that it would be in Austin's best interest to have visitation with Karen. Gerald filed a motion for reconsideration, which was deemed denied; he then filed his notice of appeal. On appeal, Gerald contends that the trial judge erred in granting Karen visitation. Specifically, he argues that the trial court erred in relying on *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988), and *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997), because those rulings were overturned by *Troxel v. Granville*, 530 U.S. 57 (2000), and *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002). Alternatively, he argues that if this court holds that *Golden* and *Rawlins* were not overturned, then Karen "failed to meet the standard of proof set forth in *Rawlins*." We disagree with his arguments and affirm the trial court's award of visitation to Karen.

At trial, Gerald characterized Karen's and Austin's relationship as one of "buddies." He said that he and Karen had discussed her being Austin's mother, and he told her that adoption was not

an option because Austin had a biological mother, Lisa Marie Robinson, although her parental rights had been terminated in their divorce. However, he admitted that he had described Karen's relationship with Austin as that of "mother" in e-mails and conversations that he had over the years. He acknowledged that he had executed powers of attorney for Karen so that she could get medical care for Austin when he was away, both prior to and during their marriage, but he said that was not unusual because he was in the military.

Gerald objected to Karen having any contact with Austin after the divorce because he said that she had told him one of the reasons she left was because she was a nanny, not a wife or mother. He also said that since she left, Austin had not asked for her or asked to spend any time with her, and that Austin had never cried for Karen. Gerald said that he did not want to confuse Austin because Karen had been seeing a man from work. However, he admitted that he was also seeing someone, and that he had a sexual relationship with her.

Gerald said that Karen met him at the door when he came home from temporary duty and told him that she had moved out of their residence. Prior to telling Gerald that she was leaving, Karen had taken Austin over to her new apartment without Gerald's knowledge and told him to pick out which room he wanted to be his room.

Gerald testified that he believed that Karen having visitation with Austin "would interfere with someone else playing a role model" in his life. He said that if Austin's biological mother wanted to be in his life again, he thought it would be her right to have some sort of contact. He also said that he hoped that he would meet someone else to marry that Austin could call mother, and he had concerns about there being "too many mothers" in Austin's life.

Karen testified that she came into Austin's life when he was approximately eighteen months old, that she had been his mother for almost the last seven years, and that she loved him as if she was his mother and had loved him since the day she "laid eyes on him." She described their relationship as "great," and said that Austin had called her "Mommy" since he was a little over two years old. She stated that Austin did not know that she was not his birth mother until he was in first grade. She said that Austin was a sweet, lovable child, and that she wanted to continue to have some type

of relationship with him although she had been very unhappy in her marriage to Gerald. She testified that she was not willing to try to prove that Gerald was an unfit parent.

In explaining her relationship with Austin, Karen said that she loved him and cared for him; that she went to all of his parent-teacher conferences, games, and school functions; and that she was a good mother and role model for him. She said that she wanted visitation because she loved Austin, they had a good relationship, and she felt that it would be in his best interest for them to be able to continue that relationship.

Karen admitted that she took Austin to her new residence and let him pick out a room before she told Gerald that she was moving out; however, she explained that she did not want Austin to think that she had "skipped town or abandoned him." She agreed that it might be confusing for Austin to possibly end up having three mothers, but she also said that she thought it would be confusing for him not to have the person whom he called mother for over six years in his life anymore. She said that Gerald had told her that they were a package deal — if she did not want him then she could not have Austin.

Tommye Jo Ford, Karen's mother, testified that Karen and Austin had a very close relationship and that Karen had immediately fallen in love with Austin when she met him. She said that the two of them really bonded as mother and son. She stated that Austin began referring to Karen very early in the relationship as Mommy. She said that Karen was Austin's mother in every sense of the word for over six years, and that she believed that Austin would benefit from any visitation he had with Karen. She said that Austin was one of her grandchildren. She stated that she believed Gerald's resistance to Austin seeing her or Karen came from the fact that his mother had remarried somewhere around sixteen times, from what she had been told. However, she said that she was not saying that Gerald was an unfit father; in fact, she stated that she had nothing negative to say about Gerald's parenting ability.

Martha Wiley, an assistant director at Sylvan Hills Learning Center, testified that Austin was enrolled at the center and was a happy kid. She said that she did not know that Karen was his mother until Karen showed up at the center with cookies after she and Gerald had divorced. Wiley said that she had never seen Karen before, that Austin was not enthused to see her, and that he did not accept the cookies.

Linda Johnson, Gerald's mother, testified that Austin was worried about his daddy being by himself and did not understand why his mother was "doing this" to his daddy. She said that she had never seen Austin cry because he missed his mother.

Serena Dempsey, Austin's babysitter once or twice a month, said that she had not seen him cry because he missed his mother. She said that he did not ask about Karen, and once, when she asked him if he missed Karen, he told her, "no, not really."

Domestic relations cases are reviewed *de novo*, and the trial judge's findings will not be disturbed unless they are clearly against the preponderance of the evidence. *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997). On appeal, Gerald argues that the trial court erred in granting Karen visitation with Austin. Specifically, he argues that the trial court erred in relying on *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988), and *Golden v. Golden, supra*, because those rulings were overturned by *Troxel v. Granville*, 530 U.S. 57 (2000), and *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002). We disagree.

We hold that the present case is distinguishable from *Troxel* and *Linder*, both of which concern grandparent visitation. Specifically, *Troxel* involved a statute from the State of Washington that allowed any person to petition the court for visitation rights at any time, and a trial court could grant visitation when it was determined that such visitation would serve the best interest of the child. In that case, the paternal grandparents petitioned for visitation with their two granddaughters after their son's death and after the girls' mother limited their visitation to one daytime visit per month. The superior court granted grandparent visitation one weekend per month, one week during the summer, and four hours on each of the grandparent's birthdays. The Washington Court of Appeals reversed the visitation order and dismissed the case, and the Washington Supreme Court affirmed that decision. The United States Supreme Court granted *certiorari* and affirmed the denial of visitation in a plurality opinion.

In affirming the denial of visitation and holding the Washington statute unconstitutional, the Supreme Court recognized the "fundamental right of parents to make decisions concerning the care, custody, and control of their children," 530 U.S. at 66, under the Fourteenth Amendment, and held that the "breathtakingly broad" statute infringed upon that fundamental right by permitting any third party who sought visitation to subject a

parent's decision regarding visitation to state-court review. The *Troxel* court held that there was a presumption that fit parents act in the best interests of their children, and that when the Washington Superior Court intervened, it gave no special weight to the mother's determination of her children's best interests, thus failing to provide any protection for the parent's fundamental right to raise her daughters. The Court held that if a fit parent's decision is subject to judicial review, there must be accorded at least some special weight to that fit parent's determination.

However, the Court held that it did not define the "precise scope of the parental due process right in the visitation context. . . . Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter." 530 U.S. at 73.

In *Linder, supra,* our supreme court held that while our state's grandparent-visitation statute was not facially invalid, it was unconstitutional as applied. In so finding, the supreme court held that the trial court found the mother to be a fit parent for all purposes except the issue of making a decision about her son's relationship with his paternal grandparents. The court held that unfitness solely to decide visitation matters was not a compelling interest on the part of the State that warranted invasion of a parent's fundamental parenting rights and reversed and dismissed the order providing visitation to the grandparents. We also note Justice Hannah's dissent in *Linder,* in which he stated:

> I also write to emphasize that this decision is narrow in scope and applies only to visitation issues arising from application of Ark. Code Ann. § 9-13-103 (Repl. 2002). In other words, this decision is limited to an attempt by grandparents to obtain visitation under the subject statute. The analysis should not be confused and applied in a case where the State is determining custody, and visitation on other bas[e]s, including other statutory schemes, or under the State's exercise of its sovereign *parens patriae* power in protection of the children of this State.

348 Ark. at 357-58, 72 S.W.3d at 861.

We hold that the facts of the present case are distinguishable from *Troxel* and *Linder.* Here, we are not dealing with statute-mandated visitation rights; rather, stepparent visitation is a creature of case law. Furthermore, the situation in the present case is one of

a person whom the trial court found had stood *in loco parentis* to the child rather than a person or persons who simply had a relationship with the child. We hold that the finding of an *in loco parentis* relationship is different from the grandparent relationships found in *Troxel* and *Linder* because it concerns a person who in all practical respects was a parent.

This court's decision in *Golden, supra,* is distinguishable from *Troxel, supra,* and *Linder, supra,* and we hold that it supports affirming the trial judge's decision to grant Karen visitation with Austin. In *Golden,* the trial judge found that the stepfather stood *in loco parentis* to the child and granted him visitation. On appeal, the natural mother argued that the trial judge erred in finding that the stepfather stood "*in loco parentis*" to the child; however, this court found no error in the trial judge's finding. Citing Black's Law Dictionary (6th ed. 1990), the court defined *in loco parentis* as "in the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities," and stated that the supreme court had held in *Moon Distrib. v. White,* 245 Ark. 627, 434 S.W.2d 56 (1968), that a stepmother stood *in loco parentis* to the minor child when they lived in the same home as mother and daughter.

In *Golden,* this court held that the circumstances warranted the finding of *in loco parentis* because the stepfather had lived with the child as his father from October 1993 until November 1994 and from December 1994 until April 1995. Although the stepfather mistakenly believed that he was the natural father in that case, he was the only father the child had ever known. In the present case, Karen was the only mother that Austin ever knew, and Austin believed that she was his natural mother until he was in the first grade. Furthermore, Karen was involved in Austin's life for a much longer period of time than was the stepfather in the *Golden* case. We cannot say that the trial judge was clearly erroneous in finding that Karen stood *in loco parentis* to Austin. We also hold that *Golden* clearly indicates that the status of *in loco parentis* permits, where circumstances warrant, that a stepparent be granted visitation with a stepchild, and such circumstances are present in this case.

Gerald alternatively argues that Karen "failed to meet the standard of proof set forth in *Rawlins.*" We find no merit in this contention. *Rawlins, supra,* involved whether a stepparent could gain custody of a stepchild, not whether a stepparent could be

granted visitation. In that case, our supreme court held that a stepparent could be awarded custody if it was established that the natural parent was unfit; however, there was a preference for natural parents in custody matters when the natural parent was a fit and proper person for custody. In that particular case, although the supreme court held that a stepparent could be granted custody, the court reversed the grant of custody to the stepfather because the trial judge had specifically found that the mother was a fit and proper person for custody. We do not find *Rawlins* to be instructive with regard to the particular situation before us.

We affirm the trial court's grant of visitation to Karen based upon the determination that she stood *in loco parentis* to Austin.

Affirmed.

PITTMAN and CRABTREE, JJ., agree.

Douglas Edward WILSON *v.* STATE of Arkansas

CA CR 03-1067 196 S.W.3d 511

Court of Appeals of Arkansas
Opinion delivered October 27, 2004

[redacted]

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[redacted]

James Law Firm, by: *William O. James, Jr.*, for appellant.

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

JOHN MAUZY PITTMAN, Judge. Appellant was charged with attempt to manufacture methamphetamine and possession of drug paraphernalia with intent to manufacture methamphetamine. After a jury trial, appellant was convicted of those offenses and sentenced to fifteen years in the Arkansas Department of Correction. On appeal, appellant argues that the trial court erred in denying his motion for a directed verdict; in denying his motion to suppress evidence seized pursuant to a warrant that, appellant asserts, did not authorize the nighttime search and was not supported by probable cause; in denying his motion to dismiss for lack of a speedy trial; and in denying his motion to dismiss counsel. We affirm.

We first address appellant's argument that the trial court erred in denying his motion for a directed verdict. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Fields v. State*, 349 Ark. 122, 76 S.W.3d 868 (2002). In reviewing a challenge to the sufficiency of the evidence, we will not second-guess credibility determinations made by the fact-finder. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). Instead, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We affirm the conviction if there is substantial evidence to support it. *Hughes v. State*, 74 Ark. App. 126, 46 S.W.3d 538 (2001). Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty, without resorting to speculation or conjecture. *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991).

Appellant's conviction was based on an accomplice's testimony that he and appellant were engaged in manufacturing methamphetamine. The accomplice testified that he and appellant had an agreement to manufacture methamphetamine for sale and to split the proceeds. The accomplice stated that he did all the cooking, and that the appellant helped him acquire the ingredients and stood watch on the road during the manufacturing process to make sure no one came up. The accomplice's testimony was

corroborated by the presence of numerous precursor products and substances found in the search of appellant's house, including a cellophane wrapper containing pseudoephedrine, a syringe, a glass pie plate, a glass coffee pot, a glass jar containing pseudoephedrine, a spoon, coffee filters containing residue, a spoon with pseudoephedrine residue, a clear drinking glass with coffee filters, a plastic sandwich bag with talc powder, and a green-and-black compressed gas cylinder containing ammonia.

On appeal, appellant argues that this evidence is insufficient because the accomplice's testimony was not credible. We do not agree. In a similar context where it was argued that an accomplice's testimony given in exchange for leniency was not substantial evidence, we applied the longstanding rule that the determination of credibility issues is left to the trier of fact. *Johnson v. State*, 75 Ark. App. 81, 55 S.W.3d 298 (2001). The credibility of the accomplice in the present case was likewise a question for the trier of fact to resolve, and we hold that appellant's conviction is supported by substantial evidence.

We next address appellant's contention that the evidence obtained in the search of his house should be suppressed because the warrant did not authorize a nighttime search. Rule 13.2(c) of the Arkansas Rules of Criminal Procedure requires that a search warrant be executed between the hours of 6:00 a.m. and 8:00 p.m. unless the warrant authorizes a nighttime search. The officers' application for a search warrant in this case specifically sought a nighttime warrant. The search warrant was executed at 8:46 p.m. The warrant provided, in pertinent part, that:

> [A]s I am satisfied that there is probable cause to believe that the property so described is being concealed at the above described and that the foregoing grounds for application for issuance of a night time search warrant exists [sic].
>
> COMMANDED; to search forthwith the (person) (place) (vehicle) named for the party specified, serving this warrant and making the search and if the property be found there to seize it, and prepare a written inventory of the property seized and return this warrant and bring the property as required by law.

The warrant was not a form with filled-in blanks or checked items, but was an individually-prepared document.

In *Carpenter v. State*, 36 Ark. App. 211, 821 S.W.2d 51 (1991), we held that a printed-form search warrant checking only the box indicating that there was reasonable cause to believe that the objects to be seized were in danger of imminent removal, but not the box authorizing a nighttime search, was insufficient either to authorize a nighttime search or to justify application of the good-faith exception in *Leon v. State*, 468 U.S. 897 (1984). The present case is distinguishable. Here, the affidavit stated facts tending to support an order authorizing the request to conduct the search at night, including statements that the house was equipped with cameras to detect the approach of police officers; that the house contained weapons, including a sawed-off shotgun; and that most of the drug manufacturing took place at night. Although the language of the warrant could have been plainer, the warrant was not a form conspicuously lacking a check mark authorizing a nighttime search, but was instead an individually-prepared document expressly stating that (1) a warrant for a nighttime search had been applied for; (2) grounds for a nighttime search existed; and (3) commanding that the search be conducted. Even assuming, without deciding, that this language was insufficient to constitute an unambiguous command to execute a nighttime search, we think that it was sufficient to justify the executing officers in the good-faith belief that they were authorized to do so. *See Leon v. State, supra.*

Appellant next contends that the trial court erred in issuing a search warrant at all. He argues that the affidavit in support of the warrant was insufficient to establish probable cause to believe that contraband would be found at appellant's home because the affidavit lacked specific dates and was otherwise conclusory.[1] We disagree. Probable cause cannot be quantified merely by counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit; instead, time factors must be examined within the context of a specific case and the nature of the crime being investigated. *Ilo v. State*, 350 Ark. 138, 85 S.W.3d 542 (2002). Although it is reasonable to imply that

[1] Appellant's argument regarding probable cause is limited to these specific points. He does not challenge, and consequently we need not decide, whether the many other facts stated in the affidavit were sufficient to justify the trial court's separate finding that adequate grounds existed for conducting the search at night, rather than only in daylight hours.

probable cause dwindles rather quickly with the passage of time in cases where the affidavit recites a mere isolated violation, the passage of time becomes less significant where the affidavit recites facts indicating activity of a protracted and continuous nature, *i.e.*, a course of conduct. *Id.* Here, the affidavit stated that a member of appellant's family informed police officers that appellant was manufacturing methamphetamine at his home on a *regular basis,* and that this was reiterated on December 12, 2000, immediately before the warrant was issued. The affidavit also stated that the family member informed the affiant that materials used in the manufacture of methamphetamine were located on the appellant's premises at that time. Under these circumstances, we cannot say that probable cause was lacking.

Resolution of appellant's issues relating to speedy trial and the motion to dismiss counsel requires consideration of facts arising out of a pretrial hearing, where the following colloquy took place:

> THE COURT: Now then, let's talk about the trial then. Is this matter one that can be tried in a day?
>
> [PROSECUTOR]: Yes.
>
> THE COURT: Okay, then let's try it on Thursday.
>
> MR. WILSON [APPELLANT]: You Honor —
>
> THE COURT: Mr. Wilson, we've discussed before that you have counsel and that your counsel can present matters to the court, that you do not communicate to the court but through your counsel.
>
> [APPELLANT]: You Honor, my counsel will not make —
>
> THE COURT: Mr. Wilson —
>
> [APPELLANT]: — you aware of something that's in the transcript where Mr. Rich lied on the stand in the probable cause hearing and it's real relevant to the affidavit for the search warrant and —
>
> THE COURT: Mr. Wilson, we're going to — I'm going to give you the last time I'm going to talk to you about this.

[APPELLANT]: You honor, I have to defend myself.

THE COURT: No, sir, you have —

[APPELLANT]: If he won't defend me I have to defend myself.

THE COURT: Take Mr. Wilson to jail.

[APPELLANT]: So I'm relieving him as my counsel —

THE COURT: Take Mr. Wilson to jail —

[APPELLANT]: — right now.

THE COURT: — right now. I don't need his presence in this hearing anymore.

[APPELLANT]: Okay, but if you're not going to hear my motion —

THE COURT: Take Mr. Wilson to the jail.

[APPELLANT]: — then I can't —

THE COURT: I will continue to make my record outside of Mr. Wilson's presence. Take him to the jail right now.

[APPELLANT]: Mr. Blair, you are no longer my lawyer.

THE COURT: Take Mr. Wilson to the jail.

[APPELLANT]: Have a trial without me.

After appellant had been taken to jail, appellant's attorney requested that appellant be allowed to represent himself. The trial court denied this request, noting that appellant's behavior throughout the pretrial proceedings had been so disruptive as to cast doubt on appellant's capacity to present his own defense before a jury. Appellant's attorney then requested that a mental examination of appellant be conducted to determine whether he was capable even of assisting in his own defense. The trial court granted the motion over the State's objection.

Under Ark. R. Crim. P. 28.1, a defendant must be brought to trial within twelve months unless there are periods of delay that are excluded under Ark. R. Crim. P. 28.3. *Gondolfi v. Clinger*, 352 Ark. 156, 98 S.W.3d 812 (2003). A continuance that is requested by the defendant is an excludable period for speedy-

trial purposes. *Moody v. Arkansas County*, 350 Ark. 176, 85 S.W.3d 534 (2002). In the present case, the only disputed excluded period was the period attributable to the request for a mental examination made by appellant's court-appointed attorney after appellant purported to dismiss him immediately before being removed from the courtroom. Therefore, the speedy-trial question hinges on whether the trial court erred in denying appellant's motion to dismiss his trial counsel. We hold that he did not.

Although the trial court granted the motion for a mental examination, the appellant refused to cooperate with the psychologist for "legal reasons" and was never evaluated. Nevertheless, we do not agree with appellant's assertion that the trial court should have allowed him to dismiss his attorney and proceed *pro se*. The disruptive behavior described in the above-quoted colloquy was not an isolated event, nor was it limited to a single hearing. Our examination of the record reveals that, although the two trial judges involved showed an extraordinary degree of patience and forbearance, appellant's demeanor before the court was characterized by consistent disrespect and disruption, interspersed with numerous motions to dismiss his attorney that were later rescinded. The constitutional right to counsel is a shield, not a sword, and a defendant may not manipulate this right for the purpose of delaying the trial or playing "cat-and-mouse" with the court. *Brooks v. State*, 36 Ark. App. 40, 819 S.W.2d 288 (1991). The right to counsel of one's choice is not absolute and may not be used to frustrate the inherent power of the court to command an orderly, efficient, and effective administration of justice. *Burns v. State*, 300 Ark. 469, 780 S.W.2d 23 (1989). Once competent counsel is obtained, the request for a change in counsel must be considered in the context of the public's interest in the prompt dispensation of justice. *Id.* There is no indication that appellant's court-appointed counsel was not competent, and, on this record, we hold that the trial court did not err in denying appellant's motion to dismiss counsel and that appellant was not denied his right to a speedy trial.

Affirmed.

GLADWIN and NEAL, JJ., agree.

Beverly ROBINSON *v.*
ST. VINCENT INFIRMARY MEDICAL CENTER

CA 04-165 196 S.W.3d 508

Court of Appeals of Arkansas
Opinion delivered October 27, 2004

Simmons S. Smith, for appellant.

Walter A. Murray, for appellee.

ROBERT GLADWIN, Judge. Appellant Beverly Robinson appeals from a decision of the Workers' Compensation Commission denying her benefits. The Commission found that appellant did not suffer a compensable injury because she was not performing employment services at the time of her injury. We affirm.

Appellant worked as a housekeeper and part-time supervisor for St. Vincent Infirmary Medical Center. On the day of her injury, she had finished cleaning an operating room on the second floor and was proceeding to the fourth floor to get her coin purse

and her lunch. She testified that although she did not clock out for lunch, she was on her lunch break and was planning to take her lunch to the cafeteria after she retrieved it from the fourth floor.

As appellant stepped off the elevator on the fourth floor, she slipped in a puddle of spilled coffee, heard a pop, and thought her leg was broken. After she got up, she called for help. Her supervisor arrived, and the two women cleaned up the spilled coffee. Appellant then went to the emergency room for an exam.

Appellant later received treatment from Drs. John Wilson, Karmen Hopkins, and Harold Chakales. Dr. Chakales diagnosed lumbar disc syndrome and ordered an MRI of the appellant's lumbar spine. Following an abnormal discography, he performed an IDET procedure at L4/5 and L5/S1.

Appellant sought temporary total disability benefits and payment of medical benefits from treatment performed by Dr. Hopkins and Dr. Chakales. Appellees controverted the claimant's request for benefits, contending that appellant did not sustain a compensable injury. The administrative law judge (ALJ) found that appellant had failed to prove by a preponderance of the evidence that she was performing employment services at the time she sustained the injury, and her request for benefits was denied. The opinion of the ALJ was affirmed and adopted by the Commission.

Appellant argues four points on appeal. First, she argues that the Commission's decision is not supported by substantial evidence. We will discuss appellant's next three points together because they are essentially the same in that appellant contends that she was performing job-related duties at the time of her injury.

Our standard of review is well settled. We view the evidence in a light most favorable to the Commission's decision and affirm if it is supported by substantial evidence. *Deffenbaugh Indus. v. Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993). 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. *ERC Contr. Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998).

A compensable injury is defined, in part, as an accidental injury arising out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2003). A compensable injury does not include an injury "inflicted upon the employee at a time

when employment services were not being performed." Ark. Code Ann. § 11-9-102(4)(B)(iii). In *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998), we held that a claim was not compensable because employment services were not being performed when Harding tripped over a rolled-up carpet on her way to a designated smoking area in the work place. We rejected her argument that the break advanced her employer's interest by allowing her to relax and thus to work more efficiently. We observed that an employee's injury sustained en route to the break area would have been in the course of employment under prior law and the personal-comfort doctrine but that Act 796 of 1993 excluded from the definition of compensable injury any injury inflicted upon an employee while the worker was not performing employment services.

In *Beaver v. Benton County*, 66 Ark. App. 153, 991 S.W.2d 618 (1999), a child-support enforcement investigator was attending a training seminar in Fort Smith when she was injured. While at lunch, she slipped on a wet floor when she approached the buffet table. Although the employee was provided an allowance for the meal, she was not required to eat at a certain location or with her group. The lunch break was considered free time, and each person could do as he pleased. We affirmed the Commission's denial of benefits based on the finding that appellant was not performing employment services at the time she was injured. We held that an employee is performing "employment services" when he is engaging in an activity that carried out an employer's purpose or advanced the employer's interest and that appellant was not advancing the employer's interest. *Id.* at 157.

In *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999), a cafeteria employee was injured during a paid fifteen-minute break when she fell in a puddle of salad dressing as she was getting a snack from the cafeteria. The record showed that even though the employee was on break, if she was approached by a student, the worker was required to leave her break and address the student's needs. The Commission found that appellant was not performing employment services at the time of the injury and denied benefits. We reversed the Commission's decision because the employee was paid for her fifteen-minute break and was required to assist student diners if the need arose. *Id.* at 181.

In *White v. Georgia Pacific Corp.*, 339 Ark. 474, 6 S.W. 3d 98 (1999), the employee was required to monitor the machines he worked on during his smoke break because no relief worker was

provided. He was injured when he fell during his smoke break. The Commission denied benefits, finding that the employee failed to demonstrate that he was performing employment services at the time of his injury. Finding White's situation to be analogous to *Ray*, *supra*, the supreme court found that the employer gleaned a benefit from White in that he remained near his work station in order to monitor the progress of his machines and would immediately return to work if necessary.

Appellant argues that this case falls within the purview of *Ray* in that she was advancing her employer's interest in the course of her employment and that she was not on a break at the time of her injury. In addition, she argues that by cleaning up the coffee after her fall, she was advancing the interest of her employer.

We believe this case is distinguishable from *Ray*. Here, appellant left the second floor and was proceeding to the fourth floor to get her lunch and personal effects. From there, her intention was to go to the cafeteria. Appellee gleaned no benefit from appellant going to the fourth floor to get her lunch. Her action was totally personal in nature and more in line with *Beavers* and *Harding*. Further, the fact that appellant cleaned up the spill after her fall could be considered performing employment services; however, this occurred after the fall and is of no consequence in determining whether she was performing employment services at the time of the fall.

Based on the foregoing, we hold that the Commission did not err in finding that appellant was not performing employment services that advanced her employer's interest, either directly or indirectly, at the time of her injury. As a result, the Commission's decision displays a substantial basis for the denial of benefits.

Affirmed.

NEAL, J., agrees.

PITTMAN, J., concurs.

1993 FORD PICK-UP (VIN # 1FTDF15Y4PNA28918);
Steve Grisham *v.* STATE of Arkansas

CA 04-29 196 S.W.3d 493

Court of Appeals of Arkansas
Opinion delivered October 27, 2004

Jenkins Law Firm, PLLC, by: *Kara Bideler Moore*, for appellant.

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

WENDELL L. GRIFFEN, Judge. Steve Grisham appeals from a forfeiture proceeding, arguing that the State failed to prove by a preponderance of the evidence that his 1993 Ford Pickup (VIN #1FTDF15Y4PNA28918) was used or intended to be used to transport, for the purpose of sale or receipt, a controlled substance. We agree; therefore, we reverse.[1]

On June 26, 2003, police executed a search warrant on a Fort Smith residence. At the residence, police found evidence of three separate methamphetamine laboratories along with empty cans, empty bottles, and stained coffee filters. Police found several vehicles on the property, one of which was stolen. Among the vehicles was a 1993 Ford Pickup parked near the front door of the house registered to Grisham and Nan Bartimus, Grisham's mother.[2] In the truck, Narcotics Supervisor George Lawson Jr. found a yellow piece of paper listing eight names and varying dollar amounts beside each name. Lawson testified that "I've seen papers just like this in pretty much every place that we go into where there is actual distributing of drugs and it's consistent with pruning out the narcotics to certain individuals and then writing down what they owe. I mean, it's basically business accounting practices." Grisham, representing himself at the September 10, 2003 hearing, testified that the piece of paper was an accounting of people he had lent money to over the years. Lawson was then recalled and testified that one of the persons on the list was arrested for narcotics. During the search of the residence, a man, later

[1] Grisham also makes a constitutional argument, stating that the forfeiture of the truck violates his Due Process rights. Grisham failed to make these arguments below, and we do not address arguments not raised at the trial court level. *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002). Even if we were to consider the argument, the Arkansas Supreme Court has already addressed the issue. *See One 1982 Datsun 280ZX v. Bentley*, 285 Ark. 121, 685 S.W.2d 498 (1985) (affirming the constitutionality of the forfeiture statute under article 2, section 22 of the Arkansas Constitution). *See also Bennis v. Mitchell*, 516 U.S. 442 (1996) (holding that the Michigan forfeiture statute was not a violation of the Fifth and Fourteenth Amendments of the United States Constitution).

[2] Bartimus filed an Affidavit of No Interest in the vehicle. She is not a party to this appeal.

identified as Grisham, rode by the residence on a motorcycle and left. Grisham testified that he did not make an attempt to claim his truck that day because he felt it was best to stay away.

Five days after the search, Grisham contacted Lawson and asked about getting his truck back. Grisham told Lawson that he had taken the motorcycle and left his truck at the residence. Grisham also told Lawson that he knew that methamphetamine was produced at the residence and that anyone who walked onto the property would have known that the property was a methamphetamine laboratory simply because of the amount of chemicals on the property.

After hearing testimony, the court found that grounds for forfeiture existed under Ark. Code Ann. § 5-64-505 (Supp. 2003). This appeal followed.

Forfeiture actions are *in rem* civil proceedings, independent of any pending criminal charges. *Burnett v. State*, 51 Ark. App. 144, 912 S.W.2d 441 (1995). The burden of proof in the trial court is by a preponderance of evidence. *Id.* Because the forfeiture statute is penal in nature and because forfeitures are not favored under the law, the forfeiture statute is to be narrowly interpreted. *Id.* This court will reverse the findings of the trial court only if they are clearly against the preponderance of the evidence. *Id.*

Arkansas Code Annotated section 5-64-505(a)(4) provides for the forfeiture of:

> [a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in subdivision (a)(1) or (2) of this section [referring to controlled substances and other drug paraphernalia].[3]

The statute requires proof that "the vehicle was used to transport the controlled substance 'for the purpose of sale or receipt.' " *Burnett*, 51 Ark. App. at 145, 912 S.W.2d at 441-42.

In this case, a piece of paper (the drug dealer's accounting method) was found in a wallet found in a truck on property known to be a methamphetamine lab. Our standard of review

[3] While other potential theories were alleged in the original complaint (e.g., the truck was given in exchange for drugs), the parties dispute the applicability of subsection (a)(4) only.

requires us to accept Lawson's testimony and conclude that the piece of paper was "drug paraphernalia"; however, there is no proof that the truck was used to transport drugs. No one testified that the truck was used to transport any drugs. The trial court may have drawn this inference based on the minimal evidence presented, but the proof does not support such an inference. Because there was no evidence to show that the truck had been used or was intended for use in transporting drugs, we reverse.

Reversed.

NEAL and ROAF, JJ., agree.

Margie Elaine ROCCONI *v.* James Richard ROCCONI

CA 03-1464 196 S.W.3d 499

Court of Appeals of Arkansas
Opinion delivered October 27, 2004

Wynne & Wynne, by: *Tom Wynne, III*, for appellant.

James M. Pratt, Jr., for appellee.

OLLY NEAL, Judge. Appellant Margie Rocconi appeals from a June 5, 2003 order of the Ouachita County Circuit Court granting appellee James Rocconi a divorce. On appeal, she contends that the trial court erred in ruling that appellee had proved he was entitled to a divorce on the grounds of personal indignities. She also contends that, in light of appellee's admitted adultery, the doctrine of recrimination barred appellee from obtaining a decree of divorce.

The parties were married on December 23, 1993, and there were no children born of the marriage. Despite separating on June 17, 2002, the parties continued to share the marital residence until August 2002. On June 19, 2002, appellant filed a complaint seeking separate maintenance. Appellee answered with a counterclaim for divorce on the grounds of personal indignities. Appellant filed a motion to dismiss the counterclaim for divorce on November 22, 2002. She alleged that within the past five years, appellee had committed adultery and that he was, therefore, barred from obtaining a divorce. Appellee denied the adultery allegation.

At the hearing, appellant testified that she was fifty-one years old. She said that, from 1994 to 2002, their marriage was "wonderful." She testified that in November 2001, appellee moved out of the marital bedroom because he thought his snoring was bothering her. Despite their separate sleeping arrangements, appellant said that up until August 2002, they continued to have an intimate relationship. She stated that at some point between November 2001 and February 2002, appellee stopped spending time with her. Appellant said that appellee would spend every weekend at their property in Chidester.

In July 2001, appellant began going to the casinos in Shreveport. She said that she won $25,000 her first weekend and that the third time she went she won $37,500. Appellant testified that she did not go to the casinos on a regular basis. She said that between July 2001 and August 2002, she only went to the casinos twenty-five times. Appellant estimated that she had won about $235,000 and lost about $16,000. She said that appellee never voiced any concern about the amount of time she spent at the casinos, and that one time he had taken her winnings and had refused to tell her how he had spent them. Appellant testified that appellee kicked her out of the marital home in May 2002, when she refused to sign a deed transferring certain marital property to appellee's son. She stated that she stayed two days with her sister and that when she returned appellee had changed all the locks. She said that eventually

appellee gave her a new key and that from May 2002 to August 2002, they lived at opposite ends of the marital home. Appellant also said that she never used household money or money from appellee's veterinary clinic to gamble. However, she admitted charging $10,000 on one of their joint credit cards to pay off her Discover Card debt.

Appellant testified that appellee was living with Teresa King. She also testified that, following the August 12, 2002, temporary hearing, someone left pictures of appellee and a woman other than King outside her apartment. Appellant said that she gave the pictures to appellee.

John Thomas Wilson, appellant's son, testified that he lived with the parties up until their separation. He said during the marriage, appellant had several illnesses and that, when appellee came home from work, appellant was usually in bed. Wilson testified that appellant went to the casinos every other weekend.

Jo Ann England, appellant's sister, testified that appellee had called her several times and had tried to convince her that appellant had "problems." She said that a couple of times he suggested that appellant had a gambling problem.

Terry Harcrow testified that he had known appellant for seventeen years. He said that sometime in early 2002, appellant informed him that she had won around $225,000 at the casino and that she had hidden "somewhere between $151,000 and $161,000" from appellee.

Appellee testified that appellant began gambling in 2001 and that, by early 2002, he began to suspect that her gambling was out of hand. Appellee also testified that he did not have a problem with appellant gambling every now and then but when she started going to the casinos every weekend, he thought there was a problem. Appellee said that he learned the full magnitude of appellant's gambling when they had their 2001 taxes prepared. He said that at that time he learned that, instead of the $60,000 that appellant said she had won, appellant's actual winnings for 2001 were $231,000. Appellee said that during a fishing trip, he learned that appellant had "maxed out" his clinic credit card. He stated that he did not approve the $10,000 credit-card transfer to pay appellant's Discover Card debt. Appellee could not recall ever voicing to appellant his concerns about her gambling. However, he later testified

that he told appellant she needed help. He said that appellant's gambling had an effect on their marriage in that appellant was never home, she stopped accompanying him to church, stopped cooking, and stopped accompanying him to meetings and banquets. He also said that appellant would go three to five days without putting on her "street clothes." During his testimony, appellee indicated that the parties' marriage could not be saved.

Appellee testified that his relationship with Teresa King began in August 2002. He denied any involvement prior to August.

Cindy Mouse, appellee's daughter, testified that appellant was going to the casinos as often as every weekend and that appellant had stopped attending family functions. She described appellee as being unhappy. She stated that the parties would often quarrel about the amount of time appellant was spending at the casinos.

Appellee's son, James Phillip Rocconi, testified that, because appellant was either gone or locked in her room, the parties spent little time together. He said that appellant first started going to the casinos once a month and that she eventually started going three times a month. He said that the reason he knew this was because, each time appellant would go to the casino, appellee would call him. He testified that when appellee would call, he would change his plans so that he could spend time with him. He described appellee as being miserable and lonely.

Teresa King testified that she and appellee became friends in August 2002. She denied having a romantic relationship with appellee prior to August 2002.

Based on this evidence, the trial court found that appellant's gambling, prior to the parties' separation, was excessive and was the primary cause of their separation. The trial court also found that appellant's gambling constituted personal indignities and that, because of appellant's gambling, appellee was entitled to an absolute divorce. The trial court denied appellant's claim for separate maintenance and also denied appellant's motion to dismiss.

Our standard of review in this case is *de novo*. *Rutherford v. Rutherford*, 81 Ark. App. 122, 98 S.W.3d 842 (2003). On appeal, we do not reverse the lower court's findings unless they are clearly erroneous. *Banks v. Evans*, 347 Ark. 383, 64 S.W.3d 746 (2002). A finding is clearly erroneous when, although there is evidence to

support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.*

In her first argument on appeal, appellant contends that the trial court erred in ruling that appellee had proved he was entitled to a divorce on the grounds of personal indignities. Divorce is a creature of statute and can only be granted upon proof of a statutory ground. *Poore v. Poore*, 76 Ark. App. 99, 61 S.W.3d 912 (2001). In the case at bar, the action for divorce was based on personal indignities. In order to obtain a divorce on that ground, the plaintiff must show a habitual, continuous, permanent, and plain manifestation of settled hate, alienation, and estrangement on the part of one spouse, sufficient to render the condition of the other intolerable. *Id.* Personal indignities have been defined as rudeness, unmerited reproach, contempt, studied neglect, open insult and other plain manifestations of settled hate, alienation and estrangement, so habitually, continuously and permanently pursed as to create an intolerable condition. *See Copeland v. Copeland*, 2 Ark. App. 55, 616 S.W.2d 773 (1981). It is well settled that the testimony of the plaintiff as to the ground for divorce is not sufficient and that same must be corroborated by other testimony. *See id.*

It is clear that appellant engaged in a habitual conduct that had alienated her husband and made his living situation intolerable. Therefore, we cannot say that the trial court erred when it found that appellant's gambling caused the demise of the parties' marriage and that the gambling constituted personal indignities such that appellee was entitled to a divorce.

Appellant also contends that, in light of appellee's "admitted adultery," the doctrine of recrimination barred appellee from obtaining a decree of divorce. The doctrine of recrimination provides that when the conduct of both parties has been such as to furnish grounds for divorce, neither of the parties is entitled to relief. *Narisi v. Narisi*, 229 Ark. 1059, 320 S.W.2d 757 (1959). The doctrine of recrimination applies only when both parties are equally at fault. *Lewis v. Lewis,* 248 Ark. 621, 453 S.W.2d 22 (1970); *Posey v. Posey*, 268 Ark. 894, 597 S.W.2d 834 (Ark. App. 1980).

While we recognize that pursuant to *Milne v. Milne*, 266 Ark. 900, 587 S.W.2d 229 (Ark. App. 1979)[1], appellant committed adultery, it is the province of the trial court to determine which party's conduct was more egregious. However, when one party's conduct is more egregious than the other's conduct, it is proper to grant a divorce to the party whose conduct is the lesser of the two. *See Ayers v. Ayers*, 226 Ark. 394, 290 S.W.2d 24 (1956); *Longinotti v. Longinotti*, 169 Ark. 1001, 277 S.W. 41 (1925); *Posey v. Posey*, *supra*. Quite often, the party whose conduct is more egregious is also the first offender. *See Ayers v. Ayers*, *supra*; *Longinotti v. Longinotti*, *supra*. Here, appellant was the first offender, and it was proper for the trial court to find her conduct to be more egregious than that of appellee's. *See Ayers v. Ayers*, *supra*; *Longinotti v. Longinotti*, *supra*.

Affirmed.

GRIFFEN and ROAF, JJ., agree.

Dedra D. THOMPSON,
Jeff Mynatt, Shanna Mynatt, and Paul Albert *v.*
DIRECTOR, ARKANSAS EMPLOYMENT SECURITY DEPARTMENT and Arkansas Eastman Division

E03-127; E03-128; E03-143; E03-152 196 S.W.3d 521

Court of Appeals of Arkansas
Opinion delivered October 27, 2004

[1] In *Milne*, we defined adultery as including sexual intercourse by a married person with a person who is not his or her spouse, regardless of whether the person accused is living with his spouse.

Larry J. Steele, for appellants.

Allan Franklin Pruitt, for appellee.

WENDELL L. GRIFFEN, Judge. Dedra Thompson, Jeff Mynatt, Shana Mynatt, and Paul Albert appeal a decision from the Board of Review which denied them unemployment benefits after they accepted a voluntary severance package from their employer rather than risk being laid off in a reduction-in-force.[1] The Board, affirming the decision from the Arkansas Employment Security Department (ESD), relied on *Billings v. Director, Employment Security Dep't,* 84 Ark. App. 79, 133 S.W.3d 399 (2003), and found that appellants left their jobs voluntarily and without good cause. We reverse and remand for an award of benefits.

The facts are not disputed. Appellants were employees at Arkansas Eastman, and each had been so employed for more than ten years. Each was informed that Eastman intended to layoff approximately fifty employees. The layoffs were to be determined by a combination of salary grade and length of service, but no individual knew definitely whether or not he or she would be terminated. To reduce the number of involuntary layoffs, Eastman offered many of the employees a "voluntary-severance package." Gary McDonald, manager of administration for Arkansas Eastman, described the severance package in his testimony as involving two weeks' pay for every four years' service, four months' continuation of health, life, and dental insurance coverage, a retraining allow-

[1] The case involved five separate employees. Only four employees are involved in this appeal. The same facts and decisions pertain to each of them.

ance of up to $5,000, and assistance in getting into a job-displacement program. He also testified that Arkansas Eastman was notified in November 2002 by the local division office of the ESD that the division had changed its interpretation of the eligibility requirements concerning applicants for unemployment compensation by voluntary-severance-package recipients.

Cassondra Sherrell, manager with the ESD, testified that the division changed its policy regarding eligibility of voluntary-layoff claimants in October 2002. By that time, appellants had already accepted the severance packages offered them by Arkansas Eastman based on the previous division position whereby voluntary-layoff workers were deemed eligible to receive unemployment benefits. Employees had to apply for the packages, and Eastman would accept or reject the application depending on the needs of the employee. Appellants opted to take the package. They testified that they were aware of past layoffs where Eastman offered similar packages and that those employees had later received unemployment benefits. Eastman, relying on the stated policy of the ESD, told each employee that they would also be eligible for unemployment benefits.

Sherrell also testified that had appellants filed their claim prior to October 11, 2002, they could have drawn unemployment benefits. However, because they worked at Eastman for such a long time, they had more severance pay to draw, which meant that they did not seek unemployment benefits until they had exhausted the severance pay. By that time, the division had changed the policy that existed when appellants were offered the voluntary-severance package.

Appellant Jeff Mynatt testified that he did not feel that he would have lost his job had he not taken the severance package; however, his job requirements and duties would have changed. He further stated that he did not feel secure in his job, as this was the third layoff in three years. Appellant Shana Mynatt testified that her department head told her that her department would be among the first to be targeted by the reduction-in-force. Appellant Dedra Thompson testified that she took the severance package based on past layoffs as well as the assurances from Eastman that she would be able to draw unemployment benefits.

The Board of Review relied on *Jackson v. Daniels*, 267 Ark. 685, 590 S.W.2d 63 (Ark. App. 1979) and *Billings v. Director, Employment Security Dep't*, 84 Ark. App. 79, 133 S.W.3d 399

(2003), in reaching its decision that appellants left their jobs voluntarily and without good cause so as to be disqualified from receiving benefits. Ark. Code Ann. § 11-10-513(a)(1) (Repl. 2002). This appeal followed.

We review the evidence in the light most favorable to the Board's findings and will affirm its decision if it is supported by substantial evidence. *Billings, supra.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The review is limited to whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

Appellants frame the issue as a possible inconsistency between *Jackson, supra*, and *Billings, supra.* In *Jackson*, the employer announced that he had to lay off one of his employees. The claimant in that case told the employer that, if someone had to be laid off, she preferred that it were her and not one of the two recently hired employees. The claimant was eventually laid off and made a claim for unemployment benefits. In reversing the Board's decision to deny her benefits, we said, "We see an appreciable difference in an employee communicating directly to an employer that he wishes to be laid off and what occurred in this case." *Jackson*, 267 Ark. at 687, 590 S.W.2d at 64. We made it clear that the appellant in that case lost her job because of a reduction-in-force and not for personal reasons.

In the present case, the Board relied on *Billings, supra*, in its decision to deny benefits. That case also involved employees who accepted severance packages pending a reduction-in-force layoff. In an effort to reduce the number of people involuntarily laid off, the employer offered packages to its more senior employees and continued offering packages until enough people left their jobs. There was further testimony in that case that had not enough people taken the packages, the least senior employees would have been laid off. Many of the employees who took the packages were not in danger of losing their jobs. This court affirmed the denial of benefits, finding the layoffs truly voluntary.

In resolving these cases we need not overrule our decision in *Billings* or embrace appellants' argument that our decisions in *Billings* and *Jackson* are inconsistent. The cases before us today present facts that plainly are different from both *Billings* and *Jackson.* Appellants left their jobs in May and June 2002 after deciding to accept the voluntary-severance package offered by

their employer. At that time, ESD policy allowed former employees to receive unemployment benefits when they voluntarily left their jobs after taking a severance package in light of a reduction-in-force. When appellants decided to accept the severance package, they acted in reliance on that policy and the understandable belief that their lives would be more secure by leaving voluntarily with the severance package rather than waiting to see if the proverbial axe would fall. We hold, on these facts, that it would be unfair and inequitable for appellants to be denied unemployment benefits after they acted in reliance on explicit ESD policy.

For these reasons, we reverse the decision of the Board and remand this case for an award of benefits.

Reversed and Remanded.

STROUD, C.J., and HART, J., agree.

BAKER, J., concurs.

ROBBINS and VAUGHT, JJ., dissent.

KAREN R. BAKER, Judge, concurring. I concur in the majority's decision to reverse and remand this case for an award of benefits. As I discussed in my dissent in *Billings v. Dir.*, 84 Ark. App. 79, 133 S.W.3d 399 (2003), our court in *Jackson v. Daniels*, 267 Ark. 685, 590 S.W.2d 63 (Ark. App. 1979), set out what remained our policy for over twenty years that, even without the legislature's specific directive, those employees participating voluntarily in a permanent reduction in the work force were not disqualified from receiving benefits. *See Billings* at 86, 133 S.W.3d at 404 (2003) (Baker, J., dissenting). The majority in *Billings* characterized the 2003 amendment to Ark. Code Ann. § 11-10-513 as a change in public policy and asserted that the dissent was applying the amendment retroactively. As the majority in this case recognizes, prior to the change in ESD policy that gave rise to the denial of benefits in *Billings,* the explicit ESD policy allowed former employees to receive unemployment benefits when they voluntarily left their jobs after taking a severence package in light of a reduction in force. Therefore, the 2003 amendment was not a change in policy; rather, it was the legislature's response to the change in explicit ESD policy. For this reason, I maintain that *Billings* was wrongly decided when it was before this court and should be overruled.

Furthermore, under the facts of the present case, the 2003 amendment was unquestionably in effect at the time of the Board's decision to deny appellants benefits.[1]

JOHN B. ROBBINS, Judge, dissenting. I dissent from the majority's decision to reverse and remand for an award of benefits. In my opinion, this case should be reversed and remanded for additional findings of fact.

I agree with the majority to the extent that a claimant's reliance on an agency misrepresentation may be the basis for awarding unemployment benefits. In *Foote's Dixie Dandy v. McHenry*, 270 Ark. 816, 607 S.W.2d 323 (1980), the supreme court abandoned the principle that the State can never be estopped by the actions of its agents. Estoppel is not a defense that should be readily available against the State, but neither is it a defense that should never be available. *Id.* Estoppel should only be applied when there is clear proof of an affirmative misrepresentation by the agency, and there must be substantial evidence of a citizen's reliance upon the actions or statements of an agent. *See Arkansas Dep't of Human Servs. v. Estate of Lewis*, 325 Ark. 40, 922 S.W.2d 712 (1996).

In this case the appeal tribunal specifically found, "The workers were told they would be entitled to unemployment benefits based on information received from the local office of the department." The Board adopted the decision of the tribunal, and thus made the same finding. However, while this finding supports the conclusion that there had been a misrepresentation by the agency, the Board made no finding as to whether any of the claimants relied on the misrepresentation in opting for the severance package. Estoppel will protect a citizen only to the extent that he relied upon actions or statements by an agent of the State. *Foote's Dixie Dandy v. McHenry, supra.*

I acknowledge that some of the claimants indicated in their testimony that they took the severance package in reliance on assurances that they would be eligible for unemployment benefits. However, it is for the Board to judge the credibility of witnesses, *see Williams v. Director*, 79 Ark. App. 407, 88 S.W.3d 427 (2002), and the Board made no finding as to the veracity of this testimony.

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[1] The effective date of the amendment to Ark. Code Ann. § 11-10-513 (Supp. 2003) was April 10, 2003, and the Board's decision in this case was dated April 24, 2003.

Moreover, some of the claimants gave other reasons for accepting the package. Neither Mr. Mynatt nor Mrs. Mynatt testified that they took the package in reliance on the agency's misrepresentation.

The long-standing rule is that when an administrative agency fails to make a finding upon a pertinent issue of fact, the courts do not decide the question in the first instance. *Alcoholic Beverage Control Bd. v. Hicks*, 19 Ark. App. 212, 718 S.W.2d 488 (1986). In such cases, the cause is remanded so that a finding can be made on that issue. *Id.* Because the Board failed to make any findings on the pertinent issue of whether there was any detrimental reliance on the part of any of the claimants, I would reverse and remand with directions to make such findings.

LARRY D. VAUGHT, Judge, dissenting. The majority has reversed these unemployment cases and ordered an award of benefits by applying the doctrine of equitable estoppel. This theory was not raised below, no findings were made by the Board of Review on the necessary elements, and the appellants have not argued estoppel as a basis for reversal. In order to reach its decision, the majority has acted as both an advocate for the appellants and the finder of fact. Because I believe that those actions are beyond our authority and that the findings of the Board of Review are supported by the evidence, I would affirm.

As Judge Robbins points out in his dissenting opinion, the doctrine of equitable estoppel has been held to be available to apply against a state agency since the supreme court's decision in *Foote's Dixie Dandy v. McHenry,* 270 Ark. 816, 607 S.W.2d 373 (1980). It was first applied in an employment security case by this court in *Rainbolt v. Everett, Director,* 3 Ark. App. 48, 621 S.W.2d 877 (1981), where we reversed and remanded for further findings on the elements of estoppel. The doctrine has been sparingly used in the ESD context since then. *See Rankin v. Director,* 82 Ark. App. 575, 120 S.W.3d 169 (2003); *Wall v. Director,* 83 Ark. App. 424, 128 S.W.3d 480 (2003); *Wells v. Everett, Director,* 5 Ark. App. 303, 635 S.W.2d 294 (1982); *Jones v. Everett, Director,* 4 Ark. App. 169, 629 S.W.2d 305 (1982), *reversed by Everett, Director v. Jones,* 277 Ark. 162, 639 S.W.2d 739 (1982).

In each of the cases cited above, there was a discussion of the elements necessary to establish estoppel:

> (1) [t]he party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party

> asserting the estoppel had a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and, (4) he must rely on the former's conduct to his injury.

Wall, supra at 427, 128 S.W.3d. at 481. The majority in the case at bar does not mention the elements and does not recite any findings to support them. Judge Robbins, in his dissent, suggests that the proper disposition would be to remand to the Board of Review for further findings on the elements of estoppel. I disagree.

I believe that the case should be affirmed based on the reasoning of the supreme court in *Everett, Director v. Jones, supra.* In that case the Arkansas Supreme Court reversed the court of appeals' decision, which had remanded to the Board of Review for an award of benefits based on findings of estoppel. The claimant had argued estoppel on appeal based on an allegation made in her notice of appeal that she had relied on information from the ESD about the timeliness of her actions seeking employment. This court, after discussing the elements of estoppel, held that the agency should be estopped to deny benefits and remanded for an award. *See Jones v. Everett, Director, supra.*

On review, the supreme court noted that the only evidence in the record of the agency's action with regard to the claimant was in the notice of appeal. The court cited *Foote's Dixie Dandy, supra,* for the proposition that estoppel could apply to state agencies but reasoned:

> However, this doctrine is to be applied against the State only when there is substantial proof and a compelling reason. Here there was no substantial proof of the only allegation of affirmative misconduct. That allegation was made in respondent's notice of appeal quoted above. In addition, the State was never given the opportunity to submit evidence to rebut the allegation.
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> * * *
>
> The other reasons given by the Court of Appeals for applying the doctrine do not involve allegations of affirmative misconduct. They can be summarized as findings of unconscientiousness on the part of the administrative agency. Likewise, these issues were not fully developed below and there was no substantial proof of lack of unconscientiousness. Certainly, we do not intend that the Foote's doctrine be extended to a nebulous and indefinite situation where

> the agent of the State has not clearly caused the claimant to believe that nothing more is necessary other than to return on the assigned date.
>
> * * *
>
> Before the State is estopped from applying this law there must be substantial evidence that the citizen relied upon actions or statements by an agent of the State.

Everett, Director v. Jones, supra at 166-67, 639 S.W.2d at 741.

The court then concluded that the evidence did not support estoppel and reversed the court of appeals and affirmed the Board of Review. In the case at bar the Board of Review made no findings beyond one nebulous sentence regarding an agency action which might form the basis for estoppel. There were no findings that the claimants relied on the statement, and there was testimony of only one claimant that could have been construed as alleging reliance.

Because there was substantial evidence to support the findings of the Board of Review denying benefits to these claimants pursuant to our holding in *Billings v. Director,* 84 Ark. App. 79, 133 S.W.3d 399 (2003), and because the issue of estoppel is not appropriately before this court, I would affirm.

Halley P. JOPLIN *v.* Janice L. JOPLIN

CA 03-1472 196 S.W.3d 496

Court of Appeals of Arkansas
Opinion delivered October 27, 2004

Joe Cambiano, for appellant.

Mobley Law Firm, by: *Jeff Mobley*, for appellee.

LARRY VAUGHT, Judge. In this case from Pope County, the trial court amended a divorce decree that it had entered approximately eleven months earlier. Appellant argues that the court lacked jurisdiction to modify the decree because more than ninety days had elapsed since its entry. We agree and reverse and remand with directions to vacate the amended decree.

Appellant and appellee had been married for eighteen years when appellant filed for divorce on August 22, 2002. No children were born of the marriage, and the sole matter at issue was the division of property. On October 7, 2002, the parties, who were both represented by counsel, met in open court and testified to the terms of a property-settlement agreement. The agreement divided approximately twenty-seven items of both real and personal property and provided that each party would pay one-half of the couple's outstanding personal property taxes and one-half of their credit-card debt. Appellee testified that she was in agreement with the settlement "if it will be followed through," and she stated that she felt like she had been treated fairly. On October 21, 2002, the trial court entered a decree incorporating the parties' agreement.

Among the items that appellant was awarded in the decree were a 27-foot fifth-wheel travel trailer, a Harley Davidson motorcycle, two acres of land in Oklahoma, and a single lot of real

estate in Florida. The fifth-wheel and the motorcycle were encumbered by debt; however, the decree made no provision for payment of the debt on those items. At some point following entry of the decree, appellee determined that appellant was not making payments on the motorcycle or the fifth-wheel. This caused her some concern because both items had been financed in her name. On January 30, 2003, she filed a petition to amend the decree to designate who would be responsible for the debt on the property awarded. Appellant responded that it was common practice for the party receiving the property to pay the debt on the property, and he said that he had paid off the motorcycle, a fact that was later confirmed by appellee. However, he had not paid off the fifth-wheel.

Thereafter, appellee amended her petition and went to trial on the claim that the decree should be set aside in its entirety for what she considered the following fraudulent acts by appellant: 1) his purchase of the fifth-wheel in her name and without her knowledge and consent; 2) his misrepresentation that the tracts of land in Oklahoma and Florida were gifts to him from relatives when in fact the land had been deeded to them both; 3) his purchase of a truck in her name without her knowledge; 4) his use of a forged power of attorney to obtain the title papers to the motorcycle after the divorce; 5) his obtaining two credit cards in her name. On September 16, 2003, which was approximately eleven months after entry of the original decree, the trial court entered an amended decree. The amended decree made no specific finding of fraud, but it did away with the parties' agreed property settlement and provided that all but a few items were marital property to be sold to pay off the couple's debts, with the excess, if any, to be divided equally between them. Appellant now appeals on the ground that the trial court did not have jurisdiction to amend the original decree more than ninety days after it was entered.

[redacted] In order to vacate or modify a judgment or order more than ninety days after it has been entered, the trial court must determine that at least one of an enumerated list of circumstances in Ark. R. Civ. P. 60(c) (2004) exists. *Grubbs v. Hall*, 67 Ark. App. 329, 999 S.W.2d 693 (1999). Rule 60(c)(4) allows a trial court to vacate or modify a judgment after ninety days in the case of "misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party." Our courts have particularly noted that a divorce decree containing an integrated

property-settlement agreement may not be judicially modified in the absence of fraudulent inducement in executing the agreement. *See Helms v. Helms*, 317 Ark. 143, 875 S.W.2d 849 (1994); *Anding v. Anders*, 249 Ark. 413, 459 S.W.2d 416 (1970). *See also McGinnis v. McGinnis*, 268 Ark. 889, 597 S.W.2d 831 (Ark. App. 1980) (recognizing that property-settlement agreements in divorce cases are highly favored under the law and, in the absence of fraud, they should not be modified by judicial action).

The elements of fraud are: (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. *Riley v. Hoisington*, 80 Ark. App. 346, 96 S.W.3d 743 (2003). The party seeking to set a judgment aside for fraud has the burden of proving fraud by clear, cogent, and convincing evidence or, as our courts have sometimes said, clear, strong, and satisfactory proof. *See McAdams v. McAdams*, 353 Ark. 494, 109 S.W.3d 649 (2003); *Grubbs v. Hall, supra*; *Mow v. Mow*, 66 Ark. App. 374, 990 S.W.2d 578 (1999); *Ward v. McCord*, 61 Ark. App. 271, 966 S.W.2d 925 (1998). We review a trial court's decision under Rule 60 for an abuse of discretion. *Fritzinger v. Beene*, 80 Ark. App. 416, 97 S.W.3d 440 (2003); *Grubbs v. Hall, supra.*

Although the amended decree does not state as much, it is apparent that the trial court set the original decree aside based on the above listed acts of fraud by appellant. We conclude that the trial court abused its discretion in doing so because, even if we assume that appellant committed the acts in question, appellee has not shown that these acts induced her to enter into the property-settlement agreement.

Regarding appellant's 1998 purchase of the fifth-wheel in appellee's name, it is not clear from appellee's testimony whether she was aware at the time of the 2002 property-settlement agreement that the trailer was financed in her name. Her testimony might be read to say that she did not find this out until after the divorce when she was going through some papers, but her proof on this point is far from clear. In any event, she does not say how the 1998 purchase induced her to enter into the 2002 settlement, nor does she say what she would have done differently had she

known the truth. Her main complaint on this point seems to be that appellant did not make the payments on the trailer as she understood he would do. However, a broken promise is not fraud. *See Evans Indus. Coatings v. Union County Chancery Court*, 315 Ark. 728, 870 S.W.2d 701 (1994). Further, if the parties truly had an understanding that appellant would make the payments and he failed to do so, the issue would be better addressed by a contempt motion than a petition to set aside the decree.

As for appellant's misrepresentation that the real property had been gifted to him when, in fact, it had been deeded to both him and appellee, appellee's point, as we understand it, is that she believed appellant's misrepresentation and thus did not try to assert her rightful interest in the properties. However, appellee's claim of fraud falls short because, at several points in her testimony, she acknowledged that she knew prior to the divorce that the properties were given to both her and appellant. In the case of the Florida property, she was even aware that she and appellant had received it in exchange for a trailer that they gave appellant's family. In light of that testimony, it cannot be said that appellee justifiably relied on appellant's misrepresentations or that they induced her to enter into the property-settlement agreement.

The remaining three acts of fraud likewise were not shown to have affected appellee's decision to enter into the settlement agreement. The pickup that appellant purchased in appellee's name in 1997 was repossessed in 2000 and was not part of the property division. Appellant's use of a power of attorney to obtain title to the motorcycle occurred after the decree was entered. Regarding the credit cards, the record does not reflect when appellant obtained the cards or whether appellee was aware of them prior to the divorce. Much like the fifth-wheel travel trailer, her issue seems to be that appellant did not pay one-half of the credit-card debt as he was ordered to do by the court. As we stated earlier, such a problem would be better handled by a contempt citation rather than setting aside the decree.

The evidence in this case gives every appearance that appellant has engaged in one or more acts of fraud during the course of the parties' marriage. However, a divorce decree containing an integrated property-settlement agreement may not be judicially modified in the absence of fraudulent inducement in executing the agreement. *See Helms v. Helms, supra*; *Anding v.*

Anders, supra; McGinnis v. McGinnis, supra. Because evidence of fraudulent inducement is lacking in this case, we hold that the trial court abused its discretion in setting aside the original decree more than ninety days after its entry. We therefore reverse and remand with directions to vacate the amended decree.

Our resolution of the case on this issue makes it unnecessary for us to address appellant's second point, that the trial court erred in dividing his Veterans' Administration disability benefits as marital property.

Reversed and remanded.

GLADWIN and ROBBINS, JJ., agree.

Darren Wayne HAWKINS *v.* STATE of Arkansas

CA CR 04-171 196 S.W.3d 517

Court of Appeals of Arkansas
Opinion delivered October 27, 2004

Washington County Public Defender's Office, by: *Michael J. Dodson,* for appellant.

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

KAREN R. BAKER, Judge. A Washington County jury convicted appellant, Darrin Wayne Hawkins, of second-degree battery and sentenced him to seventy-two months' imprisonment in the Arkansas Department of Correction. He raises one point on appeal, arguing that the trial court erred by failing to warn him sufficiently of the dangers and disadvantages of waiving his right to counsel and proceeding at trial *pro se*. We agree and therefore reverse and remand.

Mr. Hawkins was charged in the First Division of the Fourth Judicial Circuit with battery in the second degree in violation of section 5-13-202 of the Arkansas Code Annotated. He was arraigned on those charges on September 29, 2003. On the day of arraignment, the public defender's office was appointed to represent him. Soon thereafter, attorney Michael Dodson was assigned Mr. Hawkins's case. Mr. Dodson represented Mr. Hawkins until mid-November, when Mr. Hawkins expressed his desire to represent himself. On November 26, 2003, the trial court addressed Mr. Hawkins's wish to proceed without counsel in a motion hearing. In that motion hearing, the trial court acknowledged Mr. Hawkins's intention to proceed *pro se* and allowed him to proceed, appointing Mr. Dodson as standby counsel to answer any question or advise Mr. Hawkins at his request. On December 1, 2003, Mr. Hawkins wrote a letter directly to the trial judge "releasing Mr. Dodson of his responsibility of representing [Hawkins]. On December 9, 2003, Mr. Dodson filed a motion to withdraw in compliance with Mr. Hawkins's wishes.

In *Hatfield v. State*, 346 Ark. 319, 57 S.W.3d 696 (2001), our supreme court addressed the issue of whether an appellant knowingly and intelligently waived his right to counsel by stating as follows:

> [T]his court has long recognized the crucial aspect of informing an accused of his right to represent himself, along with the attendant

> risks. Furthermore, our court has held that the trial court maintains a weighty responsibility in determining whether an accused has knowingly and intelligently waived his right to counsel. Every reasonable presumption must be indulged against the waiver of fundamental constitutional rights, and the burden is upon the State to show that an accused voluntarily and intelligently waived his fundamental right to the assistance of counsel. Determining whether an intelligent waiver of the right to counsel has been made depends in each case on the particular facts and circumstances, including the background, the experience, and the conduct of the accused.
>
> A criminal defendant may invoke his right to defend himself *pro se* provided that (1) the request to waive the right to counsel is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. A specific warning of the dangers and disadvantages of self-representation, or a record showing that the defendant possessed such required knowledge from other sources, is required to establish the validity of a waiver. The "constitutional minimum" for determining whether a waiver was knowing and intelligent is that the accused be made sufficiently aware of his right to have counsel present and of the possible consequences of a decision to forego the aid of counsel.

Id. at 325-26, 57 S.W.3d at 700-01 (citations omitted).

There is no question that Mr. Hawkins's request to proceed *pro* se was unequivocal and timely asserted. Nor does it appear that Mr. Hawkins engaged in conduct that prevented the fair and orderly exposition of the issues in the case. We must therefore determine whether Mr. Hawkins knowingly and intelligently waived his right to counsel. If we find that Mr. Hawkins's waiver was involuntary, we must also determine whether Mr. Dodson's assistance as standby counsel rendered the involuntary waiver moot.

The assistance of standby counsel may rise to a level sufficient for our court to moot an assertion of involuntary waiver of right to counsel based on our determination that the appellant had counsel for his defense. *See Bledsoe v. State*, 337 Ark. 403, 989 S.W.2d 510 (1999). Whether the assistance rises to this level is a question that is answered by looking at the totality of the circum-

stances. *See id.* To moot an assertion of involuntary waiver, the assistance must be substantial, such that standby counsel was effectively conducting the defense. *See id.*

After applying the guidelines governing knowing and intelligent waiver to the facts and circumstances in *Hatfield, supra,* the *Hatfield* court determined that the trial judge failed to adequately advise Hatfield of the consequences of proceeding *pro se.* The court noted that the trial judge erred by failing to make even a limited inquiry into Hatfield's understanding of the legal process, although the judge allowed standby counsel to remain in the case. However, the court held that deficiencies in the judge's inquiry were rendered moot because standby counsel actively participated throughout the trial such that Hatfield waived his right to proceed *pro se. See Hatfield v. State, supra.*

Similarly, in *Bledsoe, supra,* our supreme court determined that there was no evidence of an inquiry by the trial court into Bledsoe's waiver of the right to counsel, and that Bledsoe's appointed standby counsel did not actively participate in his defense. Unlike *Hatfield,* however, Bledsoe was left to represent himself, and because Bledsoe's appointed counsel did not actively represent him, the court determined that Bledsoe was denied his right to counsel. *See Bledsoe v. State, supra.*

While Mr. Bledsoe was informed several times about the requirement that he follow the rules and procedures of court, he was given no explanation as to the consequences of failing to comply with those rules, such as the inability to secure the admission or exclusion of evidence, or the failure to preserve arguments for appeal. There was simply no discussion about the substantive risks of proceeding without counsel. Furthermore, the reference to the State's offer of a thirty-five-year sentence on a plea of guilty to the rape and burglary charges did not include a full disclosure about the range of penalties Mr. Bledsoe faced on any of the charges.

As in *Bledsoe,* in this case Mr. Hawkins was neither sufficiently advised of the consequences of proceeding *pro se,* nor did standby counsel actively participate in Mr. Hawkins's defense so as to render deficiencies in the judge's inquiry moot. As the following colloquy between Mr. Hawkins and the court at the November 26, 2003, hearing demonstrates, while the court made it clear that it discouraged Mr. Hawkins from proceeding *pro se,* the requisite inquiry and admonitions were lacking.

> APPELLANT: I'd still like to go to — represent myself and to go to the law library.
>
> THE COURT: Well, you have the right to represent yourself. I'd advise against it.
>
> APPELLANT: Yes, sir.
>
> THE COURT: It's not a good idea, but . . . if you want to do that you have a right to do that.
>
> APPELLANT: Yes, sir.
>
> THE COURT: I'll appoint Mr. Dodson as standby counsel and . . . if you want some legal advice he will give it to you. So that's fine, if that's your request.

The trial court further tried to discourage Mr. Dodson from proceeding *pro se* at the December 12, 2003, hearing but once again the requisite inquiry and admonitions were lacking.

> THE COURT: [A]s I have said in previous hearings, you have a right to represent yourself and I don't think that's a good idea. I have tried to discourage it and in fact, I've appointed Mr. Dodson as your standby counsel and he's of course here present today. And if you choose to avail yourself of his services, and I recommend that you do so, he's as I say, standing by.

Merely discouraging appellant from proceeding *pro se* did not adequately inform him of the risks attendant to *pro se* representation. Additionally, under the facts of this case, this failure is not rendered moot by the trial court's appointment of Mr. Dodson as standby counsel.

We must determine whether the assistance of standby counsel was so substantial that the defendant is deemed to have had counsel for his defense, thereby mooting any assertion of involuntary waiver. *See Calamese v. State*, 276 Ark. 422, 635 S.W.2d 261 (1982). Whether or not such assistance rises to that level is a question that must be answered by looking at the totality of the circumstances. *See Wicoff v. State*, 321 Ark. 97, 900 S.W.2d 187 (1995). Before an assertion of involuntary waiver is considered, the totality of the circumstances must demonstrate that the assistance was such that standby counsel was effectively conducting the defense. *See Calamese, supra.*

In *Calamese, supra,* there was no evidence of any inquiry by the trial court into the defendant's attempted waiver of counsel, but our supreme court determined that the defendant had been effectively represented at trial by the attorney appointed to assist her. The attorney "immediately assumed a fully active role as trial attorney, conducting the entire interrogation, cross-examination, making objections to evidence and exhibits, presenting a defense with numerous exhibits and four defense witnesses, including eliciting lengthy testimony from the defendant and making a forceful closing argument, all of which was done with evident familiarity." *Id.* at 424, 635 S.W.2d at 262. Under those facts, the defendant was not left to represent herself at any stage of the proceedings, and she was not denied her right to counsel. *Id.*

Similarly, in *Oliver v. State*, 323 Ark. 743, 918 S.W.2d 690 (1996), no effective waiver was obtained when the defendant elected to proceed *pro se* and standby counsel was appointed to assist during trial. As in *Calamese,* our supreme court affirmed the conviction where, with the exception of the defendant's cross-examination of the first State witness, standby counsel cross-examined each State witness, made objections during the State's case, and presented a motion for directed verdict at the conclusion of the State's case. *Id.* Further, standby counsel recalled the State's first witness and examined him as well as the remaining six defense witnesses. *Id.* Counsel also made the closing argument. *Id.* Under such circumstances, the court held that the defendant was not denied his right to counsel because standby counsel not only advised the defendant but actively represented him during most of the proceeding, and the defendant effectively relinquished representation to his standby counsel early in the trial. *Id.*

No similar factual analogy is indicated by the abstract or record in this case. In fact, standby counsel, although present in the courtroom during the trial, did not participate in any part of appellant's trial on December 17, 2003. Accordingly, we must reverse and remand.

Reversed and remanded.

HART and BIRD, JJ., agree.

ARKANSAS STATE BOARD of NURSING *v.*
Jody Marie MORRISON

CA 03-1291 197 S.W.3d 16

Court of Appeals of Arkansas
Opinion delivered November 3, 2004

[Rehearing denied December 8, 2004.]

William F. Knight, for appellant.

Ledbetter, Cogbill, Arnold & Harrison, L.L.P., by: *R. Ray Fulmer, II*, for appellee.

JOSEPHINE LINKER HART, Judge. This is an appeal from the Sebastian County Circuit Court reversing the decision of appellant Arkansas State Board of Nursing (Board) in a disciplinary action. The Board argues that the trial court erred in reversing its decision on judicial review. We affirm the trial court and reverse the Board.

Appellee Jody Morrison was licensed as an advanced practice nurse (APN) and registered nurse in Arkansas after she was first licensed as an APN in Kansas in 1994. An APN is a nurse who has gained additional knowledge and skills through successful completion of an organized program of nursing education that certifies nurses for advanced practice roles as advanced nurse practitioners and requires national certification. *See* Ark. Code Ann. § 17-87-102(3) (Repl. 2002). An APN may be granted authority to prescribe drugs and medications under certain conditions. *See* Ark. Code Ann. § 17-87-310 (Repl. 2002). In order to obtain prescriptive authority, an APN must have a collaborative practice agreement (CPA or agreement) that outlines the procedures for consultation with a physician in the joint management of the needs of the APN's patients. *See* Ark. Code Ann. §§ 17-87-102(2), 17-87-310(a)(2) (Repl. 2002).

On January 23, 2003, the Board sent appellee notice of a hearing to determine whether she had violated Ark. Code Ann. § 17-87-309(a)(6) (Repl. 2002) by engaging in "unprofessional conduct." The Board's regulations defines the term "unprofessional conduct" as that conduct

> which, in the opinion of the Board, is likely to deceive, defraud, or injure patients or the public, means any act, practice, or omission that fails to conform to the accepted standards of the nursing

> profession and which results from conscious disregard for the health and welfare of the public and of the patient under the nurse's care.
>
> . . .

Arkansas State Board of Nursing, Rules and Regulations, Ch. 7, § XV(a)(6) (hereafter "Regulations").[1] The factual basis to support the Board's charge was an allegation that appellee had admitted writing prescriptions without authority from May 16, 2002, until November 2002.

At a hearing before the Board, Georgia Lewis, the Board's director of advanced nursing practice, described the contents of her investigative file. She testified that appellee was licensed as a registered nurse in Arkansas by endorsement from Kansas on February 12, 2002, and that her Arkansas APN license by application was issued on February 15, 2002. She noted that appellee held licenses in Missouri and Maine, in addition to Kansas, with no disciplinary action noted. The Board received appellee's CPA with her prospective employer, Neurosurgical Associates, on February 7, 2002. On February 15, the Board received a letter from Neurosurgical Associates, stating that appellee would not be employed by them and that the CPA was null and void. Lewis testified that, after receiving the letter from Neurosurgical Associates, she communicated several times with appellee who, according to Lewis, said that she probably would not pursue getting a certificate of prescriptive authority. Lewis stated that, on November 19, 2002, her assistant, Pam Beggs, called appellee to remind her that her application would soon expire. She stated that the file showed that appellee told Beggs that she had been prescribing medicine in Arkansas.

Lewis testified that, following appellee's disclosure of her writing prescriptions, she wrote a letter to appellee informing her that she did not have prescriptive authority and directing appellee to immediately cease prescribing medications. Lewis stated that the Board received a letter in which appellee explained that she had been prescribing an occasional Xanax and cholesterol medications, together with some other drugs, and that, to her knowledge, she had never prescribed a Schedule II drug. In the letter, appellee also stated that her Drug Enforcement Administration (DEA) registration was up to date. In addition, appellee also wrote that, to the

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[1] That section then goes on to list nineteen non-exhaustive examples of "unprofessional conduct."

best of her knowledge, all of her paper work had been submitted to the Board. The Board received a CPA on November 21, 2002, that, according to Lewis, did not comply with the Board's regulations concerning the contents of such agreements.

On December 4, 2002, the Board received a letter from appellee's employer, Dr. Kurt Mehl, of Cooper Clinic, stating appellee's employment dates and the types of medication that she had been prescribing. Lewis testified that the letter stated "[u]nfortunately, [appellee] was unaware that prescriptive authority number was needed to be written on her prescriptions. She has clearly written her DEA number on the prescriptions that she has written from our office." Lewis further stated that Mehl's letter indicated that it was the understanding of everyone at Cooper Clinic, including appellee, that all necessary paperwork had been completed and properly sent to the Board.

Lewis acknowledged that appellee had submitted a new CPA that complied with the Board's rules. Lewis further testified that the Board had also received a letter from Steve Brown, the director of human resources for Cooper Clinic, stating that the original CPA between appellee and Dr. Mehl dated July 12, 2002, had been sent at an earlier date. She also testified that, during an earlier conference call, appellee informed the Board's attorney and herself that a CPA had not been sent. Lewis stated that she contacted the DEA in November and was informed that appellee's relocation registration with DEA had occurred in September 2002. On cross-examination, Lewis admitted that she did not recall making notes during the conference call.

Lewis opined that prescriptive authority could not be given at the time appellee's APN license was issued because there was no CPA due to Neurosurgical Associates' canceling the agreement. She stated that appellee never contacted the Board to see if it had received her CPA or if everything was in order. She also stated that appellee never asked about the scope of her prescriptive authority.

Appellee testified that she was a nurse practitioner at Cooper Clinic and that she has prescriptive authority. Appellee stated that she is supervised by three physicians on the cardiology floor at the clinic and that the physicians periodically review by random selection files on patients with whom she has worked. She stated that there has never been a time while practicing at Cooper Clinic when she did not have a physician available to her. Appellee stated that, in preparation of her moving to Arkansas, she became

national-board certified by taking a certification test and passing in December 2001. After she passed the test, she began the process of applying for a license in Arkansas. She stated that Neurosurgical Associates was somewhat concerned with the language of the proposed CPA, but the agreement was sent to the Board on January 28, 2002. She stated that, prior to beginning work with Neurosurgical Associates, there was some misunderstanding as to whether her license in Kansas had been inactivated because of a disciplinary action. Appellee testified that it was not. She stated that on February 13, 2002, Neurosurgical Associates withdrew its offer of employment.

After the offer was withdrawn, appellee continued to look for employment in Arkansas and contacted Cooper Clinic. Appellee testified that she had called Mrs. Lewis to inquire about the status of her license. During appellee's interview with Cooper Clinic, she was asked about the status of her Arkansas license and she informed them that she would need a CPA. According to her, the clinic administrative personnel indicated that they were familiar with the licensing process and would assist in the preparation of the agreement. Appellee stated that her change of address form with the DEA was effective July 17, 2002, but that it takes approximately six to eight weeks to receive paperwork acknowledging the change.

Appellee stated that she signed the first CPA with Cooper Clinic on May 15, 2002, the day before she commenced her employment. She also stated that she never functioned independently at the clinic but that there were times when she met with patients without the presence of a doctor. She described her first couple of months as becoming familiar with a new area of practice for her and said she spent her time reading materials that the doctors asked her to learn.

Appellee stated that she first realized that there was a problem with her prescriptive authority on November 20, 2002, when she received a phone call from Pam Beggs. She stated that she ceased prescribing medications when she was told to do so by Georgia Lewis and that she had not prescribed any medication since. She also stated that she was not aware of the separate requirements for prescriptive authority because, in Kansas, prescriptive authority is part of advanced practice licensure. Appellee stated that Kansas does require CPAs but that they are not required to be filed with the Kansas board. She stated that she believed that she was in compliance because Cooper Clinic had forwarded a

CPA to the Board but that she also now realized that the original agreement she executed with the clinic was never filed with the Board.

Appellee denied Lewis's statement that she would not pursue a certificate of prescriptive authority. Appellee also stated that Lewis informed her that all she needed to do was send in a CPA from her new employer. She admitted that she did not contact Mrs. Lewis until being contacted by Pam Beggs. She stated that she did not know the exact date she starting prescribing medications but believed that it was the end of July or early August, when Cooper Clinic moved into a new building. She stated that she did not realize it was a separate application process because she filled out a packet of information and sent it to the Board, together with several checks. She admitted that she did not send a properly completed CPA with Cooper Clinic until November or December 2002. Appellee admitted that she did, in fact, write prescriptions without authority to do so but that she did not know that she lacked authority at the time she was writing the prescriptions.

Dr. Riley Foreman, a cardiologist at Cooper Clinic, testified as to appellee's competence and professionalism and stated that he had not observed any conduct on appellee's part that negatively impacted on patient care. Dr. Timothy Waack, a cardiologist and the medical director at Cooper Clinic, testified that appellee was an excellent practitioner and that appellee serves the public well. He also stated that part of the clinic's administrative function is to assist the practitioner in licensing and credentialing. He did admit that it is ultimately the professional's responsibility to obtain the necessary licensure.

Steve Brown, Cooper Clinic's director of human resources, testified that appellee advised the clinic of her need for a CPA, that the clinic was familiar with such agreements, that appellee signed an agreement before beginning work at the clinic, and that he advised appellee that he would obtain the necessary physicians' signatures and file the agreement with the Board. He stated that the agreement was not filed with the Board but that he believed that it had been. He stated that the original agreement had been misplaced in a hanging folder containing appellee's file. He admitted that he made a mistake by not sending the original agreement to the Board.

The Board found that appellee admitted that she had written prescriptions between May 16, 2002, and November 2002 and concluded that appellee was guilty of "unprofessional conduct."

The Board imposed a $1,000 civil penalty on appellee, placed appellee's license on six months' probation, and ordered appellee to complete a Legal and Ethical Issues course. The Board imposed several conditions of probation, including that appellee present each future employer with a copy of the Board's order; that appellee and her employer must submit quarterly reports concerning appellee's safe practice of nursing; and that appellee not practice nursing outside the State of Arkansas without the written permission of the Board and of the appropriate board in the state in which appellee seeks to practice.

Appellee then sought judicial review in circuit court, alleging that the Board's finding that she was guilty of "unprofessional conduct" was not supported by substantial evidence because the Board failed to produce evidence as to each element necessary to support such a finding of "unprofessional conduct." The circuit court reversed the Board, finding that the Board's decision was not supported by substantial evidence because there was no proof as to the accepted standards of the nursing profession or that appellee's failure to obtain prescriptive authority was a result of her "conscious disregard for the health and welfare of the public and of the patient under the nurse's care." This appeal followed.

For reversal, the Board specifically argues that there was substantial evidence to support its decision; that the decision was within the scope of its statutory authority; and that the decision was not arbitrary, capricious, or an abuse of its discretion.

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

■ In determining whether a decision is supported by substantial evidence, we review the record to ascertain if the decision is supported by relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Arkansas Bd. of*

Exam'rs v. Carlson, 334 Ark. 614, 976 S.W.2d 934 (1998). In doing so, we give the evidence its strongest probative force in favor of the administrative agency. *Id.* The question is not whether the testimony would have supported a contrary finding, but whether it supports the finding that was made. *Id.*

The Board argues that there was substantial evidence to support the finding that appellee wrote prescriptions without proper authority and, therefore, it was error for the trial court to reverse its decision imposing discipline on appellee. Noting that appellee admitted to writing prescriptions without authority, the Board argues that this admission is sufficient evidence to support its decision. In our view, the Board's analysis does not go far enough. Appellee was not simply charged with writing prescriptions without proper authority; she was charged with "unprofessional conduct." Because of the language used to define "unprofessional conduct," the Board must prove both an act or omission on appellee's part that fell below the standard of care of the nursing profession **and** that such act or omission was the result of a "conscious disregard for the health and welfare of the public and of the patient under the nurse's care. . . ." Regulations, Ch. 7, § XV(a)(6). Appellee's admission was just the first prong necessary to support the Board's decision. The second prong is that there must be evidence to show that appellee's admitted actions fell below the standard of care and "which results from conscious disregard for the health and welfare of the public and of the patient under the nurse's care. . . ." There is no evidence in this record showing that appellee's actions were the result of a "conscious disregard of the health and safety of the public."

Arkansas case law contains many cases requiring expert testimony on the standard of care in professional discipline cases where the applicable rules or regulations define professional misconduct as falling below certain standards. In *Hake v. Arkansas State Medical Board*, 237 Ark. 506, 374 S.W.2d 173 (1964), the supreme court first addressed the issue of whether expert testimony is required to establish the standard of care against which a professional is judged by a professional licensing board. There, Dr. Hake appealed an order by the Arkansas State Medical Board revoking his license to practice medicine. Dr. Hake argued that the board's decision was not supported by any competent evidence because

"the findings and opinion of the board [were] based on testimony or conversation or other matters which arose or were presented at [an] informal and unreported hearing." 237 Ark. at 510, 374 S.W.2d at 176. The court agreed and reversed the revocation on the grounds that "there [was] a virtual absence of evidence in the record to sustain the board's findings, as well as no expert testimony to provide a standard for the board's medical opinions." *Id.*[2]

Hollabaugh v. Arkansas State Medical Board, 43 Ark. App. 83, 861 S.W.2d 317 (1993), involved discipline of a physician. The Arkansas State Medical Board placed Dr. Hollabaugh on probation and directed her to refrain from writing certain narcotics prescriptions, and the circuit court affirmed this decision. This court reversed the circuit court, determining that there was not substantial evidence to support the board's decision, stating:

> There is a virtual absence of evidence in the record to sustain the board's findings, as well as no expert testimony to provide a standard for the board's medical opinions. The valuable property rights here involved cannot be taken from appellant upon such questionable compliance with due process.

Hollabaugh, 43 Ark. App. at 87, 861 S.W.2d at 319 (citing *Hake*). This court then held that the record must contain expert testimony establishing the standard of care to which Dr. Hollabaugh is to be held and whether she violated that standard and that, without such evidence, this court could not affirm the decision of the board.

The Board attempts to distinguish *Hollabaugh* and *Hake*, arguing that they involve doctors who admitted to overprescribing medications, while the present case is a licensing case. We do not believe this to be a valid distinction. All three cases involve disciplinary actions. *Hake* involved the revocation of a

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[2] In *Finch v. Neal*, 316 Ark. 530, 873 S.W.2d 519 (1994), an attorney disciplinary proceeding, the supreme court clarified its holding in *Hake*. The attorney, citing *Hake*, argued that the reprimand issued to him should be reversed because there was no expert testimony regarding the standard against which to measure his conduct. The supreme court explained that the board's decision was overturned in *Hake* because the board had not complied with the statutory requirement that all evidence considered by the board be included in the official record of the proceedings. The board in *Hake* had relied on conversations and evidence from an earlier, unofficial, unreported meeting with the doctor.

medical license, while *Hollabaugh* and the present case involve placing the professional on probation. The present case is not one where the Board is denying appellee a license in the first instance because Georgia Lewis admitted that appellee's RN license was issued on February 12, 2002, and her APN license was issued on February 15, 2002. The present case involves discipline to one already licensed in the profession.

In *Livingston v. Arkansas State Medical Board*, 288 Ark. 1, 701 S.W.2d 361 (1986), the supreme court affirmed the medical board's finding that Dr. Livingston had committed "grossly negligent or ignorant malpractice" warranting the suspension of her license to practice medicine for thirty days. The court noted that "malpractice" is defined by the medical board's regulations to include "any professional misconduct, unreasonable lack of skill or fidelity in professional duties, evil practice, or illegal or immoral conduct in the practice of medicine and surgery." 288 Ark. at 5, 701 S.W.2d at 363. In *Livingston*, there was expert testimony that Dr. Livingston's actions had breached the ordinary standard of care in the community.

These cases, together with such cases as *Arkansas Department of Human Services v. Haen*, 81 Ark. App. 171, 100 S.W.3d 740 (2003), show that an administrative agency must make findings on the issue of intent when the applicable statute or regulation so requires. In the present case, the Board argues that appellee conceded that she was guilty of an act or omission falling below the standard of care. However, at the time, appellee's counsel was making a motion to dismiss in the nature of a directed-verdict motion, arguing that the Board had not met its burden of proving every element of the charge of "unprofessional conduct" because there was no proof of the standard of care or proof of intent and that both elements were necessary in order to prove the charge. In this context, we believe that appellee was conceding only the act or omission, not that it fell below the standard of care or that it was done with the requisite intent. Even if this statement could be characterized as an admission that her act or omission violated the standard of care, there still must be evidence regarding whether appellee's action was the "result of a conscious disregard of the health and safety of the public or the patient. . . ." There is no substantial evidence regarding the standard of care or regarding appellee's intent. As such, the Board's

decision was made in excess of its statutory authority, and the circuit court was correct to reverse the Board.

Affirmed.

BIRD and BAKER, JJ., agree.

Barbara D. BOGARD *v.* STATE of Arkansas

CA CR 03-1328 197 S.W.3d 1

Court of Appeals of Arkansas
Opinion delivered November 3, 2004

Guy R. Satterfield, for appellant.

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

ROBERT J. GLADWIN, Judge. Barbara Bogard was charged with first-degree forgery and possession of drug paraphernalia in Faulkner County Circuit Court. Pursuant to Ark. R. Crim. P. 24.3, appellant entered a guilty plea conditioned on the outcome of her appeal of the trial court's denial of her motion to suppress. Appellant raises several points on appeal: (1) the probation officers' conduct was an unlawful intrusion without probable cause or a search warrant and was not the result of valid consent; (2) she was not advised of her Miranda rights and the search exceeded the reasonable scope of a search under the totality of the circumstances; (3) the probation officers were without authority and jurisdiction to conduct a warrantless search of her home. Because there was simply no evidence as to good faith, which was the basis of the trial court's finding, we reverse and remand.

At a hearing on appellant's motion to suppress, Probation Officer Terri Rowlett testified that appellant's husband, Scott Crow, began his three years' probation on May 29, 1997, for a felony conviction of fraudulent use of a credit card. As a result of the State's petition to revoke, Crow's probation period was extended two years on July 16, 2001. Rowlett stated that on January 25, 2002, she made a routine visit to Crow's residence. Rowlett testified that appellant, Crow's wife, opened the door and said she had something on the stove. Rowlett went inside the home, and appellant explained that Crow was at work. The other two probation officers with Rowlett did a "walk through" of the residence. One of the officers informed Rowlett that she had found a plastic corner baggie with residue on a bed. Rowlett called her supervisor and told the supervisor they were going to conduct a full search. Rowlett stated that in the bedroom they found pipes, a baggie with white powder residue, pills in bottles, cigarette cellophanes, a tin box containing pills and four $100 bills, a red bag containing four more $100 bills and one $10 bill, and a baggie of seeds and residue. In the trash they found pieces of burnt tin foil, corner baggies with white powder residue, and a pipe with burnt residue. In the medicine cabinet, they found various pills in

cellophane. A pill bottle found in the kitchen cabinet contained empty capsules and loose powder. In a bag in the music room, they found a pipe, straws, and glass. Because the money appeared to be counterfeit, Rowlett called the sheriff's office, and an investigator eventually arrived on the scene.

On cross-examination, Rowlett testified that appellant invited them into the home. Further, Rowlett stated that she did not file a petition to revoke Crow's probation based on the items found at his residence because he was not present during the search and because his probationary period had expired. She admitted that she and the other probation officers opened drawers and containers and that they questioned appellant about the contraband.

Michelle Ross, a probation officer, testified that appellant let them come inside the house. Ross stated that she asked appellant about the money that looked counterfeit and that appellant told her how she made it on the computer and said she was just fooling around. Ross stated that she did not advise appellant of her Miranda rights before questioning her. At that point, the State conceded that appellant's statement was not admissible.

Kelli Brock, another probation officer, testified that Rowlett told appellant they were there to do a home visit on Crow and that appellant said that Crow was not there. She stated that they then entered and appellant did not tell them to leave. Brock explained that she was not sure about the exact conversation at the door because she was standing in the yard.

Jim Wooley, an investigator with the Faulkner County Sheriff's Office, testified that the probation officers turned all of the evidence over to him. Based on the evidence and statements from the probation officers, he arrested appellant.

In denying appellant's motion to suppress, the trial court found that Crow was, or appeared to be, on probation and that the probation officers had the authority to be on the site. The court further found that the probation officers had a good-faith belief that they had authority to search.

Appellant then testified at the hearing. She stated that she was cooking breakfast when the probation officers knocked on her door. She stated that she told them that Crow was not at home. She testified that she told them to wait but that they came inside anyway. Appellant stated that they began to search and started

asking questions about what they found. She said that they told her to sit down and would not let her get up from where she sat.

In reviewing the trial court's denial of a motion to suppress evidence, we conduct a *de novo* review based on the totality of the circumstances, reviewing findings of historical fact 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 and proper deference to the trial court's findings. *See Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). The trial court's ruling will not be reversed unless it is clearly against the preponderance of the evidence. *See Scott v. State*, 347 Ark. 767, 67 S.W.3d 567 (2002). We will defer to the trial court in assessing the credibility of witnesses. *Id.*

A warrantless entry into a private home is presumptively unreasonable, and the burden is on the State to prove the warrantless activity was reasonable. *See Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999). A warrantless entry made with consent does not violate the Fourth Amendment; however, consent to a warrantless search of one's home must be given freely and voluntarily. *See id.* The State has a heavy burden to prove by clear and positive testimony that consent was freely and voluntarily given. *Id.* Consent cannot be presumed from proof that a person merely acquiesced to police authority nor from an absence of proof that a person resisted police authority. *See id.*

Although it was not in the record, the State contends that Crow had executed a consent to search form pursuant to being placed on probation. In all three of her arguments on appeal, appellant points out that Crow's probation was illegally extended and that any consent to search on Crow's part ceased when his probationary period expired. The State essentially concedes that the revocation and subsequent extension of Crow's probation was invalid but contends that the search of Crow's residence, pursuant to what Rowlett believed to be a valid order of probation and consent to search, falls under the good-faith exception to the exclusionary rule set out in *United States v. Leon*, 468 U.S. 897 (1984). The State relies on a case involving a similar situation where a probationer's search waiver had expired. *See People v. Downing*, 33 Cal. App. 4th 1641 (1995), *cert. denied*, *Downing v. California*, 516 U.S. 1120 (1996). Citing *Leon*, *supra*, the court in *Downing* noted:

> Where . . . the search is later found to be invalid, as in this case where it was conducted pursuant to a probation condition or "consent" that had expired, *i.e.*, was nonexistent, at the time of the search, a Fourth Amendment violation is shown and the question thus becomes whether such constitutional violation is appropriately remedied by the application of the judicially created exclusionary rule which prohibits the admission at trial of the evidence obtained during the unlawful search.

Id. at 1650-51.

That case is distinguishable. There, a police officer received information that Downing was engaged in drug activity. The officer then ran Downing's name on the police department's "criminal history" computer log, which indicated that Downing was subject to a search waiver that was still in effect. The officer double-checked that information with a "Fourth Amendment Log" to verify that the waiver expired on the same date as listed in the police computer log. This procedure was in compliance with the police department's policy regarding verification of search waivers before conducting warrantless searches. When the officer found that the dates were the same, he believed the search waiver was valid. Although Downing told him prior to the search that he was no longer on probation, the officer conducted a search anyway. It was later determined that Downing's search waiver was, indeed, no longer valid and that there had been a computer error. At the suppression hearing, the court clerk who made the entry error testified as to how the error occurred. Downing presented the testimony of his probation officer and a person from the Probation Department records section. They testified that if the officer had called them, as many police officers do, they could have easily given him information about Downing's probation status. The appellate court held that the trial court had erred in granting Downing's motion to suppress because the officer acted in objectively reasonable good faith. The court further held that the officer was presented with facially valid computer information produced by the superior court and that the officer was not required to exhaust all avenues of investigation when he had no reason to question the computer information in front of him. Finally, the court held that to apply the exclusionary rule would not serve to promote its purpose of deterring unlawful police conduct.

In the case at bar, the search of appellant's residence was carried out by probation officers and not the police. As probation officers, they should have been in a better position to know the status of Crow's probation. The revocation and extension of Crow's probation was clearly an illegal sentence because Crow's probationary period had already expired. Here, there was no evidence as to what information the probation officers relied on in conducting a walk-through of the residence or, for that matter, whether they even consulted their records. While the State suggests that the probation officers relied on a consent to search form that Crow signed, that form is not in the record for our review to determine the nature of the consent. Moreover, there was no evidence as to what the probation officers believed regarding their authority. Even assuming that the good-faith exception applies under these circumstances, we cannot agree with the trial court's finding that the probation officers believed they had the authority to search and were acting in good faith with regard to the initial entry. There is simply no evidence to support that conclusion without speculating.

The State also contends that appellant had a diminished expectation of privacy in cohabiting with a probationer. Instead of pressing the issue as to whether appellant consented to the search, the State argues that, irrespective of appellant's consent or lack thereof, the probation officers were entitled to rely on the order of probation allowing them to do a walk-through search of the residence. Crow, however, was not a probationer at the time of the search. Because his consent was no longer a valid basis for the search, the probation officers had to have had appellant's consent to search. It is doubtful that the State could have met its burden of proving that any consent by appellant was freely and voluntarily given when she was faced with three probation officers who alleged that they had the authority to search the residence because Crow was a probationer. Even assuming that appellant specifically invited the probation officers inside her home instead of merely acquiescing to their entry, there was no testimony that appellant consented to the subsequent search.

Because of the lack of evidence as to the probation officers' good faith in their initial entry of residence, we cannot say that the probation officers were entitled to rely on Crow's consent given in conjunction with a probation order that had expired.

Accordingly, we hold that the trial court erred in denying appellant's motion to suppress.

Reversed and remanded.

ROBBINS and VAUGHT, JJ., agree.

ARKANSAS DEPARTMENT of HUMAN SERVICES *v.* Ronald PARKER

CA 04-311 197 S.W.3d 33

Court of Appeals of Arkansas
Opinion delivered November 3, 2004

[Rehearing denied December 8, 2004.]

Gray Allen Turner, for appellant.

R. Victor Harper, for appellee.

ROBERT J. GLADWIN, Judge. Appellant Arkansas Department of Human Services (DHS) appeals the entry of an order of the Lincoln County Circuit Court that found appellee Ronald Parker should have his name removed from the child-abuse

registry. The ruling was based upon the circuit judge's finding that Parker, as a stepparent acting at the direction of and in concert with the natural mother in their household, was merely disciplining the children. Because the judge found that the administrative law judge (ALJ) erred in not including Parker in the exception allowing for reasonable and moderate discipline by a parent or guardian, he expunged Parker's name from the child-abuse registry. From that decision comes this appeal with DHS arguing that the agency's decision should be reinstated. We disagree.

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

Administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues affecting their agencies, and this recognition accounts for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency. *Tomerlin v. Nickolich supra.* Administrative decisions will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion. *McQuay v. Arkansas State Bd. of Architects*, 337 Ark. 339, 989 S.W.2d 499 (1999). These standards are consistent with the provisions of the Administrative Procedure Act codified at Ark. Code Ann. §§ 25-15-201 to 25-15-214.

Under the Administrative Procedure Act, the circuit court or appellate court may reverse the agency decision if it concludes:

> (h) [T]he substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;

(2) In excess of the agency's statutory authority;

(3) Made upon unlawful procedure;

(4) Affected by other error or law;

(5) Not supported by substantial evidence of record; or

(6) Arbitrary, capricious, or characterized by abuse of discretion.

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

Substantial evidence is defined as "valid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion, and force the mind to pass beyond conjecture." *Tomerlin*, 342 Ark. at 333, 27 S.W.3d at 751 (*quoting Arkansas State Police Comm'n v. Smith*, 338 Ark. 354, 362, 994 S.W.2d 456, 461 (1999)). To establish an absence of substantial evidence, the challenging party must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion. *Id.* We review the entire record in making this determination. *Arkansas Alcoholic Beverage Control Bd. v. Muncrief*, 308 Ark. 373, 825 S.W.2d 816 (1992). Although an agency's interpretation of a statute is highly persuasive, where the statute is not ambiguous, we will not interpret it to mean anything other than what it says. *Social Work Licensing Bd. v. Moncebaiz*, 332 Ark. 67, 71, 962 S.W.2d 797, 799 (1998).

With these rules of law, the evidence that was presented at the administrative level must be examined. On January 21, 2003, an abuse hotline report was made indicating that appellant's stepchildren had been abused. Appellant admitted that he used a belt to spank eight-year-old H.H., six-year-old C.P., and three-year-old I.P. for misbehaving Appellant was married to their mother, and the children resided in their home. On that particular day, the children's mother told appellant that the children had misbehaved all day and, after having given them three warnings, she gave them "one lick," which was ineffective. After discussing what to do, they agreed that he would give them "three licks" with a belt, and acting in a rational manner, he administered that punishment. Both appellant and his wife denied that any child was slapped.

The hotline call was attributed to the children's maternal grandmother, who did not like appellant. A family services worker came out the next day to investigate. She was told by H.H. and I.P. that their stepfather slapped I.P. in the face for her misbehaving, but C.P. denied that it occurred. They all believed that they had been spanked with a belt for disobeying their mother. The worker said that she observed and photographed the children's behinds and noted that there were linear bruise marks consistent with a belt on H.H. and C.P. There were no marks on I.P.'s face or buttocks. The photos were not admitted into evidence. The worker opined that the marks were "minor and transient" and that the abuse investigation should be found untrue.

On this evidence, the agency found that a preponderance of the evidence supported a finding of abuse against appellant with regard to only H.H. and C.P. because of the spanking with a belt. The ALJ defined abuse in this context as any person inflicting on a child "any *injury* which is at variance with the history given." Ark. Code Ann. § 12-12-503(2)(A)(iv) (Repl. 2003) (emphasis in administrative opinion.). The ALJ further cited to subsection (2)(C)(i), (iii), and (iv) (Repl. 2003) which provides that abuse does *not* include:

> [D]iscipline of a child when it is reasonable and moderate and is inflicted ***by a parent or guardian*** for purposes of restraining or correcting the child . . . Reasonable and moderate physical discipline inflicted by a parent or guardian shall not include any act that is likely to cause and which does cause injury more serious than transient pain or minor temporary marks . . . The age, size, and condition of the child and the location of the injury and the frequency or recurrence of injuries shall be considered when determining whether the physical discipline is reasonable or moderate[.]

(Emphasis in administrative opinion.)

The administrative officer specifically found that appellant, as a stepfather, did not enjoy the protection of this reasonable-and-moderate-discipline exception. He appealed, and the circuit court found that he did fall within the discipline portion of the statute. DHS appealed to our court.

The argument on appeal by DHS focuses on DHS's belief that appellant slapped three-year-old I.P. in the face to uphold the finding of abuse, a finding not made by the ALJ. This

is specifically a basis to find abuse, with or without injury, where the child is age six or under. Ark. Code Ann. § 12-12-503(2)(A)(vii)(a) (Repl. 2003). However, we are limited to the ALJ's findings: that only H.H. and C.P. suffered "an injury at variance with the history." I.P. was not the subject of this administrative finding.

DHS also argues that the ALJ was correct to exclude the exception. Appellant initially claims that appellee failed to preserve this issue for appeal. We hold that this issue is preserved.

Appellee argues that the ALJ incorrectly found that he committed abuse. He contends that there is no substantial evidence to support the ALJ's finding.

■ The ALJ, in making his finding, defined the abuse in this context as any person inflicting on a child "any injury which is at variance with the history given." The bruising here was not at variance with the history given. It was undisputed that appellee spanked the two older children, and as a result they sustained bruises on their buttocks. That injury is entirely consistent with the history given. As a result, we hold that the ALJ's finding was arbitrary, capricious, and an abuse of discretion.

■ The ALJ also found that appellee should not be afforded the protection of the discipline exception of Ark. Code Ann. § 12-12-503(2)(C)(i) because he was not a parent. The statute defines "parent," and appellant does not fit into that category; however, it does not define "guardian." Appellant suggests that we look to Ark. Code Ann. § 28-65-101 (Repl. 2004) which provides that a "guardian" is one appointed by the court to have the care and custody of the person or the estate, or of both, or of an incapacitated person. We believe that the definition of "guardian" found in the criminal code regarding sexual offenses is more on point. Arkansas Code Annotated section 5-14-101(10) (Repl. 1997) provides:

> Guardian means parent, step-parent, legal guardian, legal custodian, foster parent or anyone who, by virtue of a living arrangement is placed in an apparent position of power or authority over a minor.

Certainly, considering the definition found in the criminal statute, which is more akin to the child-abuse statute, appellee was a guardian because he was a stepparent and one who lived with the children in an apparent position of authority.

Finally, both parties cite *ADHS v. Caldwell*, 39 Ark. App. 14, 832 S.W.2d 510 (1992), where our court held that a student receiving three average "licks" with a paddle at school that resulted in bruising on the buttocks did not warrant a school official being placed on the child-abuse registry. That case is not relevant to our analysis because the exception applied to a school official, which is not the issue in the case at bar.

For the reasons stated above, we hold that the ALJ's decision is not supported by substantial evidence and, accordingly, affirm the circuit court's decision.

Affirmed.

ROBBINS and VAUGHT, JJ. agree.

Christine SHERMAN *v.* Earley WALLACE

CA 04-183 197 S.W.3d 10

Court of Appeals of Arkansas
Opinion delivered November 3, 2004

James W. Harris, for appellant.

Danny W. Glover, for appellee.

ROBERT J. GLADWIN, Judge. Appellant Christine Sherman appeals the Crittenden County Circuit Court's ruling that appellee Earley Wallace acquired title to two lots located in Earle, Arkansas, by adverse possession. We reverse and dismiss.

In 1960 Sam and Armetta Davidson acquired the lots in question by warranty deed. Upon Armetta's death, title to the property vested in Sam. Sam died in 1974 and left a will bequeathing one half of his interest in the property to Howard Wallace, Jr., his step-grandson, and one half to Christine Wallace Sherman, his step-granddaughter. On August 20, 1974, Christine and Howard filed an affidavit for the collection of small estates by distributees with the Crittenden County Probate Court, stating that the property of Sam Davidson was divided one half to Christine and one half to Howard.

In 1976 Howard and Earley Morton, who were unmarried at the time, took possession of the property. In 1981 Howard and Earley were married and continued to live on the property. Howard died in December 2002, and Earley filed a petition to quiet title to the land.

Christine neither paid any taxes nor requested rent from her brother. She stated that she asked her brother if he needed help paying taxes and that he declined. Christine testified that the reason she did not ask for rent and did not inspect the property was because her brother was living there. She also testified that she and Earley disliked one another and that she had once stated that she was going home to Detroit and was never coming back because of problems with Earley. When asked why she did not try to file a petition to get Earley off the property, Christine testified it was because of her brother; he wanted Earley there, so she did not want to do "anything like that." Christine testified that Earley sent a letter in 1994 requesting that she sign documents to remove her name from the property. Christine said she called her brother and told him, "I'm not going to take my name off the property. My step-father willed it to both of us, and I'm not removing my name." Christine also testified that "at no time did my brother ever give me any notice whatsoever that he was holding this property adverse to my interest."

Earley testified that she had lived on the property since 1976. She testified that she and Howard made numerous repairs and substantial improvements to the house but that Christine did not

contribute any money. Earley said that when she and Howard took possession of the property, there was no agreement between them and Christine as to who would own and possess the property. She said that Christine did not give them permission to live there and that they did nothing to conceal their possession of the property from Christine.

Earley also testified that in 1994 Howard went to legal services and had some papers prepared and sent them to Christine to get her name removed from the property. She stated that Christine called and talked to Howard and that Howard told her afterwards that Christine was angry and that if he was the "short liver," Christine was going to give Earley trouble about the property. Earley admitted that she and Howard both knew that Christine owned one half of the property, but they went ahead and fixed up the property. She said that Howard sent letters asking Christine to turn over her interest in the property. Earley admitted, however, that she did not know if Howard ever gave Christine any notice that he was holding the property adverse to her interest.

> The trial court held that ["regardless of whether [Howard], the co-tenant of Christine Sherman, exercised possession of the property hostile to Christine Sherman and regardless of whether [Howard] exercised possession of the property with the intent to hold against [Christine,] the court finds that Earley Wallace, who was not a co-tenant, exercised possession of the property hostile to [Christine] and with the intent to hold against [Christine] for over seven years. The court finds that the relationship between [Christine] and [Earley] was hostile and that [Earley] had sent notice in 1994 of her intent to claim ownership of the property."] The trial court concluded that Earley had established ownership of the property by adverse possession.

■■ The dispossession of the cotenant is a question of fact, and we will not reverse the trial court's decision absent a showing that it was clearly erroneous. *See Graham v. Inlow*, 302 Ark. 414, 790 S.W.2d 428 (1990). In *Utley v. Ruff*, 255 Ark. 824, 502 S.W.2d 629 (1973), the supreme court set forth the general principles of law concerning adverse possession:

> Title to land by adverse possession does not arise as a right to the one in possession; it arises as a result of statutory limitations on the rights of entry by the one out of possession. Possession alone does not

> ripen into ownership, but the possession must be adverse to the true owner or record title holder before his title is in any way affected by the possession, and the word "adverse" carries considerable weight.

Id. at 826, 502 S.W.2d at 631.

In *Mitchell v. Hammons*, 31 Ark. App. 180, 792 S.W.2d 333 (1990), we discussed adverse possession as it relates to a claim against a cotenant:

> In examining the issue of adverse possession we begin with the familiar rule that the possession of one tenant in common is the possession of all. A tenant in common is presumed to hold in recognition of the rights of his cotenants. It has been said that the presumption continues until an actual ouster is shown. Since possession by a cotenant is not ordinarily adverse to other cotenants, each having an equal right to possession, a cotenant must give actual notice to other cotenants that his possession is adverse to their interests or commit sufficient acts of hostility so that their knowledge of his adverse claim may be presumed. In order for the possession of one tenant in common to be adverse to that of his cotenants, knowledge of his adverse claim must be brought home to him directly or by such notorious acts of an unequivocal character that notice may be presumed. The statutory period of time for an adverse possession claim does not begin to run until such knowledge has been brought home to the other cotenants. There is no "hard and fast" rule by which the sufficiency of an adverse claim may be determined; courts generally look to the totality of the circumstances and consider such factors as the relationship of the parties, their reasonable access to the property, kinship, and enumerable [sic] other factors to determine if non-possessory cotenants have been given sufficient warning that the status of a cotenant in possession has shifted from mutuality to hostility. When a tenant in common seeks to oust or dispossess the other tenants and turn his occupancy into an adverse possession and thus acquire the entire estate by lapse of time under the statute of limitations, he must show when knowledge of such adverse claim or of his intention to so hold was brought home to them, for it is only from that time that his holding will be adverse. When . . . there is a family relation between cotenants, stronger evidence of adverse possession is required.

Id. at 184-185, 792 S.W.2d at 335 (citations omitted).

In *Ueltzen v. Roe*, 242 Ark. 17, 411 S.W.2d 894 (1967), the supreme court listed the following as factors to be considered

in determining whether possession is adverse: (1) possession of the property; (2) payment of taxes; (3) enjoyment of rents and profits; (4) making of improvements; (5) payments of insurance made payable to the possessor; (6) holding possession of lands for a long period of time, such as thirty years; (7) selling timber; (8) executing leases; (9) assessment of property in one's own name; (10) selling crops; (11) the execution, delivery, and recording of a deed by one cotenant that purports to convey the entire property; (12) generally treating property as one's own. However, the court noted that it was necessary to look at the evidence as a whole:

> What in one case would be sufficient as a warning might not be enough in another. Relationship of the parties, their reasonable access to the property and opportunity or necessity for dealing with it, their right to rely upon conduct and assurances of the tenant in possession, kinship, business transactions directly or incidentally touching the primary subject matter, silence when one should have spoken, natural inferences arising from indifference — these and other means of conveying or concealing intent may be important in a particular case, but not controlling in another; for after all what a designated plaintiff or defendant had in mind when he or she consummated an act or engaged in a course of conduct often depends upon the personal equation and the individual's method of expression. There can, therefore, be no "open and shut" rule by which purpose can be measured.

Id. at 21-22, 411 S.W.2d at 896, (citing *Linebarger v. Late*, 214 Ark. 278, 216 S.W.2d 56 (1948)).

Christine argues that the trial court erred in concluding that Earley adversely possessed the lots in question. She contends that because possession by one cotenant is not ordinarily adverse to another cotenant, there were not sufficient acts of hostility to put her on notice that Earley was holding the property adversely. Christine also argues that the court erred in concluding that the equities of the case were weighed in favor of Earley because of the improvements she made.

Earley relies on the case of *Martin v. Certain Lands in Izard County*, 9 Ark. App. 181, 656 S.W.2d 713 (1983), to support her position that she obtained the property by adverse possession. In *Martin*, L.A. Harvell had sole possession of a 120-acre tract of land for sixty-nine years. There was an agreement with his four brothers, who were cotenants, that if he paid off a debt on the land

he could have it. Harvell paid the debt and remained in sole possession of the property. Harvell's sister never objected to his living there and selling the timber. According to Harvell's nephew, nothing had been done concerning a division of the property for fifty years because there would be controversy and they wanted to avoid a "showdown." Further, Harvell paid the taxes on the property for sixty-nine years. In affirming the trial court's finding that Harvell had established ownership by adverse possession, this court held that there was recognition on the part of the cotenants of the hostile character of Harvell's possession.

The case at bar is clearly distinguishable from *Martin*. First, there was no clear recognition that Earley's possession was hostile. She first entered the land with Howard, and her possession was permissive. After she and Howard married and Howard died, her interest in the property was derived from Howard's interest, so she was a cotenant. Further, Christine indicated that she did not attempt to oust Earley because her brother wanted her there and Christine would not do "anything like that." Again, this shows permissive possession.

Earley's argument that the letter sent in 1994 is proof of her intention to hold the property adversely to Christine's interest is misplaced. Earley's testimony was that Howard sent the letter, not her. Further, there is no testimony whatsoever that the letter stated an unequivocal intent to hold the property adversely to Christine's interest. Both parties testified that the letter was a request for Christine to relinquish her interest in the property, which Christine declined. A request to relinquish one's interest in property does not in and of itself constitute a statement of intent to hold against the recipient's interest.

Earley also argues that her paying taxes and making improvements on the property were evidence of her hostile intent to hold the property. The trial court stated that these improvements caused the equities to be weighed in favor of Earley. In *Graham v. Inlow*, *supra*, the supreme court stated:

> It is well settled that a tenant in common has the right to make improvements on the land without the consent of his cotenants; and, although he has no lien on the land for the value of his improvements, he will be indemnified for them, in a proceeding in equity to partition the land between himself and cotenants either by

> having the part upon which the improvements are located allotted to him or by having compensation for them, if thrown into the common mass.

302 Ark. at 417, 790 S.W.2d at 430 (citations omitted).

We agree with Christine and hold that the trial court's ruling was clearly erroneous. As a cotenant, Earley was required to prove that she gave actual notice to Christine that her possession of the property was adverse and hostile to Christine's interest, or to prove there were acts sufficiently hostile in nature that notice could be presumed. The request for Christine to relinquish her interest in the property, the payment of taxes, and the making of improvements to the land were not such notorious acts of an unequivocal character as to put Christine on notice that Earley was holding the property adversely to her interest.

For the reasons stated above, we hold that the circuit court's judgment was clearly erroneous. Accordingly, we reverse and dismiss.

Reversed and dismissed.

ROBBINS and VAUGHT, JJ., agree.

BANK of LITTLE ROCK *v.* CASADYNE CORPORATION, Bill C. Casto and Commercial R.E., Inc.

CA 04-114 197 S.W.3d 37

Court of Appeals of Arkansas
Opinion delivered November 3, 2004

Frederick S. Wetzel, II, P.A., for appellant.

Appellees, pro se.

JOHN B. ROBBINS, Judge. Appellant Bank of Little Rock (BLR) appeals the order of the Jefferson County Circuit Court that denied its motion for a deficiency judgment against appellees Casadyne Corporation and Bill C. Casto, individually and as president of Casadyne Corporation. Casto borrowed money from BLR and secured the debt by a first mortgage on certain real property. After Casto defaulted on the loan, a foreclosure suit was instituted, but prior to trial, the property was privately sold. The sale proceeds that BLR received at closing did not cover the outstanding balance of the mortgage loan. Casto resisted BLR's subsequent attempt to recover a judgment for the deficiency. The trial judge found that BLR had elected its remedy by participating in a private sale and releasing its mortgage lien that excluded Casto from protecting his interests. Therefore, the circuit court denied the motion for a deficiency judgment. We reverse and remand.

The facts are not in dispute, and we recite them here to properly consider the merits of the appeal. In June 1998, BLR extended a loan in the amount of $150,000 to Casto secured by a mortgage lien on property located in Pine Bluff, Arkansas. Under the terms of the promissory note, Casto was obligated to make thirty-five monthly installment payments, and a balloon balance being due in June 2001. BLR chose not to renew the note, Casto was unable to pay, and BLR instituted a foreclosure complaint on October 10, 2001, naming Casto and Casadyne Corporation as defendants. The mortgage and promissory note set forth BLR's rights upon default which included, in addition to remedies under applicable law, the right to demand payment of reasonable attorney's fees and collection costs.

In December 2001, after learning that Casto had deeded the property to Commercial R.E., Inc. (CRE), BLR filed an amended foreclosure complaint to add CRE as a defendant. Trial was set for October 31, 2002. A few hours prior to trial, CRE received a $150,000 offer on the property from Mr. Doyle Kittler, and a copy of the offer was provided to BLR. By letter, BLR requested the trial court to hold the trial in abeyance, in anticipation that the sale would go forward "and an order of dismissal would be entered in the next few weeks." The letter was copied to appellant Casto and CRE.

Prior to closing, BLR provided information for a closing statement, reporting that the amount owed to BLR for principal and interest was $142,860.32, and later reporting that additional monies were due under the terms of the promissory note and mortgage for reimbursement of a reasonable attorney's fee. This increased the amount due at closing to $148,333.03. This figure was provided to Casto, but Casto was not present at the sale closing, which was conducted on November 15, 2002.

In preparation for closing, the final figure BLR provided CRE as the amount owed on the note was $148,575.85. CRE informed BLR that it incurred additional closing costs that would cause the net sales proceeds actually realized to be less than the $150,000 sales price and that it would not have the additional funds to pay the difference to BLR. Nevertheless, the sale proceeded and BLR collected $140,136.98 and released its mortgage so that the sale could be closed. No notice about the deficiency was given Casto prior to the closing.

On November 21, 2002, BLR filed a motion with the trial court in the pending foreclosure action seeking a deficiency judgment against Casto in the amount of $8,300.12. At BLR's request, the trial judge dismissed defendant CRE from the foreclosure suit on December 9, 2002. A hearing on this matter was conducted on February 11, 2003, after which the trial judge concluded that BLR had elected its remedy and that BLR's motion would be denied. The trial judge emphasized that Casto was given no notice of the shortfall and was thereby precluded from seeking contribution from CRE.[1] He also noted that this private sale prevented a public sale "for sufficient funds to satisfy BLR." This appeal resulted.

On appeal, BLR argues that it pursued two consistent remedies as was provided for in the promissory note and mortgage and also under Arkansas law; that the amounts due were not paid in full upon sale of the property; and that Casto and his corporation are liable to provide one satisfaction of this debt. Casto responds that BLR controlled the collection of the monies due; that it improperly excused CRE from paying the full amount owed on the mortgage debt out of the $150,000 sales price; that proceeding to foreclosure would have ensured a higher sales price and would

[1] CRE is not a party to this appeal. Consequently, we do not address any rights or liabilities that may exist between appellees and CRE.

have covered the debt in its entirety; and that he and his corporation were wrongly denied notice of any deficiency prior to closure.

Appellant BLR correctly states that the election-of-remedies doctrine bars more than one recovery on inconsistent remedies. *Wilson v. Fullerton*, 332 Ark. 111, 964 S.W.2d 208 (1998). The general rule as to election of remedies is that, where a party has a right to choose one of two or more appropriate but inconsistent remedies, and with full knowledge of all the facts and of his rights he makes a deliberate choice of one, then he is bound by his election and cannot resort to the other remedy. *Coats v. Gardner*, 333 Ark. 581, 970 S.W.2d 802 (1998). However, where the law furnishes a party with two or more concurrent and consistent remedies, he may prosecute one or all until satisfaction is had; but a satisfaction of one is a satisfaction of all. *Haney v. Phillips*, 72 Ark. App. 202, 35 S.W.3d 373 (2000). He may select and adopt one as better adapted than the others to work out his purpose, but his choice is not compulsory or final. *Id.*

A mortgagee may ordinarily pursue all of his remedies at once, or he may pursue them successively. *See Haney, supra.* State courts have uniformly held that holders of notes secured by a mortgage can both sue the maker of the note and also foreclose on the property, regardless of which action they pursue first, without offending the election-of-remedies doctrine. *See id.* citing *Szego v. Anyanwutaku*, 651 A.2d 315 (D.C. App. 1994) and *Kepler v. Slade*, 119 N.M. 802, 896 P.2d 482 (1995)). Arkansas law is consistent with these general rules. *See Haney, supra.* The circuit court erred in finding that the motion for a deficiency judgment in the foreclosure suit was barred under the election-of-remedies doctrine. *See Haney, supra.*

In the present appeal, the current owner (CRE) of the mortgaged premises desired to sell the property and voluntarily located a willing buyer. These parties agreed to a price of $150,000.00.[2] Casto was on notice that a sale was about to close, and he believed that the amount he owed would be covered. Although a shortfall resulted to his detriment, Casto remained liable. In *Pulaski Federal Savings & Loan Assn. v. Woolsey*, 242 Ark.

[2] There was no finding by the trial court that this was an unreasonable price.

612, 414 S.W.2d 633 (1967), the supreme court held that the original note obligors who conveyed mortgaged realty to third parties who assumed payment of the note, but without release from the payee of the original obligor's primary obligation, remained liable for the deficiency on foreclosure. Despite Casto's contention that the bank failed in its duty to give notice to him about the deficiency prior to closure, his citation to the Uniform Commercial Code is not persuasive. The remedies of the bank with respect to the real estate mortgage are not governed by the Code. *See Bank of Bearden v. Simpson*, 305 Ark. 326, 808 S.W.2d 341 (1991). The U.C.C. provides for the regulation of security interests in personal property and fixtures. *Arkansas Iron & Metal Co. v. First Nat'l Bank of Rogers*, 16 Ark. App. 245, 701 S.W.2d 380 (1985).

In sum, the trial court erred in finding that BLR was barred from seeking a deficiency judgment on the basis of an election of remedies.

Reversed and remanded.

GLADWIN and VAUGHT, JJ., agree.

Alex FRANKS *v.* Perri PRITCHETT, J.K. Kazi, *Husband and Wife*

CA 03-1211 197 S.W.3d 5

Court of Appeals of Arkansas
Opinion delivered November 3, 2004

[Rehearing denied December 8, 2004.*]

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

Herby Branscum, Jr., for appellant.

B. Richard Allen, for appellees.

WENDELL L. GRIFFEN, Judge. The sole issue in this case is whether $14,200 that appellant Alex Franks found in the dresser drawer of his hotel room was mislaid. The White County Circuit Court found that the money was mislaid and ordered that the money be returned to appellees J.K. and Seddika Kazi, the hotel owners. We affirm.

Appellant was staying at a Comfort Inn in Searcy, Arkansas, while working on a highway project. He checked into the hotel on Monday, September 10, 2001, and found the money at issue on

Wednesday, September 12, 2001, after he had checked out and had returned to his room to retrieve his laundry. His room had been cleaned but was not yet occupied by another guest. Appellant found the money in plain view in the left part of the left drawer of his dresser. It was wrapped tightly with masking tape, like a brick, with some of the bills showing.

Appellant notified Perri Pritchett, the hotel manager, who notified the police. The police determined that there were two bundles of money separated by denominations and then bundled together. The bundle contained forty-six one-hundred-dollar bills and four-hundred eighty twenty-dollar bills, for a total of $14,200. The officer who took custody of the money testified that the money appeared to be intentionally and meticulously wrapped because all the bills faced the same direction. The City of Searcy held the money in trust, pending the outcome of this case.

Appellant filed an action against the City of Searcy, claiming ownership of the money. The City of Searcy counterclaimed, asserting an interest in the money and asserting that the Kazis and Pritchett should be joined as parties to the suit. The Kazis answered the third-party complaint, but Pritchett did not. The City of Searcy subsequently withdrew its claim.

At the hearing, the circuit court found Pritchett to be in default for any claim to the property. The court observed that the hotel had a history as being a site for drug trafficking, but rejected the possibility that the money was drug-related and should be considered abandoned. The court also commented that not much effort was put into concealing the money; however, the court was convinced that someone knowingly put the money into the drawer. The court ruled that the property was mislaid, as opposed to lost or abandoned, and that the money should be surrendered to the Kazis, to be held in trust until it was retrieved by the owner. In its written order, the court expressly relied upon *Terry v. Lock*, 343 Ark. 452, 27 S.W.3d 202 (2001), and found that the property was neither abandoned nor a treasure trove, and therefore, found that the money was either lost or mislaid. Because the money had been placed in a drawer, as opposed to being found on the floor, the court concluded that the money had been mislaid and forgotten. It further dismissed any claims of appellant, the City of Searcy, and Pritchett. This appeal followed.

The rights of a finder of property depend on how the found property is classified, and the character of the property should be determined by evaluating all the facts and circumstances

present in the particular case. *Id.* The Arkansas Supreme Court uses the classifications of found property that were used at common law: abandoned, lost, mislaid, and treasure trove. *Id.*

Property is abandoned when it is thrown away or when its possession is voluntarily forsaken by the owner, in which case it will become the property of the finder. Property is also abandoned when it is involuntarily lost or left without the hope and expectation of again acquiring it. Abandoned property becomes the property of the finder, subject to the superior claim of the owner. *Id.*

Lost property is property that the owner has involuntarily parted with through neglect, carelessness, or inadvertence and of whose whereabouts the owner has no knowledge. *Id.* Only if the owner parted with the possession of the property involuntarily and does not know thereafter where to find it, may the property be deemed to be lost property. *Id.* Property will not be considered to have been lost unless the circumstances are such that, considering the place where, and the conditions under which, it is found, there is an inference that it was left there unintentionally. *Id.* The finder of lost property does not acquire absolute ownership, but acquires only such property interest or right as will enable him to keep it against all the world but the rightful owner. *Id.*

Mislaid property is property that is intentionally put into a certain place and later forgotten. *Id.* Mislaid property is presumed to have been left in the custody of the owner or occupier of the premises upon which it is found. A finder of mislaid property acquires no ownership rights in it, and, where such property is found upon another's premises, the finder is required to turn it over to the owner of the premises. *Id.* The owner of such premises becomes a gratuitous bailee by operation of law, with a duty to use ordinary care to return it to the owner and is absolutely liable for a misdelivery. The place where money or property is found is an important factor in the determination of the question of whether it was lost or mislaid. *Id.*

A treasure trove is money, whose owner is unknown, found concealed in the earth or in a house or other private place, but not lying on the ground. *Id.* To be classified as treasure trove, the money must have been hidden or concealed so long as to indicate that the owner is probably dead or unknown. Title to

treasure trove belongs to the finder, against all the world except the true owner. *Id.*

In *Terry v. Lock, supra,* money was also found in a motel. In that case, the finder, an independent contractor working to remove material in preparation for hotel renovations, found a dust-covered cardboard box near the heating and air supply while removing ceiling tiles. The box contained old currency in varying denominations valued at $38,310. In determining that the property was mislaid, the *Lock* court specifically affirmed the trial court's finding that the money was intentionally placed where it was found for security purposes and to shield it from unwelcome eyes.

Appellant argues that the circuit court erred in reasoning that, simply because the money was placed in a drawer, it was mislaid. He asserts that this reasoning also supports a finding that the property was lost, abandoned, or treasure trove property. Appellant argues that, in contrast to the facts in *Terry v. Lock, supra,* here, there is no reason to believe that the true owner left the money in the drawer of a public motel room for security purposes with the expectation of returning to claim it. Appellees argue that the circuit court properly inferred that the money was placed into the drawer intentionally. They point to the fact that the money was intentionally and meticulously wrapped. They also argue that common sense and logic defy that the owner intended to part with such a large amount of money.

A trial court's determination as to the status of found property will not be reversed unless it is clearly erroneous. *Terry v. Lock, supra.* 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). We affirm on these facts because the fact that the money was found in a drawer supports a finding that it was intentionally placed there rather than being carelessly or inadvertently dropped by an otherwise unsuspecting owner.

From the bench and in its written order, the court noted that if the money had been found on the floor instead of in a drawer, it could have been said to have been lost. The court also stated:

> It appears to me that the only way I can see this is that somebody put the money in the drawer. Again, it did not fall in the drawer. If they put the money in the drawer, they knew they put the money in the drawer. There is insufficient evidence to find that it's

> abandoned property. The only conclusion then that I can reach is that it was mislaid property and the court is going to find that it is mislaid property.

Thus, the trial court concluded that, because the money was intentionally placed in the drawer, it had not been abandoned (voluntarily forsaken by the owner) or lost (through neglect, carelessness, or inadvertence).

The trial court's reasoning is consistent with the principle that the place where money or property is found is an important factor in determining whether it was lost or mislaid. To reason by analogy, if one leaves a wallet in a drawer, there is no greater reason to believe it was lost rather than intentionally placed there and forgotten. Similarly, here, as the trial court found, the fact that the money was placed in the drawer supports a finding that the property was not abandoned or lost, but was mislaid.

Affirmed.

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

HART and BAKER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. The majority concludes that the $14,200 in cash was mislaid property because it was recovered from a motel room drawer. Following the majority's reasoning, someone meticulously wrapped forty-six one-hundred dollar bills all facing the same direction into one bundle, and meticulously wrapped 480 twenty dollar bills all facing the same direction into another bundle, then wrapped the two bundles into a block the size of a brick using masking tape, intentionally placed the $14,200 block of money into a drawer in a public motel room, planning to later reclaim it, and then somehow forgot where he put it. As the majority notes, "the place where money or property claimed as lost is found is *an* important factor in determining whether it was lost or mislaid." (Emphasis added.) As the supreme court discussed in *Terry*, the character of the property should be determined by evaluating *all* the facts and circumstances present in the particular case. *Terry v. Lock*, 343 Ark. 452, 37 S.W.3d 202 (2001). The majority's failure to properly consider all the facts and circumstances present in this case leads the majority to a nonsensical result.

Likewise, I cannot agree with the majority that leaving a wallet in a drawer is in any way analogous to leaving a $14,200 block of cash in the same drawer. Unless those in the majority

customarily travel with significantly larger amounts of cash in their wallets than I, there is no validity in the comparison. The nature of the property is itself sufficient to refute the notion that it was intentionally placed in the drawer and the forgotten.

This is not to say that I do not sympathize with the trial judge's difficulty in determining the character of the property based on the scant evidence before him. The bundle of money does not fit neatly into any of the categories described in the *Terry* opinion. However, in *Terry* the money was found to be mislaid because it had been intentionally placed above the ceiling tiles of a hotel room, a place where it could be expected to remain undiscovered until the owner could return and retrieve it. This element of secreting the property in a way that suggests the owner anticipated returning to retrieve it is found not only in *Terry* but also in the cases upon which *Terry* relies. *See Benjamin v. Lindner Aviation, Inc.*, 534 N.W.2d 400 (Iowa 1995) (packets of currency recovered after removing the screws from a panel of an airplane wing); *Jackson v. Steinberg*, 200 P.2d 376 (Or. 1948) (currency removed from beneath the paper lining of a hotel room dresser drawer). However, this element is completely lacking in the present case, where there was no effort to conceal the money beyond placing it in a drawer. In contrast to the situation presented in *Terry*, here the owner of the property could be virtually certain that the money would be discovered.

The majority, employing the wallet analogy, concludes that "there is no greater reason to believe that it was lost rather than intentionally placed there and forgotten." While this may be true, it is a very different thing than establishing "by a preponderance of the evidence" that the property was mislaid. When all of the facts and circumstances in this case are considered, they lead logically to only one conclusion; that regardless of whether the money was placed in the motel room drawer intentionally, the true owner has abandoned his interest in it.

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

Bobby MORRIS *v.* STATE of Arkansas

CA CR 03-1347 197 S.W.3d 41

Court of Appeals of Arkansas
Opinion delivered November 3, 2004

James Law Firm, by: *William O. "Bill" James, Jr.*, for appellant.

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

WENDELL L. GRIFFEN, Judge. A jury convicted appellant Bobby Morris of Class B felony nonsupport and sentenced him to serve forty years in the Arkansas Department of Correction. He argues that the trial court erred in failing to grant his motion to dismiss and his motion for a directed verdict because the statute of limitations for a Class B felony is three years, and he was convicted for arrearages that date back more than three years from the time he was charged with nonsupport. Because the Arkansas Supreme Court has squarely rejected appellant's arguments, we affirm.

On November 5, 2002, appellant was charged with Class B felony nonsupport. On June 17, 2003, the State filed an amended information, more specifically alleging that appellant owed over $25,000 in child support as a result of not paying support from May 1, 1986, through June 1, 2003. On the morning of his trial, appellant filed a written motion to dismiss the charge, arguing that calculation of the arrearages exceeded the three-year statute of limitations for prosecution of a Class B felony.

Immediately before trial, appellant orally raised his motion to dismiss. He asserted that if arrearages were calculated for the three-year period prior to the filing of the information, he could be charged, at the most, with a Class C felony.[1] The State countered that the offense of nonsupport is an ongoing offense. The trial court denied the motion. Appellant later moved for a directed verdict based on the same argument. The trial court denied appellant's motion and subsequently denied his renewal, which was also based on the same argument. Appellant was convicted of the Class B felony and was ordered to serve forty years at the Arkansas Department of Correction. This appeal followed.

Appellant asserts that the three-year statute of limitations that applies to Class B felonies limits the State to calculating arrearages to those arrearages that occurred no more than three years prior to the date he was charged.[2] He asserts that the legislature has carved out no exceptions to the three-year statute of limitations that governs Class B felonies. Thus, he maintains that his charges should have been reduced to a Class C felony. Appellant reasons that classifying nonsupport as a continuing offense allows the State to wait until a person's arrearages reaches the level of the charging class that the State desires, ranging from a misdemeanor to a Class B felony. He notes that, according to the State's argument, he could have been charged in 1996 with a Class A misdemeanor, in 1997 with a Class C felony, and in 1998, with a Class B felony.

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[1] Appellant states that the appropriate three-year period is June 1999 through June 2002. However, appellant was charged in June 2003, not June 2002. Even if the statute of limitations began when the information was originally charged, in November 2002, the prosecution still began within three years from the date the information was charged, and therefore, was timely.

[2] At trial, appellant also argued in his motion for a directed verdict that the State failed to show that his failure to pay was willful. However, he asserts only the statute-of-limitations argument on appeal.

The State contends that the legislative intent that nonsupport should be considered a continuing offense is seen in the fact that the legislature chose to elevate the class of offense based upon the total amount of arrearages. Otherwise, a person could never be guilty of Class B nonsupport unless they failed to pay a one-time payment of $25,000. Further, the State cites to the Commentary to the Arkansas Code and to *dicta* in which the Arkansas Supreme Court lists nonsupport as an example of a continuing offense. *See* Original Comment to Ark. Code Ann. § 5-1-110 (Repl. 1997); *see also Hagen v. State*, 318 Ark. 139, 883 S.W.2d 832 (1994) (stating in *dicta* that nonsupport is a continuing offense).

Whether to grant a motion to dismiss a criminal prosecution lies within the discretion of the trial court. *Biggers v. State*, 317 Ark. 414, 878 S.W.2d 717 (1994). A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Miles v. State*, 350 Ark. 243, 85 S.W.3d 907 (2002). On appeal from the denial of a motion for a directed verdict, this court reviews the evidence in a light most favorable to the State, and affirms if substantial evidence supports the jury verdict; only evidence supporting the guilty verdict need be considered. *Id.*

Arkansas Code Annotated § 5-26-401(a)(2) (Supp. 2003) provides that a person commits the offense of nonsupport if he fails to provide support to his legitimate child who is less than eighteen years old. This statute further provides that nonsupport is a Class B felony if the person owes more than $25,000 in past-due-child support, and is a Class C felony if the person owes between $10,000 and $25,000 in past-due child support. A prosecution for a Class B or Class C felony must be brought within three years after the felony is committed. Ark. Code Ann. § 5-1-109(b)(2) (Supp. 2003).

For statute of limitations purposes, a single, noncontinuing offense is committed when every element of the crime occurs. Ark. Code. Ann. § 5-1-109(e)(1). However, a continuing offense is committed for statute of limitations purposes at the time a course of conduct or the defendant's complicity therein is terminated. Ark. Code. Ann. § 5-1-109(e)(1). A continuing offense is seen in the legislative purpose to prohibit a continuing course of conduct. Ark. Code. Ann. § 5-1-109(e)(1). The test to determine if a situation involves a continuing offense is whether the individual acts are prohibited, or whether the prohibited conduct is the course of action which the individual acts consti-

tute. *McClennan v. State,* 337 Ark. 83, 987 S.W.2d 668 (1999). If it is the former, then each act is a separate offense; if it is the latter, the offense is a continuous offense. *Id.*

The State asserts that the issue of whether nonsupport is a continuing offense is an issue of first impression. However, the Arkansas Supreme Court has recently addressed this issue, and in so doing, has squarely held that nonsupport is a continuing offense. *See Hampton v. State,* 357 Ark. 473, 183 S.W.3d. 148 (2004). The *Hampton* defendant filed a motion *in limine,* seeking to limit the time period in which the State could charge him with nonsupport and seeking to limit the amount of time used to calculate the amount of child support owed. *Id.* The *Hampton* defendant argued that, because he was charged with Class D felony nonsupport, and because prosecutions for Class D felonies must be brought within three years of the date the offense is committed, he could only be charged with arrearages dating no earlier than three years prior to the date the information was filed. *Id.* The State countered that the offense of nonsupport was a continuing offense. The trial court in *Hampton* denied the defendant's motion. The Arkansas Supreme Court affirmed the trial court's ruling, holding that nonsupport is a continuing offense, and that the prosecution was timely because the information was filed within three years after the offense was committed. *Id.*[3]

The *Hampton* case compels affirmance in the instant case. The only difference between the *Hampton* case and this case is the appellant here was charged with a Class B felony instead of a Class D felony. However, the same statute provides a three-year statute of limitations for Class B, C, and D felonies. Ark. Code Ann. § 5-1-109(c). Here, appellant was originally charged on November 5, 2002. An amended information was filed on June 17, 2003, alleging that appellant failed to pay support from May 1, 1986, through June 1, 2003. Therefore, the offense, a continuing

[3] We note that the *Hampton* court stated that it held in *McClennan v. State, supra,* that nonsupport is a continuing offense. This statement appears to be in error, because the statement in *McClennan* that nonsupport was a continuing offense was *dicta.* The issue in *McClennan* was whether three instances of performing a terroristic act should be charged as a single, continuing offense. In stating the law governing continuous offenses, the *McClennan* court noted that nonsupport under § 5-26-401 was a continuing offense. Therefore, we do not cite *McClennan* as direct authority that nonsupport constitutes a continuing offense.

offense, was committed as of June 1, 2003, and the charge was filed within three years of the date the offense was committed. Accordingly, the trial court did not err in denying appellant's motion to dismiss or his motion for a directed verdict.

Affirmed.

NEAL, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. I concur in affirming this case, in which appellant Bobby Morris was sentenced as an habitual offender to serve forty years in the Arkansas Department of Correction for the offense of nonsupport. The evidence presented reflected that Morris had accumulated over $40,000 in child- support arrearages dating back to his 1986 divorce, which placed him well within the class B felony category, for which the sentencing range for habitual offenders with four or more convictions is five to forty years. The unrebutted evidence presented at trial also reflected that Morris had no record of income for over seven years; that he was disabled and without a home; that his prior convictions were drug-related; and, as was suggested by the prosecutor, that his problem stemmed in part from being a drug addict.

Prior to 1997, the offense of criminal nonsupport, Ark. Code Ann. § 5-26-401 (Repl. 1997) was a Class A misdemeanor, except that it became a Class D felony if the person absented himself from Arkansas to avoid the duty to support, or had previously been convicted of nonsupport. However, the statute was amended in 1997 to provide in pertinent part that the offense be a Class D felony where the amount owed is more than $5,000 and a Class B felony where the amount owed is more than $25,000.[1]

There are undeniably hundreds of noncustodial parents in the State of Arkansas who fall into Morris's category, and while I cannot question the wisdom of the legislature in Arkansas in

[1] The offense was further amended in 1999 to provide in pertinent part for the following felony classes according to the amount of past due support:

A Class D felony if:

(C) The person owes more than two thousand five hundred dollars ($2,500) in past-due child support, pursuant to a court order or by operation of law, and the amount represents at least four (4) months of past-due support.

enhancing the punishment for nonpayment of support in this fashion, it is hardly a sensible use of our limited prison resources or of taxpayer funds to exact such a level of punishment for the offense in question.

While the greatly enhanced penalty may serve to motivate those capable of securing the funds to liquidate their child support arrearages, the Bobby Morrises of this world will undoubtedly not have that ability, and will in essence face what resembles "debtors' prison" if this statute is as aggressively pursued across Arkansas as was the case with Morris.

Kimberly POWELL *v.* Charles MARSHALL

CA 04-627 197 S.W.3d 24

Court of Appeals of Arkansas
Opinion delivered November 3, 2004

(2) Nonsupport is a Class C felony if the person owes more than ten thousand dollars ($10,000) but less than twenty-five thousand dollars ($25,000) in past-due support, pursuant to a court order or by operation of law.

(3) Nonsupport is a Class B felony if the person owes more than twenty-five thousand dollars ($25,000) in past-due child support, pursuant to a court order or by operation of law.

Hodson, Woods & Snively, LLP, by: *Bryan Sexton*, for appellant.

Steven B. Davis, for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Kimberly Powell appeals from the trial court's decision granting appellee Charles Marshall's petition for change of custody. Powell raises three arguments on appeal: (1) the "unclean hands" doctrine barred Marshall from seeking equitable relief; (2) the evidence presented was insufficient to find that a change in custody was in the child's best interest; (3) as the custodial parent, she should have had a presumption in her favor on her request for relocation.

The parties to this appeal were married in July 1995 and had one child, Payton, born in 1996. They separated in June 1997, and a decree of divorce was entered on November 18, 1997. Pursuant to the decree, Powell was awarded primary custody, with Marshall having standard visitation rights. Both the decree and the visitation

schedule attached to the decree provided that neither party was to have overnight guests of the opposite sex while the child was present. The visitation schedule also stated that neither party was to use or be under the influence of drugs or alcohol when the child was in their care.

On May 15, 2003, Marshall filed a petition for change of custody, alleging that Powell had violated court orders by cohabitating with a man to whom she was not married while the minor child was in her care. In addition to Powell's cohabitation, Marshall alleged that there had been a material change in circumstances due to Powell's planned out-of-state move, which he argued would interfere with his visitation and his relationship with the child. Marshall further alleged that he had remarried and that he and his new wife had another child, in addition to his wife's child from a previous marriage who was close in age to Payton. He argued that Payton had bonded with the other children and that it was not in Payton's best interest to move out of state. Marshall requested that he be granted permanent custody of Payton. Powell filed a response to the petition, raising the defense of unclean hands, and also filed a petition for contempt, alleging that Marshall had failed to pay for medical expenses and that he had consumed alcohol in the presence of the child during his visitation periods.

A hearing was held on February 3, 2004. At the hearing, Powell testified that Payton was currently eight years old and that she had primary custody. Powell admitted that she had cohabitated with two individuals in the presence of Payton in violation of court orders. She stated that she lived with one male in 2000 and that she had been living with Randy Trumbley since March 2003. Powell testified that she had lived with both men because she thought she wanted to marry them, and that she had in fact married Trumbley since the filing of the petition to change custody. She stated that she and Trumbley had been waiting for his divorce to become final before getting married. According to Powell, she believes it is proper to cohabitate "if the man is willing to take on another man's child and raise and be the male figure in his life."

Powell testified that she and Trumbley were planning on moving to Lone Wolf, Oklahoma, where she and her husband had already obtained employment. She stated that she would be working as a secretary and bookkeeper and would be earning $9.00 per hour, in addition to receiving insurance for herself and her son. Powell stated that she would be able to take Payton to and from school and be involved with his activities. She testified that she had

checked out the school he would be attending and had spoken with the principal. She further stated that they would be moving from a two-bedroom trailer into a three-bedroom, two-bath house, which would be free for the first six months. She stated that she has no relatives in the area but that Trumbley has relatives in Mustang and Gary, Oklahoma. Powell also testified that she has friends in the area who show cattle and that Payton was excited about getting into that activity. She stated that there were also bigger cities near where they would be living where Payton would be able to participate in other activities, such as wrestling.

Powell further testified that Marshall was not the best person to have custody of Payton because he had a drinking problem. She stated that she had observed him under the influence several weeks earlier on January 18, when he was bringing Payton home from his visitation. Powell testified that Marshall was not driving but that he was drinking in the vehicle with Payton. She stated that Marshall was slurring his words and asked her to step out in the road, and she guessed that he asked this so that he could run over her. She stated that he was angry with her because she had confronted him about his drinking, and that he had made threats toTrumbley and his son. She also stated that she had filed a harassment charge against Marshall in 1996 or 1997. According to Powell, Marshall had no objection to her cohabitation until she told him that she planned to move, and she stated that the reason he filed the petition to change custody was only because of the move. She further testified that she had never denied visitation to Marshall and had never allowed any problems between them to interfere with visitation.

Marshall testified that he currently lived in Little Rock, Arkansas, and that he had been married for four or five years. He stated that he worked at the Farmer's Co-op and lived in a three-bedroom, two-bath trailer. Marshall testified that his son, Ty, who is three years old, as well as his stepdaughter, Lindsay, who is eleven, lived with them. He stated that he also has another child, Cameron, for whom he paid child support and visits every other weekend. Marshall testified that he wants to see Payton and Ty raised together because Ty thinks highly of Payton. Although his scheduled visitation with Payton was only every other weekend, Marshall stated that he was able to visit with him every weekend and "nearly all summer long." He stated that he took Payton to rodeos and that they went fishing and rode horses. He further stated that he has family that lived nearby and that he takes Payton to visit them.

Marshall testified that he had objected to Powell's cohabitation with males in the presence of Payton in the past and that this was the reason he filed the petition to change custody, not her planned out-of-state move. Marshall admitted that he had been drinking the afternoon of January 18 and that he drank in the car while returning Payton to Powell, although his sister was driving. He testified that he drank one or two beers a day and three or four on the weekend and that he bought a case or two of beer a week. Although Marshall stated that he drinks in front of Payton, he testified that he had never been intoxicated. Marshall admitted that he had been arrested for his second DWI in August and that he did not have a valid driver's license. He further admitted that he was married to Powell at the time his son Cameron was born and that his current wife, Jeanette Marshall, was pregnant with Ty at the time they got married. According to Marshall, he had no problem with Powell's current husband, and he admitted that the cohabitation problem had been resolved by Powell's marriage to Trumbley. However, he stated that he filed the petition because Powell was violating court orders by her living situation. Marshall testified that he does not have a problem with the court ordering him not to drink in front of Payton and that he did not think it was a good thing to do. He stated that he continued drinking in Payton's presence "because the [divorce] papers said that if she could live with a guy over there, then why couldn't I have a beer because we both broke the rules."

Jeanette Marshall testified that she and Charles Marshall had been married for more than three years. She stated that he and Payton had a very good relationship and that they rode horses and went hiking together. She further stated that Ty and Payton had a close relationship and that Payton spent time with Charles's family. Jeanette testified that Charles would drink one or two beers a day or three or four on the weekend. She stated that she had seen him tipsy but never "slobbering drunk." She testified that she had overheard her husband complain about Powell having overnight guests of the opposite sex prior to the time Powell announced her intention to move. Jeanette stated that she had no problems with Powell's new husband, Trumbley, and did not know of any problems that Charles had with him. She further stated that since Powell was now married to Trumbley, the issue of her living with a member of the opposite sex to who she was not married had resolved itself. She testified that she did not live with Charles prior to their marriage due to the presence of her daughter.

At the conclusion of this testimony, Powell moved for a directed verdict, which was denied. She then asked the court to orally amend the pleadings to request that she be allowed to move to Oklahoma. Marshall stated that he had no objection, and the court allowed the amendment. Powell then offered further testimony related to her request to relocate. She stated that Payton had been attending school in Berryville for the past three years and that he was on the honor roll. She stated that Marshall called Payton every evening and asked him about school. Powell testified that she and Trumbley had the opportunity to buy their new house in Oklahoma for $30,000 and that she could not purchase a home for that price in the area in which she currently lived. She testified that she had allowed Marshall additional visitation beyond what was ordered in the past and that she was willing to work with him to ensure that he continued to have visitation after the move. She stated that she was willing to travel to Arkansas at least once a month and that she would allow six weeks of visitation in the summer. She further testified that "anything else the court would require me to do, I would be willing to do it" and that she would be willing for the court to have continuing jurisdiction over the case.

In its ruling, the trial court noted that it had been the order of the court that neither party use or be under the influence of drugs or alcohol in the child's presence or have overnight guests of the opposite sex in the presence of the child unless married to them. The court then continued as follows:

> The polestar for the court is to determine the best interest of the child providing there is a significant change of circumstance which warrant a change in custody. In this case, the court must have a custodial parent who will obey the orders of the court. There is evidence that Mr. Marshall has consumed alcohol during visitation with the child. There is evidence that Mrs. Trumbley has lived for an extended period of time with a person who was not her husband. She continued to cohabit with Mr. Trumbley after the filing of the Petition for Change of Custody. It is apparent to the court that the court cannot rely on Mrs. Marshall to obey the orders of the court. The court is aware of Mr. Marshall's use of alcohol and knows the proof of his remarriage and birth of another half-sibling of Payton. *The court cannot determine if there is any benefit one way or the other as to which parent would have custody.* The court does determine that the law of the State of Arkansas grants a presumption in favor of the custodial parent which must be overcome by evidence presented by

> the non-custodial parent. *The court cannot find that the child would be better off by the move.* The court is convinced that the best interest of the child, even without regard to the move, or even acknowledging the presumption in favor of the custodial parent, it appears that the other factors in the case and specifically the factor of the court having faith that the custodial parent will obey orders of the court, *this court is convinced that Mrs. Trumbley will not follow the orders of this court. Taking this into consideration, and Mr. Marshall's long remarriage and birth of a half-sibling will allow the child the opportunity to grow up with a brother.* The court finds that the evidence shows that the custody should be changed to Charles M. Marshall.

(Emphasis added.)

We first consider Powell's argument that the evidence presented was not sufficient to find a change in custody in the child's best interest. A party seeking to modify custody must prove that a material change of circumstances has occurred since the last order of custody or that material facts existed at the time of the decree that were unknown to the court. *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003). 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). The trial court's findings in this regard will not be reversed unless they are clearly erroneous. *Id.* While custody is always modifiable, appellate courts require a more rigid standard for custody modification than for initial custody determinations in order to promote stability and continuity for the children and to discourage repeated litigation of the same issues. *Id.* There are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carries a greater weight than those involving the custody of minor children, and our deference to the trial judge in matters of credibility is correspondingly greater in such cases. *Id.*

Powell contends that the evidence was insufficient to meet Marshall's burden of showing a change in circumstances warranting a change of custody. She asserts that the trial court based its ruling on its lack of faith in her ability to follow court orders and on Marshall's remarriage and the birth of a half-brother to Payton. She argues that the court may not modify custody in order to punish the custodial parent for failure to comply with court orders and that a change in circumstances of the non-custodial parent is not alone sufficient to modify custody.

As Powell argues, the primary consideration in a petition to modify custody is the best interest and welfare of the child, and all other considerations are secondary. *Carver v. May, supra.* "Custody awards are not made or changed to punish or reward or gratify the desires of either parent." *Id.* at 296, 101 S.W.3d at 259. A violation of the trial court's previous orders does not compel a change in custody. *Id.* at 297, 101 S.W.3d at 261. The violation is a factor to be taken into consideration, but it is not so conclusive as to require the court to act contrary to the best interest of the child. *Id.* "To hold otherwise would permit the desire to punish a parent to override the paramount consideration in all custody cases, *i.e.*, the welfare of the child involved." *Id.* Instead, to ensure compliance with its orders, a trial court has at its disposal the power of contempt, which should be used prior to the more drastic measure of changing custody. *Id.*

The trial court in this case found that Powell had violated court orders by her cohabitation with two different men to whom she was not married. The court stated that it was convinced that Powell would not follow the orders of the court and that this fact, in addition to the changes in Marshall's life, warranted the change in custody. The court noted that it was not relying on Powell's planned relocation in deciding to change custody.

It is true that the appellate courts of this state have never condoned extramarital cohabitation in the presence of a child and that it has been held that this may of itself constitute a material change in circumstances warranting a change in custody. *See, e.g., Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999); *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001); *Thigpen v. Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987). In fact, in *Hamilton*, the supreme court affirmed the trial court's modification of custody where the mother had violated the court's non-cohabitation order, in addition to the fact that she had remarried and that the father had remarried and had a new child. However, our courts have also recognized a distinction between human weakness leading to isolated acts of indiscretion that do not necessarily adversely affect the welfare of the child, and that moral breakdown leading to promiscuity and depravity, which render one unfit to have custody. *Hepp v. Hepp*, 61 Ark. App. 240, 968 S.W.2d 62 (1998); *Watts v. Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986).

In this case, as Powell argues, the trial court did not find that her cohabitation had adversely affected the welfare of the child and did not state that her cohabitation necessitated a change in custody. In fact, the court stated that it could not determine whether there was "any benefit one way or the other as to which parent" should have custody. Rather, the trial court found that her noncompliance with court orders, in combination with Marshall's change in circumstances, warranted a change in custody. However, Powell had married Trumbley by the time of the hearing, and she was no longer out of compliance with the court orders. In addition, as the trial court recognized, Marshall had also violated court orders by drinking alcohol in the presence of the child. The trial court's finding that Powell's lack of compliance warranted a change in custody in this case allowed the court's desire to punish her to override the primary consideration in the case, which was the welfare of the child, and this is not proper. *Hepp v. Hepp*; *Ketron v. Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1985). As Powell contends, the change in Marshall's circumstances, by his remarriage and the birth of Payton's half-brother, are not alone sufficient to modify custody. *See Mason v. Mason*, 82 Ark. App. 133, 111 S.W.3d 855 (2003). Moreover, Marshall testified that he had intentionally violated the trial court's order by drinking alcohol in the child's presence because Powell was in violation of the court's order by her living arrangements, and that he lacked a driver's license because of his second DWI offense. Because the trial court's modification of custody is clearly against the preponderance of the evidence, we reverse on this point.

Powell also argues that although she requested that she be allowed to move with her son to Oklahoma, she was not given the presumption allowed to the custodial parent in relocation situations. In *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), the supreme court held that a presumption now exists in favor of relocation for custodial parents with primary custody, with the burden being on the non-custodial parent to rebut the relocation presumption. The court stated that the custodial parent is no longer required to prove a real advantage to herself and the children in relocating. *Id.* The trial court should use the best interest of the child as the polestar in making a relocation decision and should consider the following factors: (1) the reason for the relocation; (2) the educational, health, and leisure opportunities available in the location in which the custodial parent and

the 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) preference of the child, including the age, maturity, and the reasons given by the child as to his or her preference. *Id.*

Although evidence was presented by both parties on the issue of relocation, the trial court did not make findings on this issue. While the trial court stated that it was aware of the presumption in favor of relocation, the court went on to state that it "cannot find that the child would be better off by the move." This statement is contrary to the holding in *Hollandsworth*, that the custodial parent need not prove a real advantage to herself and the children in relocating and that the burden is on the non-custodial parent to rebut the relocation presumption. On *de novo* review we conclude that the presumption was not rebutted in this instance. Moreover, it was clear from the trial court's ruling that it found a change in custody was warranted without regard to Powell's relocation. Accordingly, we reverse the decision changing custody to Marshall, and direct that Powell's relocation request be granted.

Because we are reversing the trial court's award of custody and failure to allow the request for relocation based upon Powell's second and third points on appeal, we need not consider her argument regarding the unclean-hands doctrine.

Reversed and remanded for entry of an order consistent with this opinion.

GRIFFEN and NEAL, JJ., agree.

Shanquita TAYLOR, a Juvenile, and Cloria Taylor, Guardian *v.* STATE of Arkansas

CA 04-369 197 S.W.3d 31

Court of Appeals of Arkansas
Opinion delivered November 3, 2004

Gary W. Potts, for appellant.

Mike Beebe, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Shanquita Taylor was adjudicated delinquent in juvenile court for check forgery in violation of Ark. Code Ann. § 5-37-201 (Repl. 1997). She was ordered to serve a one-year probation, complete forty hours of community service or pay a fine of $500, and pay restitution in the amount of $245.61 and court costs. On appeal, she argues that the trial court abused its discretion by admitting hearsay evidence that was used to identify her as the perpetrator of the crime. We affirm.

Shanquita and Trinett Miles are classmates. One day at school, Trinett asked Shanquita to hold her purse. Trinett had a checkbook in her purse. One week later, Trinett received a notice from her bank regarding insufficient funds in her bank account. She later discovered that some checks had been torn from her checkbook and that two checks had been forged on her account at a Wal-Mart store.

Matthew Hawkins testified that he was employed at the Wal-Mart store and accepted one of the forged checks from Shanquita. He testified that he recalled taking the check from Shanquita and identified her in the courtroom. When asked how he remembered accepting the check from Shanquita, Hawkins testified that he had been written up for failing to follow company policy regarding accepting checks; that he learned that the person who wrote the check was not the owner of the account; that he recognized Shanquita as someone who went to school with his wife; and that in order to identify the person who wrote the check, he looked for Shanquita's picture in his wife's yearbook. Counsel for Shanquita objected to Hawkins's testimony about the yearbook, arguing that it was inadmissible hearsay. The objection was overruled. Hawkins said that, after looking through his wife's yearbook, he was able to place Shanquita's name with her face.

Shanquita testified on her own behalf. She denied taking or forging Trinett's checks. Following the presentation of all of the

evidence, the juvenile court found Shanquita guilty, and this appeal followed.

Shanquita argues that the trial court abused its discretion by permitting Hawkins's testimony about his identification of her because his reference to her picture in the yearbook is hearsay. Shanquita also challenges the credibility of Hawkins's testimony because the State failed to introduce the yearbook into evidence. As a result, she argues, the trial court was forced to accept as true Hawkins's testimony that Shanquita and the person in the yearbook were the same.

Admissibility of evidence is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Martin v. State*, 346 Ark. 198, 57 S.W.3d 136 (2001). Our appellate courts will not reverse a trial court's ruling on a hearsay question unless the appellant can demonstrate an abuse of discretion. *Id.* "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ark. R. Evid. 801(c) (2004). Hearsay testimony is generally inadmissible. Ark. R. Evid. 802 (2004). The hearsay rule is not violated when a witness testifies about a physical object, which was not presented in court. *Johnson v. State*, 289 Ark. 589, 715 S.W.2d 411 (1986); *Redman v. State*, 265 Ark. 774, 580 S.W.2d 945 (1979). Also, a trial court does not abuse its discretion by admitting out-of-court statements that are not offered for the truth of the matter asserted. *Buchanan v. State*, 315 Ark. 227, 866 S.W.2d 395 (1993). Moreover, statements that are not offered for the truth of the matter asserted, but are merely offered to explain the witness's conduct, are not hearsay. *Brock v. State*, 70 Ark. App. 107, 14 S.W.3d 908 (2000).

In this case, Hawkins's testimony did not meet the definition of hearsay. First, Hawkins's reliance on the picture in the yearbook is not hearsay. Notwithstanding the State's failure to introduce the yearbook into evidence, Hawkins was free to testify about what he learned after viewing Shanquita's picture in the yearbook. Because the yearbook is a physical object and not a statement, it is not subject to the hearsay rule. More importantly, Hawkins's testimony was not offered for the truth of the matter asserted; rather, his testimony explained why he consulted the yearbook in the first place.

Accordingly, because Hawkins's testimony did not meet the definition of hearsay, the trial court did not abuse its discretion by overruling Shanquita's hearsay objection.

Affirmed.

GRIFFEN and NEAL, JJ., agree.

Daniel MORALES *v.* Hector MARTINEZ, *et al.*

CA 04-92 198 S.W.3d 134

Court of Appeals of Arkansas
Opinion delivered November 10, 2004

[Rehearing denied January 5, 2005.]

Jay N. Tolley, for appellant.

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

JOHN MAUZY PITTMAN, Judge. The appellant in this workers' compensation case, a Mexican national, was employed by appellee Martinez Packing Company to pick and pack produce on farms in Texas and Arkansas. On September 1, 2001, appellant and other workers were directed to clean a warehouse owned by appellee Holden-Conner Seed and Grain and used by appellee Martinez Packing Company to store produce. Appellant was injured while driving a forklift in the warehouse. He filed a claim for benefits that was denied, the Commission finding that appellant was not performing employment services at the time of the injury; that appellant's injury was not compensable because it was the result of horseplay; and that the agricultural farm labor exemption was applicable to appellee Martinez Packing Company. This appeal followed.

For reversal, appellant contends that the Commission erred in concluding that it was appellant's burden to show that he was not engaged in horseplay; in finding that appellant's injury was the result of horseplay; and in failing to impose liability for benefits upon appellee Holden-Conner Seed and Grain. We affirm.

The Commission correctly rejected appellant's contention that horseplay was an affirmative defense which must be proven by the employer. Arkansas Code Annotated section 11-9-102(4) defines the meaning of "compensable injury" in the Arkansas Workers' Compensation Law, and specifically excepts from that definition injuries caused by participation in horseplay. Ark. Code Ann. § 11-9-102(4)(B)(i) (Repl. 2002). Insomuch as the employee in a workers' compensation case has the burden of proving a compensable injury, Ark. Code Ann. § 11-9-102(4)(E) (Repl. 2002); *see Carman v. Haworth, Inc.*, 74 Ark. App. 55, 45 S.W.3d 408 (2001), the Commission correctly held that appellant in the present case had the burden to prove that he sustained an injury while engaged in the performance of employment services rather than while engaged in horseplay.

Nor do we agree with appellant's contention that the evidence is insufficient to support the Commission's finding that

his injury resulted from his participation in horseplay. In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence, *i.e.*, evidence that a reasonable person might accept as adequate to support a conclusion. *Carman v. Haworth, Inc., supra.* 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. *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002). Questions of weight and credibility are within the sole province of the Workers' Compensation Commission, which is not required to believe the testimony of the claimant or of any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Strickland v. Primex Technologies*, 82 Ark. App. 570, 120 S.W.3d 166 (2003). Once the Commission has made its decision on issues of credibility, the appellate court is bound by that decision. *Id.*

"Horseplay" has not been defined by statute or case law in Arkansas, except to note that its meaning is synonymous with the term "skylarking," which is chiefly employed in English case law. *Southern Cotton Oil Division v. Childress*, 237 Ark. 909, 377 S.W.2d 167 (1964). This is instructive, as the verb "to skylark" describes a practice in which a sailor would run up and down the rigging of a ship in sport, graphically exemplifying the dictionary definition of "horseplay" as "rough or boisterous play." *Webster's Third New International Dictionary* (1961). In the present case, there was evidence that appellant was not authorized to operate the forklift but that, while the forklift operators were distracted by a fire, appellant got behind the wheel of the forklift, began driving the forklift very fast in tight circles "like a game," and that he was "wasting time" and "playing" while doing so. On this record, we cannot say that the Commission erred in finding that the injury appellant sustained when the forklift overturned was the result of horseplay.

Given our resolution of this question, the remaining issue raised by appellant concerning the liability of appellee Holden-Conner Seed and Grain is moot, and we do not address it.

Affirmed.

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

William Robert FIELDS *v.* Patrice Anne FIELDS

CA 03-1405 198 S.W.3d 123

Court of Appeals of Arkansas
Opinion delivered November 10, 2004

Shemin & Hendren, PLLC, by: *Kenneth R. Shemin* and *Jennifer B. Hendren*, for appellant.

Pettus Law Firm, P.A., by: *E. Lamar Pettus* and *Donna C. Pettus*, for appellee.

JOHN B. ROBBINS, Judge. Appellant William R. Fields and appellee Patricia Ann Fields were divorced by a decree dated July 19, 1999, and entered on September 2, 1999. The divorce decree ordered an equal division of the parties' extensive assets. On November 2, 1999, Ms. Fields filed a petition for contempt and to show cause, and on August 18, 2000, a petition for contempt and modification. A hearing was held on January 29, 2001, and on March 5, 2001, the trial court entered an order continuing the case pending an audit to be conducted by a qualified auditor selected by agreement of the parties. On August 21, 2001, Ms. Fields filed another motion for contempt, to show cause, and for modification.

At a hearing held on April 7, 2003, Jack Bottoms, a certified public accountant selected by the parties, gave testimony relating to his analysis of how the assets should be divided. In conducting his accounting, Mr. Bottoms reviewed a twenty-one-page proposed order that had previously been agreed on by the parties. The paragraph of the proposed order pertaining to Mr. Fields's IRA provides:

> The William Fields IRA (Retirement) was valued at $2,261,984.98, as of July 19, 1999, and Ms. Fields is entitled to fifty percent (50%) of said sum or $1,130,992.49 plus interest at ten percent (10%) per annum from and after July 19, 1999, to the date of transfer to Ms. Fields's account which transfer occurred on February 3, 2000. Interest from and after July 19, 1999, to December 30, 1999, was $50,817.04 ($309.86 per day for 164 days). The sum of $1,181,809.53 should have been transferred to Ms. Fields as of December 30, 1999. Since the transfer did not occur until

> February 3, 2000, an additional interest of $10,535.24 ($309.86 per day for 34 additional days to February 3, 2000) should have been transferred to Patricia Fields as of February 3, 2000, which sum will accrue interest at the rate of ten percent (10%) from and after February 4, 2000. On February 3, 2000, Mr. Fields transferred the sum of $1,275,163.10 into Ms. Fields' IRA for which Mr. Fields is entitled to credit.

Mr. Bottoms testified that he left the February 3, 2000, IRA transfer of $1,275,163.10 totally off of his accounting because the assets were transferred in a like-kind exchange. He thus concluded that Mr. Fields was not entitled to any credit for the transfer.

On August 12, 2003, the trial court entered the order from which Mr. Fields now appeals.[1] On appeal, Mr. Fields takes issue with two of the trial court's findings. First, he argues that the trial court erred in accepting Mr. Bottoms's accounting to the extent that no credit was awarded for the February 3, 2000, IRA transfer. Next, Mr. Fields argues that the trial court erred in requiring him to pay the entire $11,129.30 fee charged by Mr. Bottoms, where the parties had expressly agreed to each pay half. We affirm on the first point, but we reverse the trial court's decision to the extent that it holds Ms. Fields responsible for the entire accounting fee.

Mr. Fields's first argument is that the trial court erred in refusing to enforce the parties agreement pertaining to division of the IRA. He argues that it is clear that the parties did not intend for the transaction to be treated as a like-kind distribution, and that the trial court was bound to accept their agreement that Ms. Fields was only entitled to interest on the sum of the IRA as of July 19, 1999, through the February 3, 2000, date of distribution. Mr. Fields notes that the parties specifically agreed in writing that he would be given credit for the overpayment when he transferred $1,275,163.10 into Ms. Fields's IRA account.

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[1] The appellee argues that the order being appealed from was not a final, appealable order, and thus that this appeal should be dismissed. She asserts that there are unresolved issues, which include final division of certain stocks and allocation of the marital debt. However, we disagree because the order resolves these issues. For an order to be final, it must not only decide the rights of the parties, but also put the court's directive into execution, ending the litigation or a separable part of it. *Capitol Life & Accident Ins. Co. v. Phelps*, 72 Ark. App. 464, 37 S.W.3d 692 (2001). When an order appealed from reflects that further proceedings are pending that do not involve merely collateral matters, the order is not final. *Id.* Applying these standards, we have concluded that any potential further proceedings are collateral in nature and that the August 12, 2003, order is final for purposes of appeal.

■ ■ We do not agree that the trial court committed reversible error when it deviated from the parties' agreement on the distribution of Mr. Fields's retirement account. The trial court is not bound by a stipulation entered into by the parties, and it is within the sound discretion of the trial court to approve, disapprove, or modify an agreement. *Rutherford v. Rutherford*, 81 Ark. App. 122, 98 S.W.3d 842 (2003). The parties came to disagree on some of the terms of the twenty-one-page proposed order, and the order was never signed or entered by the trial court. The divorce decree provided, "Any stock held in the [IRA] shall be divided by reference to date of purchase and costs. The division will be an In kind division of stocks and cash." Mr. Fields failed to distribute one-half of the IRA account, as directed by the divorce decree, until more than six months after the decree was entered. Under the trial court's interpretation of its decree, Ms. Fields was entitled to one-half of the value of the IRA at the time of distribution. We think the trial court's interpretation was reasonable, and under the facts of this case we hold that it did not abuse its discretion in failing to give Mr. Fields credit for any overpayment.

Mr. Fields's second argument is that the trial court erred in ordering him to pay the entire accounting fee charged by Mr. Bottoms. We agree. At the January 29, 2001, hearing, appellee's attorney stated to the court, "We are going to agree to employ a certified public accountant" who "will be paid by the parties." On July 23, 2001, appellee's attorney sent a letter to appellant's attorney requesting that appellant pay half of the existing fees. At the April 7, 2003, hearing, appellee's attorney asked the trial court to address the accounting fees, appellant's attorney responded, "There's no question we're obligated to pay half of those," and appellee's counsel answered, "That's fine." Even after the trial court issued a letter opinion requiring Mr. Fields to pay the entire fee, Ms. Fields responded to Mr. Fields's motion for reconsideration and asserted:

> Mr. Bottoms clearly understood he was not working one side of the case.
>
> The settlement agreement, which previously [appellant's counsel] argued did not exist, now he wants to argue does exist. The agreement, if accepted, provided among other things for an equal division on the accountant fees.
>
> One of the Exhibits introduced as evidence is a Transcript in which [appellant's counsel] agreed Mr. Fields would pay one-half of

> the accountant's fees while the work was in progress; however, Mr. Fields never paid and only pays when forced to pay.

Ms. Fields consistently agreed to pay half of the fees, and never asked the trial court to rule otherwise.

While a trial court may refuse to enforce a parties' agreement, a trial court's decision cannot be arbitrary or groundless. *See Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 768 (2001). In this case the parties repeatedly agreed to each pay half of the fees because Mr. Bottoms was hired by the parties and was working for both sides. The trial court gave no explanation for deviating from the agreement, and we see no rational basis for its action in this regard. We hold that the trial court's decision requiring Mr. Fields to pay the entire accounting fee was arbitrary and groundless, and amounted to an abuse of discretion.[2] Therefore, we remand to the trial court with instructions to enter an order requiring each party to pay half of the accounting fees.

Affirmed in part; reversed and remanded in part.

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

HART and BAKER, JJ., concur in part; dissent in part.

KAREN R. BAKER, Judge, dissenting. I agree with the majority that the trial court did not err in refusing to enforce an alleged agreement between the parties that was not accepted and adopted by the court, that the parties never signed, and that the complete terms of which were never agreed on by the parties. However, the majority is clearly wrong when it goes on to find that the trial judge erred by failing to enforce a single provision of this twenty-one page proposed agreement and does so by stating that "[t]he trial court gave no explanation for deviating from the agreement, and we see no rational basis for its action in this regard."

The majority is wrong for three reasons: (1) the parties did not request specific findings pursuant to Rule 52 of the Arkansas Rules of Civil Procedure, and therefore, we cannot reverse for the court's failure to set out its reasoning; (2) the parties never agreed

[2] The dissenting opinion suggests that we err in reversing a finding of contempt by the trial court. Although Ms. Fields sought a finding of contempt in this matter, the trial court did not address the issue of contempt. Consequently, neither do we.

to the language that would define their rights and obligations under the proposed settlement, and a trial court cannot make the agreement for them; and (3) the trial court's order that, in part, ordered the accountant's fees to be paid by Mr. Fields, resulted from a contempt petition filed due to Mr. Fields's failure to divide the property as ordered in the parties' divorce decree, and the trial judge did not abuse her discretion in exercising the court's inherent authority to enforce its own order.

This dispute arises from the disposition of a hearing held on April 7, 2003, where the court was asked to rule on a petition for contempt and order to show cause filed November 2, 1999, a petition for contempt and for modification filed August 18, 2000, and a petition for contempt of court, order to show cause, and for modification filed August 21, 2002. These petitions were filed by Patrice Fields to enforce rights decreed to her in the parties' divorce on September 2, 1999. By the time the trial judge rendered her opinion now appealed by Mr. Fields, almost three years had passed since the trial court had entered the order for which Mrs. Fields sought enforcement.

First, the majority is wrong to reverse the trial court because the parties did not request specific findings of fact and conclusions of law supporting the trial court's finding that Mr. Fields should pay the entire accountant fee. Our law does not require that a decree recite specific facts or conclusions of law on the issues presented and permits a trial court sitting as a jury to decide a case without stating its findings of fact separately. Rule 52 (a) of the Arkansas Rules of Civil Procedure affords a litigant a right to *request* specific findings of the trial court. However, failure to make a timely request for separate findings constitutes a waiver of that right. *Legate v. Passmore,* 268 Ark. 1161, 1162, 559 S.W.2d 151, 152 (Ark. App. 1980) (holding that parties' could not construe trial court's statement to be exclusive of other legal conclusions he might have reached in determining his verdict and judgment). Here, the parties made no request for findings of fact and are in no position to complain that the court did not make them. Neither can we reverse the trial judge's order because she "gave no explanation" when no explanation was required or requested by the parties.

Second, the parties never entered into an enforceable agreement. The majority thus finds that the trial court erred in failing to enforce a single provision of an agreement that the parties never had. The parties attached a transcript of a recorded conversation

memorializing their "settlement." The most significant evidence that the parties' agreement was in theory only is the statement by counsel for Mr. Fields at the close of the proposal that "we will transfer the money within two (2) business days after the execution of the agreement." No agreement was executed and no transfer of money took place. It is not within the judicial province to make private agreements. *See Rector-Phillips-Morse, Inc. v. Vroman*, 253 Ark. 750, 489 S.W.2d 1 (1973).

Third, "the Court is not bound by an agreement [that a] disputing husband and wife may enter into, in order to terminate a controversy; and this is true even in the absence of fraud or coercion." *McCue v. McCue,* 210 Ark. 826, 832, 197 S.W.2d 938, 941 (1946); *Rutherford v. Rutherford*, 81 Ark. App. 122, 98 S.W.3d 842 (2003). The trial court's order, including the provision requiring that the accountant fee be paid by Mr. Fields, was entered to enforce the court's previously entered divorce decree upon the petition of Ms. Fields for enforcement by contempt.

A court's contempt power may be wielded not only to preserve the court's power and dignity and to punish disobedience of the court's order but also to preserve and enforce the parties' rights. *Hart v. McChristian,* 344 Ark. 656, 42 S.W.3d 552 (2001). Where a party is punished for civil contempt, we will not reverse the trial court's order unless it is arbitrary or against the weight of the evidence. *Id.* It is a well established rule that the power to judge a contempt rests exclusively with the court contemned. *See Harrison v. Harrison*, 239 Ark. 756, 394 S.W.2d 128 (1965). A court must be able to enforce its judgments in order to retain its authority to act. *Smith v. Credit Serv. Co.*, 339 Ark 41, S.W.3d 69 (1999). By reversing the trial court's allocation of costs in the context of a petition for contempt, the majority disregards this standard and in so doing undermines the authority of the trial court to enforce its own orders.

For these reasons, I dissent from the majority's reversal of the trial court's judgment ordering Mr. Fields to pay all of the accountant's fees. I am authorized to state that Judge Hart joins this dissent.

Carol MARX *v.* HURON LITTLE ROCK
d/b/a Hilton Inn-Little Rock

CA 04-246 198 S.W.3d 127

Court of Appeals of Arkansas
Opinion delivered November 10, 2004

Eubanks, Welch, Baker & Schulze, by: *Darryl E. Baker* and *J.G. Schulze*, for appellant.

Barber, McCaskill, Jones & Hale, P.A., for appellee.

JOHN B. ROBBINS, Judge. In this personal injury suit filed by appellant Carol Marx, the jury found in favor of the defendant, appellee Huron Little Rock, LLC. Appellant argues on appeal that the trial court erred when it denied her motion for a directed verdict and instructed the jury on comparative fault, and when it refused to give her proffered instruction on *res ipsa loquitur*. We agree with appellant on both points and therefore reverse and remand for a new trial.

Appellant was injured in a rather bizarre accident that occurred at the Little Rock Hilton, which is owned and operated by appellee. In September 2000, appellant and her husband, who are from Louisiana, stayed overnight at the Hilton for the purpose of attending a funeral in Little Rock. On the morning of September 22, while getting ready for the funeral, appellant, who was in her late seventies, was sitting on the closed lid of the toilet in the bathroom of the hotel room. While she was in the process of putting on her pantyhose, the lid detached from the toilet-seat assembly, and appellant fell to the floor between the bathtub and the toilet. Appellant was taken to the hospital, where she was diagnosed with a compression fracture of the spine.

On November 27, 2001, appellant sued appellee for negligence in connection with the incident, and she specifically pled that the doctrine of *res ipsa loquitur* applied. Appellee answered that appellant's injuries were proximately caused by her own fault and that *res ipsa loquitur* did not apply. A jury trial was held, and the following testimony, as gleaned from appellant's abstract, was adduced. Appellant's husband, Sach Marx, testified that he was in the bedroom area of the hotel room on the morning of the incident when he heard his wife scream. He went into the bathroom and found her on the floor between the bathtub and the toilet, lying on top of the toilet lid. He called the front desk to ask for an ambulance, and upon its arrival, he accompanied his wife to the hospital.

Appellant, who was eighty-one years old at the time of trial, testified that she was a small woman, standing four feet ten or eleven inches tall and weighing 102 pounds. On the morning of the incident, she went into the bathroom and sat on the closed

toilet lid in order to put some medicine on her toes, which she did by facing straight ahead while sitting on the seat. After that task was complete, she put the medicine down and began to put on her pantyhose. While still sitting on the lid, she put the pantyhose on both feet and partly up her legs. At that point, she said, the lid slid off the toilet with her on it, and she fell to the floor, hitting the bathtub in the process. On cross-examination, appellant said that she had probably used the toilet the night before and the morning of the incident, but she had not noticed any looseness in the seat. Further, she said that she did not notice any problem with the seat while she was initially putting on her pantyhose. However, at some point, she said, she simply "felt the lid go."

Michael Durbin, the chief engineer at the Hilton, testified that it was the duty of the housekeeping and maintenance staff to be on the lookout for hazards in the rooms. After the incident, Durbin put the lid back on the toilet and had to force it onto the seat, then had to pull and twist it to get it back off. Finally, Durbin took the seat assembly off the toilet and put it in a box, which he then placed in the general manager's office. The box stayed there for over a year, at which time Durbin moved it to his office, where it remained until he showed it to appellee's attorney in September 2002. When the attorney and Durbin opened the box, they noticed that one bumper was missing from the toilet seat ring. Bumpers are the small items attached to the underside of the seat upon which the seat rests against the toilet rim. According to Durbin, bumpers provide stability to the seat. Durbin could not explain the missing bumper, and he said that he did not remember it being missing when he placed the toilet seat in the box. However, Durbin stated that a missing bumper would justify replacing the entire toilet-seat assembly.

At the close of the evidence, appellant asked the trial court to direct a verdict on the issue of comparative fault and to reject appellee's jury instruction on comparative fault. The trial court denied the directed-verdict motion and instructed the jury on comparative fault using both AMI Civil 206 and 2101 (2004). Appellant also asked the court to instruct the jury on *res ipsa loquitur* using AMI Civil 610 (2004). The trial court declined to do so. The jury was then instructed on negligence, proximate cause, premises liability, comparative fault, and damages. Following deliberations, the jury rendered a general verdict in favor of appellee. The verdict was reduced to judgment, and appellant filed a timely notice of appeal.

Appellant argues first that the trial court erred in denying her motion for a directed verdict and in instructing the jury on comparative fault because there was no evidence that she was negligent. We agree that reversal is warranted on this point.

The directed-verdict issue and the jury-instruction issue can be discussed simultaneously because they involve the same point, *i.e.*, whether the question of appellant's negligence should have been submitted to the jury. When reviewing a denial of a motion for directed verdict, we determine whether the jury verdict is supported by substantial evidence. *J.E. Merit Constr., Inc. v. Cooper*, 345 Ark. 136, 44 S.W.3d 336 (2001). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without having to resort to speculation or conjecture. *Superior Fed. Bank v. Mackey*, 84 Ark. App. 1, 129 S.W.3d 324 (2003). We review the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered, and when the evidence and inferences create a jury question, we will determine that the trial court properly denied the defendant's motion for directed verdict. *J.E. Merit Constr., Inc. v. Cooper, supra.* As for the trial court's giving of the jury instruction, we employ the abuse-of-discretion standard. *See Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001).

Under our comparative-fault statute, Ark. Code Ann. § 16-64-122 (Supp. 2003), the fault of a plaintiff in a personal-injury case is compared to the defendant's fault. If the plaintiff's fault is less than the defendant's, the plaintiff may recover damages from the defendant after the damages have been diminished in proportion to the plaintiff's own fault. If the plaintiff's fault is greater than or equal to the defendant's, then the plaintiff is not entitled to recover damages. The "fault" to be compared under the statute must be a proximate cause of the plaintiff's damages. *See generally Ouachita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997); *Skinner v. R.J. Griffin & Co.*, 313 Ark. 430, 855 S.W.2d 913 (1993); *Kubik v. Igleheart*, 280 Ark. 310, 657 S.W.2d 545 (1983).

Because comparative fault is an affirmative defense, the burden is on the defendant to prove that the plaintiff was at fault. *See Rodgers v. CWR Constr., Inc.*, 343 Ark. 126, 33 S.W.3d 506 (2000); *Young v. Johnson*, 311 Ark. 551, 845 S.W.2d 510 (1993). If

the defendant fails to satisfy this burden, a directed verdict on comparative fault in favor of the plaintiff is appropriate. *See Young v. Johnson, supra.*

Appellant contends that there was no evidence of any negligence on her part beyond speculation and conjecture, and she cites *Young v. Johnson, supra,* in support of her argument. In *Young,* the plaintiff was traveling south on a one-lane road when she saw the defendant's headlights coming toward her. She slowed down and pulled over to the right side of the road as far as she could but was nevertheless struck by the defendant, who testified that he was looking for a dropped cigarette at the time of the collision. The plaintiff asked the trial court for a directed verdict on comparative fault, which was denied. On appeal, the supreme court held that a directed verdict should have been granted because any conclusion that the plaintiff was negligent would have been "highly speculative and conjectural and, thus, is not substantial." *Young v. Johnson, supra* at 557, 845 S.W.2d at 513.

Appellee contends that there was evidence of appellant's negligence, in that appellant was an elderly person who was using the toilet seat to put on pantyhose while resting her feet on a slick tile floor. Appellee cites *Turner v. Stewart,* 330 Ark. 134, 952 S.W.2d 156 (1997), in support of its argument. In *Turner,* the plaintiff visited the defendant's home, which had a "beware of dog" sign in the front yard. The plaintiff went onto the front porch but got no answer when she rang the doorbell. While on the porch, she saw the defendant's Rottweiler looking at her from the side of the house. She then went to the side of the house and saw the defendant with the dog. She spoke with the defendant briefly, after which the defendant called his dog. When the dog started toward them, the plaintiff ran. The dog jumped on the plaintiff and bit her. At trial, the plaintiff objected to the trial court's instructing the jury on comparative fault. On appeal, that instruction was upheld by the supreme court because the jury could have concluded that the plaintiff had not used good judgment in entering the yard despite the "beware of dog" sign or in walking around the side of the house where she had seen an unfamiliar dog and further that her injuries could have been caused by her running from the dog.

Upon reading the cases cited by the parties and several other cases on the subject of whether a jury should have considered a plaintiff's comparative fault, *see Garrett v. Brown,* 319 Ark. 662, 893 S.W.2d 784 (1995); *Skinner v. R.J. Griffin & Co., supra; Wingate*

Taylor-Maid Transp. v. Baker, 310 Ark. 731, 840 S.W.2d 179 (1992), we have determined that the facts in the case at bar are most like those in *Young v. Johnson, supra*, the case relied upon by appellant. As in *Young*, there is no substantial evidence that appellant failed to do something that a reasonably careful person would do or did something that a reasonably careful person would not do under the circumstances, which is the definition of negligence. *See Ethyl Corp. v. Johnson*, 345 Ark. 476, 49 S.W.3d 644 (2001). Also, as in *Young*, any insinuation that appellant was negligent and contributed to her own injuries is conjecture. It is not uncommon for people to sit on toilet lids to perform various tasks, and there is no evidence that appellant slipped on the floor or fell onto the seat, as appellee speculates. Further, this case differs from the case that appellee cites, *Turner v. Stewart*, because in *Turner*, there was substantial evidence that the plaintiff engaged in behavior that contributed to her own injuries. We therefore conclude that the trial court should have granted appellant's motion for a directed verdict on comparative fault and should not have instructed the jury on that issue.[1]

Appellant argues next that the trial court erred in refusing her proffer of a jury instruction on *res ipsa loquitur*. A party is entitled to a jury instruction when it is a correct statement of the law and there is some basis in the evidence to support the giving of the instruction. *Barker v. Clark*, 343 Ark. 8, 33 S.W.3d 476 (2000). The appellate courts will not, however, reverse a trial court's refusal to give a proffered instruction unless there was an abuse of discretion. *Id.*

In order for the doctrine of *res ipsa loquitur* to apply, four essential elements must be established: (1) the defendant owes a duty to the plaintiff to use due care; (2) the accident is caused by the thing or instrumentality under the control of the defendant; (3) the accident that caused the injury is one that, in the ordinary

[1] The jury rendered a general verdict in this case, so we do not know if the jury actually assigned some fault to appellant or merely concluded that appellee was not negligent. Thus, appellant cannot demonstrate that she was prejudiced by the jury's consideration of the comparative-fault issue. However, our supreme court has recognized that proving prejudice under these circumstances is an impossible burden, and prejudice will instead be presumed. *See Skinner v. R.J. Griffen & Co., supra*; *Little Rock Elec. Contr. v. Okonite Co.*, 294 Ark. 399, 744 S.W.2d 381 (1988).

course of things, would not occur if those having control and management of the instrumentality used proper care; (4) there is absence of evidence to the contrary. *Barker v. Clark, supra.* In describing the doctrine of *res ipsa loquitur,* our supreme court has stated:

> The doctrine of res ipsa loquitur was developed to assist in the proof of negligence where the cause of an unusual happening connected with some instrumentality in the exclusive possession and control of the defendant could not be readily established by the plaintiff. The theory was that since the instrumentality was in the possession of the defendant, justice required that the defendant be compelled to offer an explanation of the event or be burdened with a presumption of negligence.

Id. at 14, 33 S.W.3d at 480 (quoting *Reece v. Webster,* 221 Ark. 826, 829, 256 S.W.2d 345, 347 (1953)). The supreme court has also observed that:

> In the words of Mr. Justice Holmes, *res ipsa loquitur* is "merely a short way of saying that, so far as the court can see, the jury, from their experience as men of the world, may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case." *Graham v. Badger,* 164 Mass. 42, 41 N.E. 61. This is the kind of inference that jurors commonly are allowed to make from circumstantial evidence, the only difference being that, when *res ipsa loquitur* applies, the circumstantial evidence from which the inference is drawn is the fact of the injury itself, plus the few obvious facts which surround the injury but do not clearly explain how it happened.

Coca-Cola Bottling Co. v. Hicks, 215 Ark. 803, 807, 223 S.W.2d 762, 764-65 (1949).

In the case at bar, the trial judge refused the instruction based on his determination that there was evidence of appellant's comparative fault. Indeed, several Arkansas cases have strongly suggested that evidence of a plaintiff's negligence precludes the application of *res ipsa loquitur. See, e.g., Barker v. Clark, supra* at 14, 33 S.W.3d at 481; *Phillips v. Elwood Freemen Co., Inc.,*

294 Ark. 548, 550, 745 S.W.2d 127, 129 (1988); *Coca-Cola Bottling Co. v. Hicks*, *supra* at 807, 223 S.W.2d at 765. However, because we have determined that there was no substantial evidence of appellant's negligence in this case and that the issue of comparative fault should not have been presented to the jury, we see no impediment to the court instructing the jury on *res ipsa loquitur*. The instruction offered by appellant was a correct statement of the law, being based on AMI Civil 610 (2004), which informs the jury that, if the elements of *res ipsa loquitur* are met, they are permitted but not required to infer that the defendant was negligent. Additionally, given the circumstances surrounding the incident in this case, there was "some basis in the evidence" from which the jury could have inferred appellee's negligence from the fact of the injury itself, *i.e.*, that the toilet lid, in the ordinary course of things, would not have detached from the toilet assembly if appellee had used proper care.

In light of the foregoing, we reverse and remand this case for a new trial.

BIRD and ROAF, JJ., agree.

Debra J. MOORE *v.* MUELLER INDUSTRIES
and Risk Management

CA 04-281 198 S.W.3d 136

Court of Appeals of Arkansas
Opinion delivered November 10, 2004

Sheila F. Campbell, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *Wendy S. Wood* and *Gail Ponder Gaines*, for appellee.

TERRY CRABTREE, Judge. The Workers' Compensation Commission reversed the decision of an administrative law judge that awarded the appellant, Debra Moore, temporary total disability benefits in connection with a gradual-onset injury to her right arm. The Commission found that appellant failed to prove that her injury was the major cause of her disability. The Commission also found that, even if appellant had proven the major-cause element, appellant failed to prove that her injury was caused by rapid repetitive motion. On appeal, appellant maintains that substantial evidence does not support the Commission's finding that her injury was not caused by rapid repetitive motion. We affirm.

Appellant worked for the appellee, Mueller Industries, as a bundle operator. Her job involved moving bundles of copper pipes through a large machine. She operated a panel console on the machine, attached stickers to individual copper pipes, pushed groups of pipes flush to feed them into the machine, and pulled pipes down a conveyor belt to feed them into the machine. These duties required her to walk from one end of the machine to the other at various intervals.

Appellant suffered a compensable injury when she fell and injured her left arm on July 27, 2000. The injury to her left arm is not at issue in this appeal. Appellant was off work completely following this injury through September 2000. She was released to light duty on April 9, 2001. Appellant was released to regular duty on September 11, 2001. On that date, appellant reported a right-arm injury to appellee, and she filled out a claim for workers' compensation benefits.

Due to her right-arm injury, appellant was taken off work on September 28, 2001. Appellant resumed full-duty work on April 15, 2002. After appellant was taken off work for her right arm injury, she received treatment for both her right and left arms, including surgery on her left arm on April 22, 2002, and November 22, 2002.

Appellant maintains that while her left arm recovered from a compensable injury, she suffered overuse syndrome in her right arm by engaging in rapid repetitive motions at work. Appellant argues that her right-arm injury is a new gradual-onset injury. In order to prevail in her claim for workers' compensation benefits, appellant was required to prove that she suffered a compensable injury. A compensable injury means:

> An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:
>
> (a) Caused by rapid repetitive motion.

Ark. Code Ann. § 11-9-102(4)(A)(ii)(a) (Supp. 1999). In addition, subsection (E)(ii) states that the burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(4)(E)(ii).

Here, the Commission found that appellant failed to prove that her right arm injury was the major cause of her disability or need for treatment. As a result, the Commission determined that appellant failed to establish a gradual-onset injury. As a separate basis for denying appellant benefits, the Commission found that appellant failed to prove that her injury was caused by rapid repetitive motion. On appeal, appellant only challenges the Commission's finding that she failed to prove that rapid repetitive motion caused her injury.

We recognize that we must affirm this case without reaching the merits of appellant's point on appeal. The Commission denied appellant benefits on two bases, failure to prove the major-cause requirement and failure to prove that rapid repetitive motion caused her injury. In other words, the Commission offered two independent and alternative grounds to support the denial of benefits. On appeal, appellant only challenges the Commission's second reason. Appellant does not contest that substantial evidence supports the Commission's finding that her injury was not the major cause of her disability. Thus even if appellant's argument had merit, we would still not reverse in light of appellant's failure to attack the independent bases that justify the denial of benefits. *Cf.*

Pugh v. State, 351 Ark. 5, 89 S.W.2d 909 (2002). When two alternative reasons are given for a decision and an appellant attacks only one, we must affirm. *See Pearrow v. Feagin*, 300 Ark. 274, 778 S.W.2d 941 (1989).

The issue that appellant raises on appeal is moot because any decision at the appellate level would afford her no relief. *Id.* As a general rule, the appellate courts of this state will not review issues that are moot. *Cooper Tire & Rubber Co. v. Angell*, 75 Ark. App. 325, 58 S.W.3d 396 (2001). To do so would be to render advisory opinions, which we will not do. *Cotten v. Fooks*, 346 Ark. 130, 55 S.W.3d 290 (2001). Generally, a case becomes moot when any judgment rendered would have no practical legal effect upon a then-existing legal controversy. *Id.* As appellant failed to attack the Commission's decision regarding her failure to establish the major cause of her injury, we must affirm.

Affirmed.

STROUD, C.J., and PITTMAN, J., agree.

Lisa Ann GILBERT *v.* STATE of Arkansas

CA CR 03-1303 198 S.W.3d 561

Court of Appeals of Arkansas
Opinion delivered November 17, 2004

Self Law Firm, by: *Joseph C. Self*, for appellant.

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

ROBERT J. GLADWIN, Judge. Lisa Anne Gilbert was charged with attempted capital murder and filing a false

report. A Yell County jury found her guilty of attempted first-degree murder and filing a false report, and she was sentenced to an aggregate term of thirty years' imprisonment. She raises two points on appeal: (1) the trial court erred in denying her motion to suppress certain statements she made to police; (2) her conviction for attempted first-degree murder should be reversed because she established the defense of renunciation. We affirm.

At the suppression hearing, Lieutenant David Kimball with the Yell County Sheriff's Department testified that he advised appellant of her Miranda rights prior to interviewing her. On the rights form, twenty-year-old appellant indicated that she had graduated from high school and could read and write. Kimball testified that her statement was taped and transcribed. He stated that, during the interview, appellant asked, "Do I need a lawyer or something?" to which he responded, "Are you asking for a lawyer?" Kimball testified that appellant did not answer and that the matter never came up again during the interview.

In denying her motion to suppress, the trial court found that appellant had waived her right to counsel when she signed the Miranda rights form and that her question was not a request for a lawyer and was not a request to stop the interview. The trial court noted that Kimball inquired as to whether she wanted a lawyer and that she did not make the request even though she had ample opportunity to do so.

At trial, Kimball testified that on March 5, 2002, someone called at approximately 9:00 p.m. to report that a child had been abducted. Kimball went to the residence of Brian Blevins to speak to appellant about her missing child, two-year-old S.D.W. Kimball testified that appellant did not appear to be distraught at all. He also testified that appellant's story was different from the time she called the police to when the police arrived to speak with her in person. At first, appellant told Kimball that she stopped her car to pick up the baby's bottle, which had fallen behind the seat, and that people pulled in behind her car and took the baby. Appellant's second version was that some people ran her off the road, stuck a gun in her back, and took the child. Kimball testified that he noticed that appellant did not call S.D.W. by name until approximately twenty minutes after he arrived and that she had been referring to him as simply "the child" or "the kid." Kimball stated that appellant was taken to the police station and was interviewed by him twice. During the first interview, appellant repeated her inconsistent stories. She was interviewed by another officer, who

persuaded her to tell him where the police could find S.D.W. When Kimball subsequently interviewed appellant for the second time, he told her that S.D.W. had been found. Kimball testified that appellant stayed with her initial story that S.D.W. had been abducted but then changed her story again. According to Kimball, appellant said that she took S.D.W. to the overlook on Mount Nebo and that she walked with him to the end of the overlook and then turned around and walked back to the car. Kimball stated that appellant told him that she took S.D.W. to the end of the overlook a second time and threw him over the side and did not look back. Kimball testified that S.D.W. was located thirty-five feet and six inches down from the railing. He also stated that he did some research and determined that the temperature that night was twenty-eight degrees at 2:00 a.m. Kimball testified that appellant's disclosure as to where she thought S.D.W. could be found was instrumental in finding him in such a short time.

Detective Gary Morrison testified that appellant told him two different stories about how her son came to be missing, with a slight variation from what she told Kimball, in that appellant said she stopped to put the baby's shoe back on and not to retrieve his bottle. Morrison noted that appellant appeared calm but confused. He stated that after appellant revealed S.D.W.'s location, he and other officers went to Mount Nebo to search for the boy. Morrison testified that he walked out on the first overlook and that he thought he saw something, so he called the child's name. Morrison heard something, so he went down a steep, rocky hill and through a briar thicket. Morrison testified that when he picked S.D.W. up, the child clung to him.

Sheriff Bill Gilkey testified that he interviewed appellant between the two interviews conducted by Kimball. Gilkey stated that he began talking about S.D.W. and explained how cold it would get later in the night and how it was imperative that they find him soon. Gilkey stated that he asked her where they might find S.D.W. and that, although she at first said she did not know, appellant finally said that the abductors might have taken him to Mount Nebo. Gilkey stated that he asked whether S.D.W. was at Mount Nebo and where, precisely. Gilkey testified that appellant said that S.D.W. was at Mount Nebo and could be found at one of the overlooks. Gilkey stated that S.D.W. was found almost immediately after appellant told him where the child could be found.

After the State rested its case, appellant moved for a directed verdict. Her attorney said, "I move for a directed verdict to the

offense of capital murder. I don't believe the State has met the burden of proof that she attempted to commit capital murder and she took any actions which were in the furtherance of her desire to commit capital murder or that her actions were actually for the purpose of committing capital murder." The trial court denied her motion.

Appellant then took the stand in her own defense. Appellant testified that on the day in question, she called her employer and claimed to be sick when she was actually just under a lot of stress. She testified that she went to her mother's house and asked her mother to keep S.D.W. that night but that her mother could not and there was no one else to keep him. Appellant testified that she took S.D.W., picked up a friend, and went to her former boyfriend's house to talk about a disagreement they had several months prior. The former boyfriend would not talk to her, so she left while the others stayed and watched movies. She stated that she drove around with S.D.W. She was upset, and S.D.W. was cranky. Appellant stated that she went to Mount Nebo to think and be alone. She said that she tried everything but could not get S.D.W. to stop crying. Appellant stated that she took him to the end of the lookout and sat him up on a post. She was holding his hands, but he was fussing and squirming. Appellant said that the next thing she knew, S.D.W. was not there. She insisted that he fell and that she did not throw him. Although she heard S.D.W. below, it was dark and she did not think she could get down to him, so she left the mountain. She went back to her former boyfriend's house and told him to call the police. On the stand, appellant admitted that she lied to the police but insisted that she wanted to find S.D.W. without getting herself into trouble.

Dr. Brad Diner, a psychiatrist, and Dr. Dean Whiteside, a psychologist, opined that appellant suffered from a depressive disorder but that appellant knew right from wrong. Dr. Diner testified, however, that appellant's emotional state clearly affected her thinking and behavior.

Appellant renewed her directed-verdict motion on the basis that the State had not satisfied the elements that she intended to commit the offense and that she acted purposefully. The trial court denied her motion.

Appellant argues that the trial court erred in denying her motion to suppress certain statements she made to Kimball. She contends that she had already told Kimball what happened but that

he continued to drill her. She concedes that her question concerning a lawyer was not unequivocal but that she did the best she could to convey to Kimball that she was concerned about continuing to talk to him without a lawyer present.

When reviewing a trial court's ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances and will reverse the trial court's decision if it was clearly against the preponderance of the evidence. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). Any conflict in the testimony of different witnesses is for the trial court to resolve. *Id.* A statement made while in custody is presumptively involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was given voluntarily and was knowingly and intelligently made. *Id.*

In determining whether a confession was voluntary, the following factors are considered: age, education and intelligence of the accused, lack of advice of his constitutional rights, length of detention, the repeated and prolonged nature of the questioning, or the use of physical punishment. *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004). Appellant was twenty years old, had completed high school, and could read and write. At the outset of her recorded interview, which began at 2:42 a.m. and ended at 3:10 a.m., Kimball reminded appellant of the rights she had received earlier that night and read them to her again, offering to explain anything she did not understand. Appellant indicated that she understood her rights and had not been pressured or coerced to give a statement.

A defendant may cut off questioning at any time by unequivocally invoking her right to remain silent. *Whitaker v. State*, 348 Ark. 90, 71 S.W.3d 567 (2002). When the right to remain silent is invoked, it must be "scrupulously honored." *Id.* No law enforcement officer shall question an arrested person if the person has indicated in any manner that he does not wish to be questioned, or that he wishes to consult counsel before submitting to any questioning. Ark. R. Crim. P. 4.5. A defendant may also waive an invocation of his right to silence. *Whitaker, supra.* Specifically, answering questions following a statement that attempts to invoke the right to remain silent may waive that right by implication. *Id.* The accused may change his mind and decide to talk to law enforcement officials. *Id.* An equivocal request for counsel does not obligate the police to cease questioning and seek clarification

but interrogation may continue until the suspect clearly requests counsel. *Moore v. State*, 321 Ark. 249, 903 S.W.2d 154 (1995).

Appellant said to Kimball, "Do I need a lawyer or something?" Appellant's question did not constitute an unequivocal invocation of her right to remain silent. Kimball, acting with an abundance of caution, inquired of appellant whether she was asking for a lawyer. By doing so, Kimball clearly gave appellant an opportunity to clarify whether she had indeed invoked her right to remain silent. Instead, appellant did not answer Kimball's question. Kimball testified at the suppression hearing that if appellant had answered "yes," he would have ended the interview. Under these circumstances, Kimball was not obligated to cease questioning because appellant's question, and subsequent unresponsiveness, was not sufficiently definite to invoke her right. Moreover, appellant continued answering questions and did not mention a lawyer again during the interview. Considering the totality of the circumstances, we cannot say that the trial court erred in denying appellant's motion to suppress.

Next, appellant contends that in giving information to the police as to the child's whereabouts, she abandoned her effort to commit the offense of murder. She admits that she could have been more forceful in her renunciation but maintains that she effectively conveyed the location of her son to police, despite her depressive mental state. Appellant maintains that her conviction should be reversed because she renounced her attempt to commit the offense.

A person attempts to commit an offense if he purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as he believes them to be. Ark. Code Ann. § 5-3-201(a)(2) (Repl. 1997). It is an affirmative defense to a prosecution under § 5-3-201(a)(2) or (b) that the defendant abandons his efforts to commit the offense, thereby preventing its commission, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose. Ark. Code Ann. § 5-3-204(a) (Repl. 1997). Once the State meets its burden of proving the elements of an offense beyond a reasonable doubt, the burden shifts to the defendant to prove an affirmative defense by a preponderance of the evidence. *Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001). The question as to

which way the evidence preponderates is primarily a jury question. *See Walker v. State*, 308 Ark. 498, 825 S.W.2d 822 (1992).

Appellant failed to preserve her challenge to the sufficiency of the evidence because her directed-verdict motions did not address the lesser-included offense of criminal attempt to commit first-degree murder, of which she was convicted. *See Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996). Because she did not question the sufficiency of the evidence for the lesser-included offense, either by name or by apprising the trial court of its elements, her argument is waived. *See id.*

In any event, if appellant's sufficiency argument had been preserved, we would have considered only that evidence that supported the verdict, and we would have found it to be substantial. *See Banks v. State*, 315 Ark. 666, 869 S.W.2d 700 (1994). Moreover, there was evidence to support the jury's rejection of appellant's defense. Appellant's attempt to commit first-degree murder was completed when she left her baby at Mount Nebo, which was long before her purported renunciation of the offense.

Affirmed.

ROBBINS and VAUGHT, JJ., agree.

IN RE: PARTITION of REAL PROPERTY Described as Lot B, Block T, McDiarmid's Addition to the City of North Little Rock, Pulaski County, Arkansas, James Stanley and Aubrey Burtrum Stanley *v.* William B. BLEVINS, William S. Robinson, Harriet Robinson, Bank of America, N.A., and Internal Revenue Service

CA 03-924 198 S.W.3d 567

Court of Appeals of Arkansas
Opinion delivered November 17, 2004

Ralph M. Cloar, Jr., for appellants.

Pierce, Robinson & Greene, P.A., by: *Alice Ward Greene*, for appellees.

ROBERT J. GLADWIN, Judge. Appellants James Stanley and Audrey Burtrum-Stanley appeal the Pulaski County Circuit Court's April 28, 2003 order distributing the proceeds of a partition sale. On appeal they argue that the property was subject to invalid and unenforceable leases and that the court erred in confirming the sale and refusing to set aside the partition sale. Appellees filed a motion to dismiss the appeal, contending that appellants did not file a timely notice of appeal. We agree that the appeal was not timely filed and dismiss the appeal.

A thorough discussion of the trial pleadings is necessary. On July 15, 1999, appellants filed a petition to partition a lot located in North Little Rock. On August 29, 1999, a second amended petition for partition was filed naming William B. Blevins, William

S. Robinson, Harriet Robinson, and Bank of America, N.A., as defendants. Ultimately on January 24, 2000, the Internal Revenue Service (I.R.S.) was joined as a defendant in the third amended petition.

On January 18, 2001, the trial court ordered an appraisal of the property. On March 5, 2001, the trial court entered an agreed order waiving the appointment of a commissioner and ordering that the property be sold. The order stated that, after an appraisal, the property would be sold and the proceeds of the sale would be placed in the registry of the court. On April 16, 2002, an appraisal report was filed with the court placing the market value of the property at zero dollars. The report stated that the property's value would be $275,000 if it were not subject to certain leases and litigation. On August 20, 2002, the court appointed a commissioner and again ordered the property sold.

The property was sold to appellees at a commissioner's sale held October 31, 2002. On December 6, 2002, the report of sale was filed with the court. An order confirming the sale and order of distribution was also filed on December 6, 2002.

One day prior to the confirmation order being entered, the I.R.S. filed a pleading objecting to the confirmation. On December 13, 2002, appellants filed a pleading entitled Response to the United States' Objection to Confirmation in which they joined the I.R.S. in its objections. On December 18, 2002, appellees filed a response to the objections, arguing that the objections of the I.R.S. and appellants were moot. On January 3, 2003, the I.R.S. filed a notice of appeal, and appellants filed a motion to set aside the December 6, 2002 order. On February 19, 2003, the trial court entered an order allowing appellants and the I.R.S. to submit briefs by March 5, 2003. The trial court never specifically ruled on appellants' motion to set aside the December 6 order, but on April 3, 2003, it entered an order striking the I.R.S.'s objection to the purported leases. On April 28, 2003, the trial court entered an order distributing the funds held in the registry of the court. Although not included in the addendum, appellants filed their notice of appeal on May 22, 2003, appealing the April 28, 2003 order of distribution.

Appellants raise two points on appeal. They argue that the leases for the subject property were invalid and unenforceable and that the court erred in confirming the sale and refusing to set it aside. These issues arise from the December 6, 2002 order

confirming the sale and distribution of proceeds. A notice of appeal shall be filed within thirty days from the entry of judgment, decree, or order appealed from, unless the time to appeal is extended by the filing of a post-trial motion within ten days of the order. *See* Ark. R. App. P.—Civ. 4(a), (4)(b)(1).[1] Appellants never appealed the December 6, order, nor did they file a cross appeal to the I.R.S.'s appeal. Appellants did, however, file a motion to set aside the December 6 order on January 3, 2003. Because appellants' motion was not filed within ten days of the December 6 order, but rather was filed twenty-eight days later, it was insufficient to extend the time to file their notice of appeal from the December 6 order.

The confirmation of the decree and report of sale is conclusive of any issue which might and should have been raised in opposition to the confirmation. All of the issues sought to be raised here could have and should have been raised at the proper time, and we must now give conclusive effect to this confirmation order. *See Dumas v. Owen*, 210 Ark. 505, 196 S.W.2d 987 (1946); *Jones v. National Bank of Commerce of El Dorado*, 207 Ark. 613, 182 S.W.2d 377 (1944).

Appellants filed a notice of appeal from the second order of distribution and not from the order confirming the sale. Accordingly, appellants' appeal is untimely and must be dismissed.

Dismissed.

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

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[1] Assuming that the I.R.S.'s pleading effectively filed on December 7, 2002, and appellants' pleading filed on December 13, 2002, in which they joined the I.R.S.'s objections, qualifies as a post-trial motion, appellants' notice of appeal was still untimely. Both pleadings were filed within ten days of the order, which would serve to extend their time for filing notices of appeal. Because the court took no action, their motions were deemed denied on January 5, 2003. *See* Ark. R. App. P.—Civ. 4(b)(1). Appellants then had until February 4, 2003, to file their notice of appeal. Because appellants did not file their notice of appeal until May 22, 2003, it was untimely.

Robert T. FISCHER and Linda Howeth *v.*
Robert T. KINZALOW and Ouida Smith, Co-administrators
of the Estate of Ouida B. Lawhorn, Deceased

CA 03-1134 198 S.W.3d 555

Court of Appeals of Arkansas
Opinion delivered November 17, 2004

Durrett and Coleman, by: *Gerald A. Coleman*, for appellants.

Bart Ziegenhorn, for appellees.

JOHN B. ROBBINS, Judge. This appeal concerns a will contest involving the estate of Ms. Ouida Lawhorn. Appellants Robert Fischer and Linda Howeth are former stepchildren[1] of the decedent, Ouida Lawhorn, and were the sole beneficiaries of a will Ms. Lawhorn executed on July 29, 1994. Appellee Robert Kinzalow, Ms. Lawhorn's male companion for the eleven years preceding her death, was the sole beneficiary of a handwritten will she signed in the hospital during Thursday afternoon, March 28, 2002. Ms. Lawhorn had no children and no spouse at the time of her death from cancer at age 69. She died on March 30, 2002. Appellants appeal the order of the Crittenden County Circuit Court that admitted Ms. Lawhorn's March 28, 2002, will to probate and dismissed appellants' objection to probate.

In challenging the 2002 will, appellants argued to the trial court (1) that the testatrix was not competent at the time of its execution, (2) that the testatrix was subject to duress and overreaching, and (3) that the will was not properly executed. Appellants did not prevail at trial, and on appeal, they argue that Ms. Lawhorn was not competent at the time of the execution of the 2002 will and that the handwritten will was not properly executed pursuant to Arkansas law. We disagree with their arguments and affirm.

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[1] Appellants are not blood related to the decedent or to each other. Ms. Lawhorn was married a number of times during her life.

The evidence presented to the trial judge included that of appellant Howeth. She said that she was very close to her former step-mother and that Ms. Lawhorn had given her a power of attorney at the same time that her 1994 will was executed. In addition, Howeth said that she was also given authority to write checks from Lawhorn's account in 1994. The only time Howeth ever wrote checks on the account, though, was to pay some of Lawhorn's bills after Lawhorn's surgery in January 2002.

Howeth came to see Lawhorn on Thursday, March 28, driving from Texas and arriving at the hospital around 5:00 or 6:00 p.m. Howeth did not think that Lawhorn was of sound mind at that point. Howeth did not remember Lawhorn saying much to her except that she was glad Howeth was there. Howeth left the hospital for part of Friday, March 29 and returned on Saturday. Howeth believed that she was the only person in the room with Lawhorn when she died Saturday morning. Howeth said that she, appellant Fischer, and appellee Kinzalow all contributed to the cost of Lawhorn's funeral. In looking over the 2002 will and a check purportedly written by Lawhorn on that same date, Howeth said that the signatures did not look like Lawhorn's but instead looked "forced."

Appellant Fischer testified that he arrived at the hospital on March 28 at around 8:30 a.m. and that Ms. Lawhorn asked her doctors to provide him with complete information about her medical condition. The doctor took Fischer out into the hallway and explained that Ms. Lawhorn had terminal pancreatic cancer. Fischer said that Ms. Lawhorn was cognizant of her surroundings, her impending death, her family, her estate, the existence and location of the 1994 will, the need to plan a funeral, and her desire that Mr. Kinzalow be taken care of after her death. Fischer said Lawhorn told him that the 1994 will split everything evenly between him and Howeth. Fischer said that Lawhorn wanted Kinzalow to be allowed to continue to live at her residence for the rest of his life if he wanted. Fischer intended to honor that request. Fischer believed that she was cognizant until noon or early afternoon, when she became very groggy due to the Demerol used to ease her pain.

Lorrine Long, Brenda Hodgson, and Robert Martin also came to the hospital to visit that day. Hodgson, formerly a niece by marriage to Ms. Lawhorn, explained that she and Mr. Martin lived together and rented a cottage for occasional use from Ms. Lawhorn; they were friends with Ms. Long. They all arrived after

the noon hour and were present until mid-afternoon. Their testimonies were uniform in that they agreed that Ms. Lawhorn was cognizant, alert, and conversational during the visit. They also agreed that the other visitors left the room, including Mr. Kinzalow, during the time that the handwritten will was requested, written, read, and signed.

Hodgson testified that Ms. Lawhorn asked her if she had a piece of paper and if she would write something for her. Hodgson found a dental form in her purse and used the back of it. Ms. Lawhorn told her that she wanted Kinzalow to be taken care of and for him to have everything. Hodgson testified that she wrote out a will according to Ms. Lawhorn's wishes, that she read the will back to Ms. Lawhorn, and that she acknowledged that it contained her wishes. The document read:

> March 28, 2002
> Baptist East Hospital
>
> I Ouida B. Lawhorn being of sound mind & memory do at this time declare this is my last will & testament. From this day on all other wills to be null, void, & revoked. Being a resident of Horseshoe Lake Arkansas give & bequeath all of my estate Real and Personal to Robert Kinzalow now & forever.
>
> Signed & Witnessed on this 28th Day March 2002
> Brenda L. Hodgson [signature]
> Robert Martin [signature] Ouida Lawhorn [signature]
> Ouida Lawhorn

Hodgson said she knew how to prepare a will because of her experiences when her mother died about three years before. Hodgson watched Ms. Lawhorn sign the will as she lay in bed using the roll-away hospital table. Thereafter, Hodgson and Martin signed as witnesses, all done in presence of one another. Hodgson said she folded the paper and put it in her purse, and she told no one else about it until after she had consulted an attorney to determine if it was valid. Hodgson was certain that Ms. Lawhorn was of sound mind at the time.

Robert Martin testified that he could not hear all of the conversation between Hodgson and Ms. Lawhorn, but he heard enough to understand that a will was being drafted at Ms. Lawhorn's request, that it was intended to be her last will and

testament, and that he and Hodgson were to be the attesting witnesses. Martin watched Ms. Lawhorn sign it, watched Hodgson sign it, and then he signed it. Martin said Ms. Lawhorn was treating herself that day for pain by pushing a button to receive a dose of medicine. Notwithstanding that fact, Martin believed she understood what she was saying and doing.

Lorrine Long corroborated the testimony of both Hodgson and Martin. Long testified that she was also a weekend renter of Ms. Lawhorn and that when she came to visit that day, Ms. Lawhorn asked about Long's grandchildren by name. Long said Ms. Lawhorn knew what she was doing and did not appear to be confused, even though she had self-induced intravenous Demerol. As the will was being prepared, Long said she was not near enough to hear everything that was said because she was across the room. However, Long said she had seen and heard Ms. Lawhorn asking for a piece of paper, Hodgson writing down what Ms. Lawhorn wanted, Ms. Lawhorn signing it, and then Hodgson and Martin signing it. The entirety of drafting, reading, and signing the paper took in her estimate twenty to thirty minutes.

Ouida Smith testified that Ms. Lawhorn was her aunt and that she (Smith) was the person who eventually filed the handwritten will with the probate court. Smith said her aunt had called her about a week before she died and mentioned that she had made a mistake on her will, but her aunt did not explain what she meant. Smith came to the hospital on the morning of March 28 and stayed until some time between 4:00 p.m. and 5:00 p.m. Smith was not present when the 2002 will was prepared and signed. Smith stated that her aunt was cognizant that day, that her aunt comforted her upon her departure and told her not to be upset about her illness and imminent death, and that she was talking to other people at the hospital. Smith returned the next day accompanied by her husband, and said that though her aunt was weaker, she still recognized her and her husband. Smith said that Ms. Lawhorn asked about her mother-in-law's health in that conversation, because they were friends. Smith verified that the signature on the 2002 will was Ms. Lawhorn's. She compared her aunt's signature on the will with those written on various checks; she believed that they were all Ms. Lawhorn's signatures.

Mildred Cosby, who is Smith's mother and Lawhorn's sister-in-law, testified that she had visited Lawhorn in the hospital

about a week prior to her death. Cosby testified that when she came into the hospital room, Lawhorn told her right away that she had made a mistake in her will.

Robert Lambie came to see Ms. Lawhorn on March 28 during the late afternoon and evening. Lambie was a friend of both Ms. Lawhorn and Mr. Kinzalow, who were "like parents" to him. Lambie said that Ms. Lawhorn was awake, aware, and talking to the people who visited her that day; she did not appear to be under the influence of heavy narcotics. Lambie said that Ms. Lawhorn asked his wife Diane about an eye injury that Diane had suffered earlier. Lambie observed Ms. Lawhorn sitting on the side of the bed and writing a check for a debt owed to "Tommy," hearing Mr. Kinzalow and Ms. Lawhorn discuss the amount and noting that Ms. Lawhorn was able to compute the amount in her head faster than Kinzalow could do so on paper. Lambie and his wife left that evening at around 6:00 or 7:00 p.m. When Lambie visited Ms. Lawhorn the next day, she was heavily medicated.

Mr. Kinzalow testified that he was at the hospital taking care of Ms. Lawhorn, but he was not present when the will was prepared and signed, nor did he know of its existence until weeks after her death. Kinzalow said that he and Ms. Lawhorn had lived together for eleven years, but that she had been in and out of the hospital for the last three months of her life. Kinzalow said that he would go home and sleep only if someone else would come stay with her. When she was in the hospital, Kinzalow said he would leave her room only if someone else was there.

Kinzalow agreed that Ms. Lawhorn wrote a check on March 28 in order to repay a $2200 loan to Tommy Scarborough and that she was not drugged-up at the time. He verified that her signature was on the 2002 will and was very much like the signature on the check she wrote that same day. Kinzalow believed that the doctor's notes were correct, that Ms. Lawhorn became lethargic and less functional by the afternoon of March 29 when the automatic drip of narcotics began, but that up to that point, he thought she was of sound mind, talkative, and aware. According to the hospital records, Kinzalow was in the room when she died the next morning, March 30, at 8:25, and the family was to be contacted. Kinzalow said he later wrote a check to Howeth for his part of Lawhorn's funeral expenses.

After considering the evidence presented, the trial judge concluded that the 2002 will was properly prepared and executed in substantial compliance with Ark. Code Ann. § 28-25-103

(1987); that there was no proof of duress or overreaching worked against the testatrix; and that there was no proof of incompetence of the testatrix. A timely notice of appeal was filed after the order was entered of record.

We review probate matters de novo but will not reverse probate findings of fact unless they are clearly erroneous. *McAdams v. McAdams*, 353 Ark. 494, 109 S.W.3d 649 (2003); *Morton v. Patterson*, 75 Ark. App. 62, 54 S.W.3d 137 (2001). A finding is clearly erroneous when, although there is evidence to support it, we are left on the entire evidence with the firm conviction that a mistake has been committed. *Morton, supra.* We also defer to the superior position of the lower court sitting in a probate matter to weigh the credibility of the witnesses. *McAdams, supra.*

The first point on appeal advanced by appellants is that the trial court clearly erred by finding that Ms. Lawhorn was competent to make and execute the 2002 will. We disagree.

The party challenging the validity of a will is required to prove by a preponderance of the evidence that the testator lacked the mental capacity or was unduly influenced at the time the will was executed. *Sullivant v. Sullivant*, 236 Ark. 95, 364 S.W.2d 665 (1963); *Green v. Holland*, 9 Ark. App. 233, 657 S.W.2d 572 (1983); *Oliver v. Griffe*, 8 Ark. App. 152, 649 S.W.2d 192 (1983). Generally, mental or testamentary capacity means that the testatrix must be able to retain in her mind, without prompting, the extent and condition of her property, to comprehend to whom she is giving it, the relation of those entitled to her bounty, and the deserts of those whom she excludes from her will. *Hiler v. Cude, Ex'r*, 248 Ark. 1065, 455 S.W.2d 891 (1970). Complete sanity in a medical sense at all times is not essential to testamentary capacity provided that capacity exists at the time the will is executed, during a lucid interval. Evidence of the testator's mental condition, both before and after execution of the will at issue, is relevant to show his mental condition at the time he executed the will. *See Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997). The test is whether the testatrix at the time the will was executed had a fair comprehension of the nature and extent of her property and to whom she was giving it. *Scott v. Dodson, Executor*, 214 Ark. 1, 214 S.W.2d 357 (1948).

Appellants urge us to hold that because of the hurried and unusual nature of the drafting of this will, and the fact that its existence was concealed for some time after her death, the circumstances cannot support a finding that Lawhorn was competent at the time she signed the will. Appellee counters that the trial judge was not clearly erroneous to find that Ms. Lawhorn was competent when the will was executed in the early afternoon of March 28, based upon his belief in the testimonies of the witnesses who observed her demeanor that day. We cannot say that the credibility determination made by the trial judge was clearly erroneous. Thus, we affirm this point.

Appellants also argue in regard to mental capacity that Hodgson and Martin were indirect beneficiaries of the will such that the burden shifted to appellees to demonstrate beyond a reasonable doubt that she possessed mental capacity and was not unduly influenced. This argument was never presented in the trial, and appellants cite no authority for that proposition on appeal. Nevertheless, we disagree that the drafter and witnesses, who rented from Ms. Lawhorn, were beneficiaries under the will. Therefore, the burden of proof did not shift.

For their second point on appeal, appellants challenge whether the trial court clearly erred by finding substantial compliance with the statute setting out the requirements for proper execution of a will. That statute, Ark. Code Ann. § 28-25-103(a) (1987), provides in relevant part that the execution of a will, other than holographic, must be by the signature of the testator and of at least two witnesses. This statute further requires in subsection (b) that the testatrix declare to the attesting witnesses that the instrument is her will and sign the will. The attesting witnesses must sign at the request and in the presence of the testatrix. *Id.* at subsection (c).

Our supreme court has upheld execution of wills that "substantially comply" with this statute in certain circumstances. For instance, the supreme court has used this standard regarding the requirement that the testator declare to the witnesses that this is his will, *Faith v. Singleton*, 286 Ark. 403, 692 S.W.2d 239 (1985); *Green v. Holland*, 9 Ark. App. 233, 657 S.W.2d 572 (1983), and to the requirement that the witnesses must sign at the request of the testator, *Hanel v. Springle, Adm'r*, 237 Ark. 356, 372 S.W.2d 822 (1963). *See also Burns v. Adamson*, 313 Ark. 281, 854 S.W.2d 723 (1993). Appellants concede these points of law, agreeing that the

purpose of the statute is to protect such conveyances against fraud and deception but not impede them by technicalities. *See Hanel v. Springle, supra.* Instead, appellants attempt to distinguish the cases above and demonstrate how, under these facts, there was not substantial compliance. Specifically, appellants assert that the testimony indicated that Ms. Lawhorn never declared to Martin that this was her last will and testament, nor did she specifically ask either witness to sign the will.

It is not required, however, that a testator recite precisely the words "this is my will," although that is obviously the preferred practice. *See Faith v. Singleton, supra; Green v. Holland, supra.* The fact of publication can be inferred from all of the circumstances attending the execution of the will. *Faith v. Singleton, supra; Rogers v. Diamond,* 13 Ark. 474 (1852). The trial judge believed that Martin was standing by as Hodgson read the handwritten document to Ms. Lawhorn, and he further believed the testimony that Martin understood this to be Ms. Lawhorn's last will and testament. We hold that the trial judge did not clearly err in finding substantial compliance with the requirement of declaring one's will to the witnesses.

Appellants also challenge the finding that there was substantial compliance with the statutory requirement of the testatrix "requesting" her witnesses to sign. Where there is no indication of fraud, deception, undue influence, or imposition, this court avoids strict technical construction of statutory requirements in order to give effect to the testator's wishes. *In re Altheimer's Estate,* 221 Ark. 941, 256 S.W.2d 719 (1953). We seek to determine the intent of the testator. *Morgan v. Green,* 263 Ark. 125, 562 S.W.2d 612 (1978). While the facts surrounding the execution of Ms. Lawhorn's will are troublesome, and had we been sitting as the trial court we might have held differently, we cannot conclude that the trial judge clearly erred.

Affirmed.

BIRD and ROAF, JJ., agree.

Richard J. HUDSON and Erma J. Hudson, Husband and Wife *v.* Emile HILO and Jennifer M. Hilo, Husband and Wife

CA 04-57 198 S.W.3d 569

Court of Appeals of Arkansas
Opinion delivered November 17, 2004

[Rehearing Denied December 15, 2004.]

Rice & Adams, by: *Ben E. Rice*, for appellants.

Hartsfield, Almand & Dennison, PLLC, by: *Larry J. Hartsfield*, for appellees.

WENDELL L. GRIFFEN, Judge. Appellants Richard and Erma Hudson appeal the Pulaski County Circuit Court's award of $3,019.55 in damages and $2,750 in attorney fees to appellees Emile and Jennifer Hilo in what turned into a contract-rescission case. They argue (a) that the trial court erred in awarding damages for betterments when there was no proof of the value of the betterments and (b) that the judgment for attorney fees was also improper. The appellees argue that the trial court's decision was correct despite its misplaced analysis, that the award of damages was proper, and that the award of attorney fees should be upheld. We hold that the trial court properly awarded damages to the appellees based on the cost of improvements made to the property, but that the trial court improperly based its decision on the Arkansas Betterment Act, Ark. Code Ann. § 18-60-213 (Repl. 2003). We also hold that the trial court's award of attorney fees to the appellees was permissible because appellees incurred legal expenses in defending a foreclosure action arising from a real-estate-installment note. Thus, we affirm.

Background Facts

The Hudsons executed a warranty deed on property in Pulaski County from themselves to the Hilos on April 24, 2001. The Hilos signed a real-estate-installment note for $26,500 at 8% interest. Payments were to be made in $400 installments starting in April 2001. The note was secured with a mortgage. The Hilos made several improvements to the property, including carpeting, linoleum, floor replacement, ceiling fans, sheet rock, vanity lights, a water heater, pipes, and landscaping.

On September 27, 2002, the Hudsons filed a complaint for foreclosure, alleging that the Hilos had stopped making payments on the note and were in default. The Hilos answered by admitting that they did not make payments; however, they counterclaimed for rescission of the contract, alleging that the Hudsons made incorrect statements on a disclosure statement. The Hilos alleged a misrepresentation when the Hudsons erroneously stated that the septic system and other utilities were not shared with any adjoining property owner when in fact the septic system was on the neighbor's land.

At trial, Jennifer Hilo testified that she and her husband spent $6,530 on improvements to the property. No one testified that those improvements added to the value of the property. Mrs. Hilo also testified that appellees paid $500 for the down payment and $389.55 in closing costs, that they made eighteen payments of $400, and that they occupied the property for twenty-nine months. The parties disputed the fair rental value of the property, with the Hudsons placing that value at $400 and the Hilos at $200.

The circuit court found that the Hudsons made a material misrepresentation about the location of the septic lines, but that the misrepresentation did not rise to the level of being fraudulent. The circuit court rescinded the contract and declared the Warranty Deed and Mortgage null and void. The circuit court also dismissed the foreclosure complaint and awarded the Hilos $3,019.55 in damages. On subsequent motion, the circuit court awarded the Hilos $2,750 in attorney fees.

On July 3, 2003, the Hudsons asked for findings pursuant to Ark. R. Civ. P. 52 regarding the judgment. They also asked the circuit court to set aside the judgment. While the court declined to set aside the judgment, it issued the following findings:

> 1. The defendants expended $6,530.00 for repairs and improvements to the real property.

2. The defendants made a down payment of $500.00.

3. The defendants paid closing costs in the amount of $389.55.

4. The defendants paid eighteen (18) payments of $400.00.

5. The defendants occupied the real property for 29 months.

6. The reasonable rental value of the real property, with repairs, was $400.00 a month.

This appeal followed.

Analysis

We review traditional cases of equity *de novo* and will not reverse factual findings by the trial court unless they are clearly erroneous. *McAdams v. McAdams*, 353 Ark. 494, 109 S.W.3d 649 (2003).[1] A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Murphy v. City of West Memphis*, 352 Ark. 315, 1001 S.W.3d 221 (2003). However, a trial court's conclusion of law is given no deference on appeal. *Id.*

The Hudsons argue that the trial court erred in awarding damages based on the cost of the improvements to the property. They contend that the award for betterments under the rescinded contract was erroneous because there was no proof as to the value of the betterments. The Hilos argue that the court erred in characterizing the improvements as betterments, but that the court reached the correct result for the wrong reason.

The remedy under the Arkansas Betterment Act is based on the value of the improvement to land, as the Hudsons stated in their brief.[2] *See Smith v. Nelson*, 240 Ark. 954, 403 S.W.2d

[1] Rescission is a remedy cognizable in equity. *See Phelps v. U.S. Life Credit Life Ins. Co.*, 336 Ark. 256, 984 S.W.2d 425 (1998); *Maumelle Co. v. Eskola*, 315 Ark. 25, 865 S.W.2d 272 (1993).

[2] The Betterment Act reads, in pertinent part:

(a) If any person believing himself or herself to be the owner, either in law or equity, under color of title has peaceably improved, or shall peacefully improve, any land

99 (1966). However, the Betterment Act applies in cases where a party, believing himself to be the owner of land and under color of title, peacefully improves land later discovered to belong to another. *Riddle v. Williams*, 204 Ark. 1047, 66 S.W.2d 893 (1942). In this case, the Hilos made improvements to land that they purchased under an installment contract, not land that actually belonged to others. The Betterment Act is inapplicable in such cases.

In their reply brief, the Hudsons rely on *Massey v. Tyra*, 217 Ark. 970, 234 S.W.2d 759 (1950), for the proposition that the proper measure of damages is not the cost expended on the improvements, but the increase in value to the property after the improvements. *Massey v. Tyra, supra*, is not a case involving the application of the Betterment Act. Rather, it involves damages stemming from a misrepresentation concerning the water supply on the land and the buyer's reliance that the water supply would be adequate enough to open a restaurant. Accordingly, the measure of damages provided in the Betterment Act is the wrong measure of damages. Moreover, the improvements made by the Hilos were made in reliance on the Hudsons' misrepresentation that formed the basis for the rescission. In *Massey, supra*, the supreme court awarded the buyer $509.68, the cost expended on the well on the property, because it found that the expenditure "was a direct and reasonably foreseeable result of defendants' misrepresentation, and recovery on account of it should be allowed." *Id.* at 977, 234 S.W.2d at 763.

In the present case, the trial court granted the remedy of rescission. As we have stated in the past, "It is generally recognized that in an action for rescission of a contract in a court of equity, the court applies equitable principles in an attempt to restore the status quo or place the parties in their respective positions at the time of the sale." *Riley v. Hoisington*, 80 Ark. App. 346, 355, 96 S.W.3d 743, 749 (2003) (quoting *Cardiac Thoracic & Vascular Surgery, P.A. Profit Sharing Trust v. Bond*, 310 Ark. 798, 840

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which upon judicial investigation shall be decided to belong to another, the value of the improvement made as stated and the amount of all taxes which may have been paid on the land by the person, and those under whom he or she claims, shall be paid by the successful party to the occupant, or the person under whom, or from whom, he or she entered and holds, before the court rendering judgment in the proceedings shall cause possession to be delivered to the successful party.

S.W.2d 188 (1992)). Based on these principles, it follows that the Hudsons must return all monies that the Hilos spent on the house, including money spent on improvements, where the contract has been rescinded.

We are affirming the judgment even though the trial court reached the proper result using the wrong reasoning. *See Faulker v. Arkansas Children's Hospital*, 347 Ark. 941, 69 S.W.3d 393 (2002). However, the Hudsons argue that this court should not affirm the judgment on alternate grounds. They cite *Simmons First National Bank v. Wells*, 279 Ark. 204, 650 S.W.2d 236 (1983), and argue that "it was held that because a statute was not argued to the trial court, evidence relevant to the statute was not sufficiently developed for the [s]upreme [c]ourt to apply the rule that it will affirm the trial court if a correct result is reached, even if reached on an erroneous theory." However, the evidence needed to properly calculate damages in this case, the cost of the improvements, was testified to by Jennifer Hilo. We have all the relevant evidence necessary to affirm the trial court's decision in a rescission case.

The Hudsons also cite *Hall v. Potter*, 81 Ark. 476, 99 S.W. 687 (1907), for the proposition that "a ground of relief not raised by the pleadings or in the lower court cannot be considered on appeal." The Hudsons argue that the Hilos only asked for "all expenses incurred in connection with the purchase of the aforementioned property." However, the Hilos asked for those expenses as well as attorney fees, costs, and "for all other proper relief to which [they] may be entitled."[3] Because the cost of improvements is a proper measure of recovery in contract-rescission cases, we affirm.

The Hudsons also argue that the court erred in awarding attorney fees to the Hilos. In Arkansas, a court cannot award attorney fees unless they are expressly provided for by statute or

[3] There was also an attempt to amend the pleadings to conform to the evidence when the Hudsons objected to evidence of the cost of the improvements. The court took the matter under advisement and allowed the testimony. Had the trial court sustained the objection and not allowed the evidence, then it would have run afoul of Ark. R. Civ. P. 15(b) ("If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended in its discretion."). *See also King v. State, Office of Child Support Enforcement*, 58 Ark. App. 298, 952 S.W.2d 180 (1997) (finding no abuse of discretion when the court heard a statute of limitations issue when the parties discussed it extensively at a hearing).

rule. *Friends of Children, Inc. v. Marcus*, 46 Ark. App. 57, 876 S.W.2d 603 (1994). Both parties agree that Ark. Code Ann. § 16-22-308 (Repl. 1999), which allows for attorney fees in cases involving various actions such as breach of contract and negotiable instruments, does not allow attorney fees in contract rescission cases. *See Barnhart v. City of Fayetteville*, 335 Ark. 57, 977 S.W.2d 225 (1998); *Friends of Children, Inc., supra.* However, this case began as a proceeding to foreclose on a home and enforce a promissory note. The Hilos defended the suit by alleging grounds for rescission and prevailed on those grounds. We find that under these facts, the Hilos were the prevailing party in a foreclosure action, entitling them to attorney fees. Therefore, we affirm the award.

Affirmed.

CRABTREE and BAKER, JJ., agree.

Geoffrey Chris LUEKEN *v.* STATE of Arkansas

CA CR 04-428 198 S.W.3d 547

Court of Appeals of Arkansas
Opinion delivered November 17, 2004

The Jesse Law Firm, P.L.C., by: *Mark Alan Jesse*, for appellant.

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

KAREN R. BAKER, Judge. Appellant, Geoffrey Lueken, appeals from his conviction by a Pulaski County jury of manufacturing methamphetamine, possession of drug paraphernalia with the intent to manufacture methamphetamine, possession of drug paraphernalia, and maintaining a drug premises. He was sentenced to 120 months' imprisonment in the Arkansas Department of Correction. He has four points on appeal.[1] First, he argues that when all evidence is viewed in the light most favorable to the State, the evidence was insufficient to support his conviction for manufacturing methamphetamine. Second, he argues that when all evidence is viewed in the light most favorable to the State under a joint occupancy/constructive possession argument, the evidence was insufficient to support the conviction for possession of paraphernalia with intent to manufacture methamphetamine. Third, appellant argues that the evidence was insufficient to support his conviction for maintaining a drug premises when the evidence demonstrated that contraband belonged to a joint occupant of the residence who had an equal right to control the premises. Fourth, appellant argues that the trial court erred in refusing to admit a certified copy of the co-defendant's judgment and conviction order, showing he had pled guilty to manufacturing methamphetamine under a reverse Rule 404(b) argument, as such was an exculpatory explanation for the paraphernalia found on the premises. We affirm.

On May 27, 2003, officers of the Little Rock Police Department executed a search warrant at the home of appellant and his roommate, Chris Southall. Upon the officers' arrival at the home, appellant was discovered outside working on a vehicle. Officer Russ Littleton testified that a security pat-down was conducted on appellant, and a cigarette package containing a clear smoking

[1] Appellant does not challenge the sufficiency of the evidence as to his conviction of possession of drug paraphernalia.

device with a white residue and a small metal pipe was discovered in his right pants pocket. Appellant was taken into custody.

Officer Ken Blankenship testified that while Officer Littleton stayed outside with appellant, he and other officers made their way into the home. He testified that when he reached the porch of the home a strong chemical odor was detected. Appellant's roommate, Mr. Southall, was in the bathroom, and a woman was on the sofa near the television in the living room. Officer Blankenship searched the area upstairs, which was a loft area, where a computer and paperwork were kept. In the loft area, he found a chopper, used to chop ephedrine tablets, and a propane bottle. Officer Blankenship also was responsible for searching Mr. Southall's vehicle, which was parked outside. A search of his vehicle revealed numerous items of drug paraphernalia, including a pickle jar with a bilayer liquid with a cloudy sediment on the bottom, paper plates, syringes, a drain opener, rust remover, a coffee filter inside a plastic bag containing red sludge, a 200 mm flask with tape around the top, a glass jar, and a glass.

Officer Greg Siegler explained that once the officers entered the home, there was a door straight ahead of them that was closed. He could hear someone inside a bathroom. Officer Siegler knocked on the door and identified himself. He heard the toilet flush. He told the person to come out; however, he heard the toilet flush again. Soon the door opened, Mr. Southall exited the bathroom and was taken into custody. Officer Siegler also testified that the woman who was discovered on the sofa in the living room was also taken into custody. A search of the living room revealed three straws, a glass smoking pipe, and four small plastic bags, which were all found near the coffee table.

The search continued into the kitchen and laundry room area. Officer Blankenship testified that a very strong odor was emanating from the kitchen and laundry room area. When he entered the small laundry room, he noticed boxes that had iodine stains on them. He also noticed staining on the walls as well as rust stains in the area in general. On the laundry room shelves and around the room, he found a gallon can of hexane, a funnel, plastic tubing, a container of salt, and coffee filters. A turkey baster, a jar containing a bilayer liquid, coffee filters, stirring sticks, a fan, a plastic bottle with tubing attached, and rubbing alcohol were also found in the laundry room. In the trash can in the laundry room, tubing with stains on it and tissue paper with stains on it were discovered.

Officer Michael Terry conducted a search of the bathroom and the kitchen. Once Mr. Southall was removed from the bathroom, Officer Terry discovered one small glass container with a small amount of white powder on it. In the kitchen, he found a "baster-type" object, a glass jar with a white powder type residue, a container of Red Devil lye, and a homemade smoking device.

A search of the southwest bedroom, conducted by officer Steve Pledger, revealed several items of drug paraphernalia. He discovered pipes used to ingest or smoke methamphetamine, a watertight bong used to smoke marijuana, and plastic bags with residue. Officer Pledger also testified as to items discovered on the porch of the residence. There he found a can of acetone, a can of toluene, which he testified is a thinner used in the separation of a methamphetamine cook, and a can of Coleman camp fuel.

Chris Harrison of the state crime lab testified that of the fourteen items tested for residue at the lab, seven of them tested positive for methamphetamine. Of the remaining items tested, some of them had chemicals commonly used in the manufacturing process. In his opinion, manufacturing was occurring at the residence. Moreover, on appellant's person, officers found a small plastic packet containing a glass tube with a white residue on it and a small metal pipe. As to the amount of methamphetamine found on appellant, Harrison testified that there was just a small amount of residue. As a result, he did a methanol rinse and did not weigh it.

At the conclusion of the testimony, a jury in Pulaski County Circuit Court convicted appellant of manufacturing methamphetamine, possession of drug paraphernalia with the intent to manufacture methamphetamine, possession of drug paraphernalia, and maintaining a drug premise. This appeal followed.

Sufficiency of the Evidence

Because each of appellant's first three arguments concerns the sufficiency of the evidence as to three of his convictions, we will address them together. Specifically, appellant argues that when all evidence is viewed in the light most favorable to the State, the evidence was insufficient to support each of his convictions for manufacturing methamphetamine, possession of paraphernalia with intent to manufacture methamphetamine, and maintaining a drug premise.

A motion for directed verdict is a challenge to the sufficiency of the evidence. *Cherry v. State*, 80 Ark. App. 222, 95 S.W.3d 5

(2003). When reviewing the sufficiency of the evidence, this court views the evidence in the light most favorable to the guilty verdict, considers only that evidence supporting the verdict, and affirms if substantial evidence supports the verdict. *Cook v. State*, 350 Ark. 398, 86 S.W.3d 916 (2002). The test for determining sufficiency of the evidence is whether substantial evidence supports the verdict. *Id.* (citing *Hatley v. State*, 68 Ark. App. 209, 5 S.W.3d 86 (1999)). Evidence is substantial when it is forceful enough to compel a conclusion and goes beyond mere speculation or conjecture. *Id.* (citing *Wortham v. State*, 65 Ark. App. 81, 985 S.W.2d 329 (1999)). Circumstantial evidence can be sufficient to sustain a conviction when it excludes every other reasonable hypothesis consistent with innocence. *Mace v. State*, 328 Ark. 536, 539, 944 S.W.3d 830 (1997). The question of whether the circumstantial evidence excludes every hypothesis consistent with innocence is for the jury to decide. *Ross v. State*, 346 Ark. 225, 230, 57 S.W.3d 152, 156 (2001).

Arkansas Code Annotated section 5-64-401(a) (Supp. 2003) states that it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance. "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. Ark. Code Ann. § 5-64-101(m) (Repl. 1997). Arkansas Code Annotated section 5-64-403(c)(1)(A)(i) (Supp. 2003) states that:

> It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of subchapters 1-6 of this chapter.

Arkansas Code Annotated section 5-64-402(a)(3) (Repl. 1997) states that:

> It is unlawful for any person knowingly to keep or maintain any store, shop, warehouse, dwelling, building, or other structure or place or premise, which is resorted to by persons for the purpose of using or obtaining these substances or which is used for keeping them in violation of subchapters 1-6 of this chapter.

In his brief, appellant argues that there was insufficient evidence to support his convictions under either a circumstantial case of constructive possession or a circumstantial case of accomplice liability. In *Walley v. State*, 353 Ark. 586, 595-96, 112 S.W.3d 349, 354 (2003), our supreme court stated:

> We recently explained how we conduct an appellate review in connection with a sufficiency-of-the-evidence challenge to possession when two or more personsoccupy the residence where the contraband was found.
>
> > Under our law, it is clear that the State need not prove that the accused physically possessed the contraband in order to sustain a conviction for possession of a controlled substance if the location of the contraband was such that it could be said to be under the dominion and control of the accused, that is, constructively possessed. *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994); *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991). We have further explained:
> >
> > Constructive possession can be implied when the controlled substance is in the joint control of the accused and another. Joint occupancy, though, is not sufficient in itself to establish possession or joint possession. There must be some additional factor linking the accused to the contraband. The State must show additional facts and circumstances indicating the accused's knowledge and control of the contraband.
> >
> > *Hendrickson v. State*, 316 Ark. 182, 189, 871 S.W.2d 362, 365 (1994) (citations omitted). *See also Jacobs v. State*, 317 Ark. 454, 878 S.W.2d 734 (1994); *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991). When seeking to prove constructive possession, the State must establish (1) that the accused exercised care, control, and management over the contraband, and (2) that the accused knew the matter possessed was contraband. *Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995); *Plotts v. State*, 297 Ark. 66, 759 S.W.2d 793 (1988).

Darrough v. State, 330 Ark. 808, 811, 957 S.W.2d 707, 708-09 (1997). *Darrough v. State* is consistent with a long line of cases holding that "it cannot be inferred that one in non-exclusive possession of premises knew of the presence of drugs and had joint control of them unless there were other factors from which the jury can reasonably infer the accused had joint possession and control."

> *Ravellette v. State*, 264 Ark. 344, 346, 571 S.W.2d 433, 434 (1978). In *Ravellette*, we held that where marijuana was found in a living room and dining room of a rented house jointly shared, there must be some factor in addition to the joint control of the premises to link the accused with the controlled substance. *Id.*; *see also Hicks v. State*, 327 Ark. 652, 659, 941 S.W.2d 387, 391 (1997); *Pyle v. State* 314 Ark. 165, 862 S.W.2d 823 (1993); *Bailey v. State* 307 Ark. 448, 821 S.W.2d 28 (1991); *Embry v. State*, 302 Ark. 608, 611, 792 S.W.2d 318, 319 (1990); *Plotts v. State*, 297 Ark. 66, 759 S.W.2d 793 (1988); *Westbrook v. State*, 286 Ark. 192, 194 691 S.W.2d 123, 124 (1985); *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982).

In this case, it is undisputed that appellant owned the premises where the paraphernalia and contraband were discovered. The jury was presented with testimony from Chris Harrison of the state crime lab that manufacturing was occurring at appellant's residence. Several officers testified in detail as to the numerous items commonly found in a methamphetamine lab that were seized from appellant's home. The items were found throughout various common areas of the residence including the bathroom, the loft area, the living room, the kitchen, the laundry area, and a bedroom. Some of the items included: a pill chopper, a propane bottle, a small glass container with an unknown powder on it, red devil lye, a homemade smoking device, a glass jar with a white powdery residue, a glass tube with residue, two straws with residue, plastic tubing, a funnel, coffee filters, a bottle of hexane, a turkey baster, a jar containing a bi-layer liquid, a plastic bottle with tubing that contained cat litter, pipes for ingesting methamphetamine, a watertight bong, plastic bags with residue, a can of acetone, a can of toluene, and a can of Coleman camp fuel.

Officer Blankenship testified that tubing with stains on it as well as tissue paper with stains on it were found in the laundry-room trash can. Officer Blankenship also testified that when the officers approached the porch, they could smell the intense chemical odor connected to the manufacturing of methamphetamine and that the odor was also present near the rear of the home by the kitchen and laundry room. Further, Officer Blankenship's testimony showed that in the laundry room there were iodine stains on the boxes, staining on the walls, and rust stains in the area in general. Seven of the items found at appellant's residence tested positive for methamphetamine. Of the remaining items tested, some of them had chemicals commonly used in the manufacturing process. Moreover, on appellant's person, officers found a small

plastic packet containing a glass bubbled tube with a white residue on it and a small metal pipe that tested positive for methamphetimine.

The fact that the drugs were found in common areas of the residence has been considered a linking factor to establish constructive possession. *See Sweat v. State,* 25 Ark. App. 60, 752 S.W.2d 49 (1988). In *Sweat,* the court found sufficient linking factors to support a finding that appellant was in constructive possession of marijuana found in his mother's home. *Id.* Sweat also lived there, was present when the search was conducted, and marijuana was found in common areas of the house, in the refrigerator and on top of the freezer. *Id.* at 65-66, 752 S.W.2d at 50-51. Drug paraphernalia was also found on the kitchen table. *Id.* at 65-66, 752 S.W.2d at 51. In the present case, we find that the jury could reasonably conclude that appellant knew of the existence of the drugs and drug- manufacturing paraphernalia found at his residence.

In cases where the theory of accomplice liability is implicated, we affirm a sufficiency-of-the-evidence challenge if substantial evidence exists that the defendant acted as an accomplice in the commission of the alleged offense. *Cook v. State,* 350 Ark. 398, 86 S.W.3d 916 (2002). Arkansas Code Annotated section 5-2-403 (Repl.1997), provides the statutory definition of an accomplice:

> (a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he:
>
> (1) Solicits, advises, encourages, or coerces the other person to commit it; or
>
> (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing it; or
>
> (3) Having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.
>
> (b) When causing a particular result is an element of an offense, a person is an accomplice in the commission of that offense if, acting with respect to that result with the kind of culpability sufficient for the commission of the offense, he:
>
> (1) Solicits, advises, encourages, or coerces the other person to engage in the conduct causing the result; or

(2) Aids, agrees to aid, or attempts to aid the other person in planning or engaging in the conduct causing the result; or

(3) Having a legal duty to prevent the conduct causing the result, fails to make proper effort to do so.

The relevant factors in determining the connection of an accomplice to a crime are the presence of the accused in proximity of a crime, the opportunity to commit the crime, and an association with a person involved in a manner suggestive of joint participation. *Clem v. State,* 351 Ark. 112, 90 S.W.3d 428 (2002). A defendant is an accomplice so long as the defendant renders the requisite aid or encouragement. *Atkinson v. State,* 347 Ark. 336, 64 S.W.3d 259 (2002).

Given the evidence that appellant owned the premises, that drugs and paraphernalia were found in common areas throughout the residence, and that methamphetamine and paraphernalia were found in appellant's pocket, we conclude that there was sufficient evidence whereby a jury could convict appellant of all three crimes. Accordingly, the trial court properly denied appellant's motion for a directed verdict.

Reverse Rule 404(b)

Finally, appellant argues that the trial court erred in refusing to admit a certified copy of the co-defendant's judgment and disposition order, showing he pled guilty to manufacturing methamphetamine under a reverse Rule 404(b) argument, as such was an exculpatory explanation for the paraphernalia found on the premises. It is often recognized that evidence such as other parties' threats to kill or offer of payment to someone else to commit murder are relevant to prove motive on the part of someone other than the defendant. *Larimore v. State,* 317 Ark. 111, 877 S.W.2d 570 (1994) (*citing Smith v. State,* 33 Ark. App. 37, 41, 801 S.W.2d 655, 658 (1990)). Such evidence is sometimes called "reverse 404(b)," as it is evidence of other crimes, wrongs, or acts by a party other than the defendant which may not be admitted to show that the party acted in conformity with a known character trait, but which may be admitted for other purposes, such as to show motive, opportunity, intent, or identification of that other party, thus tending to negate the guilt of the defendant. *Id.* (*citing United States v. Stevens,* 935 F.2d 1380, 401-02 (3d Cir. 1991)).

In the present case, appellant attempted to admit a certified copy of Chris Southhall's judgment and disposition order. Appel-

lant was attempting to provide an exculpatory explanation for the presence and discovery of the various items found at the scene. He asserted that the introduction of Southhall's judgment and conviction order would have demonstrated motive, opportunity, and intent.

Evidence offered under Rule 404(b) of the Arkansas Rules of Evidence must be independently relevant, thus, having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *Williams v. State*, 343 Ark. 591, 36 S.W.3d 324 (2001) (citing *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999)). Even if the evidence is relevant, it may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Ark. R. Evid. 403. The admission or rejection of evidence under Rule 404(b) is committed to the sound discretion of the trial court, which this court will not disturb on appeal absent a showing of manifest abuse. *Warren v. State*, 59 Ark. App. 155, 954 S.W.2d 298 (1997). The standard of review is similar for both relevancy determinations and the decision to admit evidence by balancing the probative value against unfair prejudice or confusion of the issues. *See Walker v. State*, 301 Ark. 218, 783 S.W.2d 44 (1990); *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988).

We find that the trial court did not err in refusing to admit the judgment and disposition order. Contrary to appellant's assertion, the order itself does not provide any information as to motive, opportunity, or intent. Accordingly, we find no abuse of discretion on the part of the trial judge in refusing to admit Southall's judgment and disposition order.

Based on the foregoing, we affirm appellant's convictions.

GRIFFEN and CRABTREE, JJ., agree.

Breezy MAYFIELD *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 04-254 198 S.W.3d 541

Court of Appeals of Arkansas
Opinion delivered November 17, 2004

Ben Seay, for appellant.

Gray Allen Turner, for appellee.

Christina Carr, attorney ad litem.

ANDREE LAYTON ROAF, Judge. Appellant Breezy Mayfield appeals from an order terminating her parental rights to her minor son. On appeal, she argues that the trial court erred in finding by clear and convincing evidence that DHS proved the grounds set forth in the petition for termination. We affirm.

Breezy Mayfield is the mother of B.M., born on January 23, 2002. On October 3, 2002, DHS filed a petition for emergency custody of B.M., based on the presence of unexplained injuries on the child, including a black eye, broken ribs, cigarette burns on the child's back, and bruises on the infant's head. The order granting DHS custody was filed on October 15, 2002. Breezy waived probable cause at a hearing on October 26, 2002, and B.M. was continued in DHS's custody. An adjudication hearing was held on December 17, 2002, however, Breezy did not appear because she had moved to California on the previous day. Breezy is originally from California, had come to Arkansas with her sixteen-year-old boyfriend, and had lived with various relatives while in Arkansas, including a grandmother and aunt. On the morning of the adjudication hearing, Breezy telephoned the DHS worker assigned to the case, explaining that she had permanently moved back to California with her mother because she needed a place to live. Until Breezy moved back to California, she had been exercising regular visitation with B.M. since his removal from her custody. During the adjudication hearing, DHS stated that other than visitation, Breezy had failed to comply with the case plan's requirements that she seek counseling, submit to random drug screens, maintain stable housing, and obtain employment. The trial court found that B.M. was dependent-neglected and continued custody in DHS.

Breezy was present at a March 11, 2003 review hearing. Her attorney had filed a motion to transfer the case to California, citing that Breezy lived in California with her mother; that while in Arkansas, Breezy did not have family or economic support; and that she had no intention of returning to Arkansas, but that she wanted to continue working with California's equivalent of DHS in order to be reunified with her child. Breezy's attorney argued that Breezy was not receiving reunification services in California, and requested that foster care be transferred to California so that

proper visitation and reunification services could be provided to Breezy in California. Both DHS and the guardian ad litem opposed Breezy's motion to transfer.

At the hearing Breezy testified that she moved to California to seek a stable home environment. She stated that she was receiving emotional and financial support from her mother, brother, and sister in California. She testified that she had contacted the equivalent of DHS in California, and that she was advised to have DHS complete an Interstate Compact for the Placement of Children form. She stated that she was advised that there was no way California could complete a home study until that form was completed. Breezy testified that she had been attending parenting classes on her own; that she began counseling; that she was looking for a job; and that she was willing to do whatever necessary to get her child back. Breezy admitted that she did not notify DHS of her intent to move to California, and that she, her mother, brother, and sister all live in the same apartment.

The representative from DHS admitted that it had not completed the "100-A" form, and admitted, "Right now we just have not made an agreement as to what needs to be done. Our ICPC says that we do not have to do the 100-A, and that they're [California] just supposed to provide the services. California says that they won't do it unless we do the 100-A. It's a form that has to be filed." DHS stated that it would not complete the form and that there were no services that it could provide to Breezy in California.

The trial court opined that it was not opposed to transferring the case to California, took Breezy's motion to transfer under advisement, and directed the ICPC officials to appear at the April 7 review hearing to explain what steps need to be taken in order to get the case transferred to California.

ICPC officials did not appear at the April 7 hearing, and instead DHS relied on *Arkansas Department Human Services. v. Huff*, 347 Ark. 553, 65 S.W.3d 880 (2002), for its position that ICPC did not apply in Breezy's case. The trial court declined to send B.M. to California, but agreed to participate in a conference call with the appropriate California judge in order to get the matter resolved.

At the August 12, 2003 review hearing, Breezy submitted letters from various people in California, indicating that she had sought counseling treatment, completed parenting classes, and was

actively seeking employment. Breezy also testified that she had a job "lined up." Reunification was continued as the goal of the case.

On September 9, 2003, a permanency planning hearing was held. DHS recommended termination of Breezy's parental rights, and the trial court authorized DHS to file a petition to terminate. The court found that, based on the history of the case and the fact that services have been available to Breezy, but she had failed to return to Arkansas to take advantage of those services, the goal should be changed from reunification to termination.

At that hearing, Felica Cobb testified that DHS was in favor of terminating Breezy's parental rights; that following termination adoption would be the goal; and that she had not been able to provide services directly to Breezy because of her relocation to California. Cobb stated that a ICPC Regulation home study was done in California at Breezy's mother's home, but that the home was not appropriate for B.M. because of the living conditions. Breezy lives in the home, the apartment is a two bedroom apartment and four people reside there, with Breezy sleeping on the sofa and her mother sleeping in the kitchen, and the carpet was filthy. Cobb also stated that Breezy's mother was taking anti-depressant medication and was not open to supervised visitation. Cobb admitted that, although California was not offering her services, Breezy was "doing some things on her own" such as attending parenting classes and counseling sessions. She admitted to speaking with someone from Yuba County Counseling who indicated that Breezy was "making progress in her counseling sessions." She also admitted that Breezy was currently working.

Breezy also testified that she moved to California to better herself, and that she attempted to seek mental health treatment, but was turned down because she did not have a diagnosis. She stated that she had completed parenting classes, and voluntarily took anger-management classes. She also took co-dependency classes. She testified that she did not move back to Arkansas because she was afraid of failing and did not have any family support or financial support here. At the conclusion of Breezy's testimony, the trial court denied the motion to transfer, and changed the goal to termination.

DHS filed its petition to terminate on September 17, 2003, asserting that it was not in B.M.'s best interest to be returned to Breezy's care and custody, and that he had been out of the home

for more than one year, and despite meaningful efforts by DHS to rehabilitate the home and correct the conditions that caused removal, the conditions had not been remedied. The petition also alleged that Breezy had failed to provide meaningful support. The termination hearing was held on October 14, 2003, and DHS essentially testified to the facts mentioned above. DHS also stated that Breezy had not provided any meaningful support, but admitted that Breezy was not asked to provide child support and did not have the means. DHS admitted that California would not provide services to Breezy because she did not have her child, but stated that it filed a "100-B" form, which California denied.

The trial court granted the petition and found that it was in the child's best interest that Breezy's parental rights be terminated, and that Breezy had provided no meaningful support and had had no meaningful contact with B.M. during the pendency of the case.

This court reviews termination of parental rights cases *de novo*. *Dinkins v. Ark. 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. Ark. Dep't of Human Servs.*, 58 Ark. App. 302, 952 S.W.2d 177 (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. *Id.*

The goal of Arkansas Code Annotated section 9-27-341 (Supp. 2003) is to provide permanency in a minor child's life in circumstances in which returning the child to the family home is contrary to the minor's health, safety, or welfare and the evidence demonstrates that a return to the home cannot be accomplished in a reasonable period of time as viewed from the minor child's perspective. Ark. Code Ann. § 9-27-341(a)(3). Parental rights may be terminated if clear and convincing evidence shows that it is in the child's best interest. Ark. Code Ann. § 9-27-341(b)(3). Addi-

tionally, one or more grounds must be shown by clear and convincing evidence. The two grounds alleged in this case are: (1) that the child has been out of the home for more than twelve months and the parent has willfully failed to provide significant material support in accordance with the parent's means or to maintain meaningful contact with the child; and (2) that the child has been out of the home for more than twelve 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. Ark. Code Ann. §§ 9-27-341(b)(3)(i)(a), 9-27-341(b)(3)(B)(ii)(a) (Repl. 2002).

Breezy argues that the trial court's order is erroneous because DHS failed to prove by clear and convincing evidence that she willfully failed to provide significant material support and that she willfully failed to maintain meaningful contact with B.M.

In *Dinkins v. Arkansas Department Human Services*, 344 Ark. 207, 40 S.W.3d 286 (2001), the supreme court held that the trial court erred in finding that the appellant had failed to provide significant material support to her children. The supreme court found that DHS never requested contributions for support from the appellant, and the trial court never ordered the appellant to pay child support. The court held that it was error for the trial court to conclude that the appellant's failure to support constituted an additional ground on which to base the termination of her parental rights. The supreme court, however, ultimately concluded that the error was harmless based on additional grounds supporting termination.

Similarly in *Minton v. Arkansas Department Human Services*, 72 Ark. App. 290, 34 S.W.3d 776 (2000), the court of appeals held that it could not find appreciable evidence that the appellant willfully refused to pay support. The court found that there was no evidence that the appellant willfully refused to pay support. The court found that the evidence did not demonstrate that the appellant had the ability to pay even a nominal amount of support even after she stopped using drugs and obtained regular employment.

Breezy was never ordered to pay child support, and DHS concedes that it never requested support from Breezy. Cobb admitted that Breezy was barely able to feed herself, and as a result DHS never asked her to provide food or clothing for B.M. The trial court's finding that Breezy willfully failed to provide mean-

ingful support is clearly erroneous where she was not ordered to pay child support and had no means to provide support, and where DHS did not request that she provide B.M. with food and clothing. *Dinkins, supra.*

However, with regard to the allegation that Breezy failed to maintain reasonable contact with B.M., it is undisputed that Breezy absented herself by moving to California immediately prior to her adjudication hearing. In short, although she appeared at several review hearings and visited with B.M. at those times, B.M. was removed from Breezy's custody at the age of nine months, and Breezy did not maintain meaningful contact with the child from the time she left the state on December 16, 2002, until her rights were terminated on November 18, 2003.

Arkansas Code Annotated section 9-27-341(b)(3)(B)(ii)(b) provides that to find willful failure to maintain meaningful contact, it must be shown that the parent was not prevented from visiting with the child, taking into account the distance of the child's placement from the parent's home. Here, Breezy voluntarily left and made her home in California, and B.M. was in foster care in Rison, Arkansas. Although Breezy was offered services by Arkansas DHS during the pendency of this case, she refused to return to the state or avail herself of the services. Moreover, while in California, she failed to maintain steady employment, never established her own residence, and moved in and out of her mother's apartment, which in any event was found to be unsuitable in a California home study. We cannot say that the trial court's finding that Breezy failed to maintain meaningful contact with the child is erroneous given the history and circumstances of this case.

Breezy also argues that the trial court erred in finding that DHS made reasonable efforts to provide reunification services to her. As a sub-argument, Breezy argues that DHS failed to make reasonable efforts toward assisting her with obtaining services in California; that DHS opposed her motion to transfer the case to California, and as a result, failed to make reasonable efforts toward complying with the Interstate Compact for the Placement of Children; that there was a misapplication of the holding in *Huff, supra* and essentially that the trial court erred in denying her motion to transfer. DHS argues that Breezy's appeal from the denial of her motion to transfer is untimely, and, alternatively,

argues that DHS made reasonable efforts toward reunification, but that Breezy failed to return to Arkansas to take advantage of those services.

Because we affirm the trial court's finding that Breezy willfully failed to maintain contact with the child, we need not address this argument. However, while DHS did not move expeditiously to seek transfer of the case after the February 2003 motion to transfer was filed, the record reflects that DHS ultimately submitted the ICPC form 100-A to California in August 2003, that the ICPC-requested home evaluation was conducted on or about September 4, 2003, at Breezy's mother's home in Yuba County, California; that the home evaluation resulted in the county recommending against an ICPC placement in the grandmother's home because of unsuitability; and that this information was conveyed to DHS prior to the permanency planning hearing. Placement was denied and the Interstate Compact Case formally closed on September 30, 2003. Testimony concerning the failed transfer attempts was presented by DHS at both the permanency planning hearing on September 9, when the trial court finally denied the motion to transfer, and at the termination hearing on October 14. Accordingly, the trial court's findings that Breezy's motion to transfer should be denied and that DHS made reasonable efforts to provide reunification services to her, which she declined to accept, were not in error.

Affirmed.

ROBBINS and BIRD, JJ., agree.

WASTE MANAGEMENT of ARKANSAS, INC. *v.*
ROLL OFF SERVICE, INC.
and Tom Smith

CA 04-174 199 S.W.3d 91

Court of Appeals of Arkansas
Opinion delivered December 1, 2004

[Rehearing denied January 5, 2005.]

Quattlebaum, Grooms, Tull & Burrow PLLC, by: *John E. Tull III*, *E. B. Chiles IV*, and *Brandon B. Cate*, for appellant.

Debby Winters, for appellees.

JOSEPHINE LINKER HART, Judge. Appellant sued appellees for intentional interference with contractual relations, violation of the Deceptive Trade Practices Act, and conversion. The jury found for appellant on all counts and awarded $350,000 in punitive damages but no compensatory damages. Thereafter, appellant asked the trial court to correct the verdict based on a juror's statement that the jury intended to award appellant both compensatory and punitive dam-

ages. The trial court refused to correct the verdict and denied appellant's alternative motion for a new trial or nominal damages. In a later order, the court denied appellant's request for attorney fees pursuant to Ark. Code Ann. § 4-88-113(f) (Repl. 2001), which is part of the Deceptive Trade Practices Act. Appellant now appeals from those rulings and argues that the trial court erred in: 1) refusing to correct the verdict; 2) refusing to grant a new trial; 3) failing to award nominal damages; 4) denying appellant's request for attorney fees. We conclude that the trial court was correct in refusing to amend the verdict but that the trial court erred in denying appellant a new trial. We therefore reverse and remand on that ground without reaching appellant's last two arguments.[1]

Since 1998, appellant has provided trash-hauling and disposal services in northwest Arkansas. It has the exclusive franchise for refuse disposal in the cities of Rogers, Lowell, and Elkins, and has private trash removal contracts with various commercial enterprises both inside and outside those cities. The written contracts entered into by appellant and its customers are for specified durations, usually thirty-six to sixty months, and most contain a liquidated-damages clause, effective in the event of early cancellation.

In 2000, appellee Roll Off Service, whose owner is appellee Tom Smith, began providing trash-hauling services in the same areas of northwest Arkansas served by appellant. Appellees immediately began pursuing customers who had contracts with appellant, including customers within the cities of Rogers, Lowell, and Elkins. When some of those customers informed appellees that they had contracts with appellant, appellees provided the customers with a cancellation letter to send to appellant. If appellant billed the customer for liquidated damages, appellees provided the customer with free service for a number of months to offset the damages.

After losing a significant number of customers to appellees, appellant filed suit in Washington County Circuit Court, seeking compensatory and punitive damages for: 1) intentional interference with contractual relations based on allegations that appellees purposely induced appellant's customers both inside and outside the exclusive franchise areas to breach their contracts with appel-

[1] Appellant attempted to certify this case to the supreme court, but the supreme court denied appellant's motion.

lant; 2) violation of the Deceptive Trade Practices Act (DTPA) based on allegations of false and misleading representations made to customers about the validity of the city franchises and the nature of the services that were covered by the franchises; 3) conversion based on allegations that appellees emptied appellant's containers.[2] A trial was held on these allegations from July 15-18, 2003, wherein the jury heard the testimony of over thirty witnesses and viewed hundreds of exhibits. Among the witnesses was appellant's economic expert, Dr. Charles Venus, who testified that, as the result of contracts that were prematurely terminated by over thirty of appellant's customers and as the result of appellees' servicing of more than 130 of appellant's customers in Rogers and Lowell, appellant suffered lost profits of $536,901.

After closing arguments, the jury retired for deliberations. They had been provided with twenty-four verdict forms asking them to make findings on each of appellant's claims against each appellee and to make findings regarding compensatory and punitive damages. At 1:33 a.m., the jury returned with its verdict. The verdict forms revealed that the jury had found in appellant's favor on all counts — intentional interference with contractual relations, violation of the DTPA, and conversion. However, the verdict forms pertaining to damages reflected a compensatory award of "-0-" and punitive damage awards of $150,000 against Roll Off Service and $200,000 against Tom Smith. After the jury verdict was read, the trial judge asked if either side wished to poll the jury; both sides declined.

A few days after the verdict was announced, appellees filed a motion for a judgment notwithstanding the verdict (JNOV) on the ground that the punitive-damage award could not stand in the absence of a compensatory award. Thereafter, the jury foreman, having read in the newspaper that no compensatory damages had been awarded in the case, filed an affidavit. In his affidavit, he averred that, given the extensive number of forms and the late hour that the jury had returned the verdict, there may have been confusion in completing the forms, but that the jury's intention was to award appellant $150,000 in compensatory damages against Roll Off Service and $200,000 in punitive damages against Tom Smith. Upon the filing of that affidavit, appellant moved to correct

[2] The City of Rogers joined appellant as a plaintiff in the lawsuit and sought an injunction prohibiting appellees from violating the city's exclusive franchise ordinance. That injunction was eventually granted by the trial court but is not at issue in this appeal.

the judgment in accordance with the jury's intention or, in the alternative, for a new trial or an award of nominal damages. The trial court struck the juror's affidavit, ruling that consideration of it was prohibited by Ark. R. Evid. 606(b), and further ruled that appellant had waived its right to correct the verdict by not doing so before the jury was discharged. Additionally, the court denied appellant's motion for a new trial or nominal damages, choosing instead to grant appellees' motion for a JNOV.

Following entry of the JNOV, appellant asked the court for $108,543 in attorney fees based on the jury's finding that appellees violated the DTPA. The trial court denied the motion, ruling that appellant was not the "prevailing party" at trial. Appellant appeals from that order and from the order denying its post-trial motions.[3]

We first address appellant's argument that the trial court erred in striking the juror's affidavit and in failing to correct the verdict. The primary basis of the court's ruling was that Rule 606(b) of the Arkansas Rules of Evidence prohibited consideration of the juror's affidavit. Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought upon any juror.

The rule embodies the public interest in preserving the confidentiality of jury deliberations, *see National Bank of Commerce v. HCA Health Services of Midwest, Inc.*, 304 Ark. 55, 800 S.W.2d 694 (1990), and ensures that jury deliberations remain secret, unless it becomes clear that the jury's verdict was tainted by a showing of extraneous prejudicial information or some improper outside influence. *Watkins v. Taylor Seed Farms, Inc.*, 295 Ark. 291, 748 S.W.2d 143 (1988).

Appellant admits that the affidavit in this case falls under neither of the rule's stated exceptions, *i.e.*, it does not aver that the

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[3] Appellees filed a notice of cross-appeal, but no cross-appeal was pursued.

jury was subject to extraneous prejudicial information or improper outside influence. Nevertheless, appellant argues that the affidavit was admissible because it was not contrary to the overall purpose of Rule 606(b), which is to restrict inquiry into the "validity" of a verdict. According to appellant, the juror's affidavit in this case did not address the validity of the verdict but the "veracity" of the verdict, *i.e.*, whether the jury's verdict as recorded on the verdict forms reflected the jury's decision. Appellant contends that Rule 606(b) does not prohibit a juror from testifying that the verdict inscribed on the verdict form and read in open court does not mirror what was truly agreed upon by the jury.

Appellant cites no Arkansas case in support of this proposition, and indeed there appears to be no case directly on point. However, appellant cites several cases that interpret the virtually identical Fed. R. Evid. 606(b) to say that juror testimony is permitted to show that, through inadvertence, oversight, or mistake, the verdict announced was not the verdict on which the jury agreed. *See, e.g., Karl v. Burlington N. R.R. Co.*, 880 F.2d 68 (8th Cir. 1989); *Robles v. Exxon Corp.*, 862 F.2d 1201 (5th Cir.), *cert. denied*, 490 U.S. 1051 (1989); *Attridge v. Cencorp Div. of Dover Tech. Int'l Inc.*, 836 F.2d 113 (2d Cir. 1987); *see also* Joseph McLaughlin, *Weinstein's Federal Evidence* § 606.04[4][b] (2d ed. 2004). Additionally, many state courts have interpreted their evidentiary rules in a like fashion. *See, e.g., Prendergast v. Smith Labs., Inc.*, 440 N.W.2d 880 (Iowa 1989); *Martin v. State*, 732 So. 2d 847 (Miss. 1998). These cases reason that Rule 606(b) is designed to prevent inquiry into the jurors' mental processes, not to prevent the correction of a clerical error in the transmission or recordation of the verdict. Their holdings appear to be the majority rule. *See* Annot., *Competency of Juror's Statement or Affidavit to Show That Verdict in Civil Case Was Not Correctly Recorded*, 18 A.L.R. 3d 1132 (1968).[4]

Appellant's argument and the cases upon which it relies are sound, if not compelling. Nevertheless, we are constrained to reject appellant's argument for several reasons. First, our courts have been very strict in interpreting Rule 606(b) to allow inquiry into a juror's thought processes only where the juror's testimony concerns extraneous information or outside

[4] *But cf. Chalmers v. City of Chicago*, 92 Ill. App. 3d 54, 415 N.E.2d 508 (1980), and the cases cited therein, holding that juror affidavits will not be considered to explain errors in a verdict form.

influence. *See Watkins v. Taylor Seed Farms, Inc., supra; Machost v. Simkins*, 86 Ark. App. 47, 158 S.W.3d 726 (2004); *see also* David Newbern and John Watkins, *Arkansas Civil Practice and Procedure* § 25-6 (3d ed. 2002), stating:

> Although the precise location of the line drawn by Rule 606(b) may sometimes be difficult to ascertain, the prohibition has been held applicable to a juror's thought processes in reaching a verdict and the factors that may have influenced that decision. It also covers jurors' misunderstanding of the facts or law. . . .

In light of this strict interpretation, we are reluctant to craft an exception to Rule 606(b) that goes beyond those stated in the rule itself.

Secondly, one of the purposes of Rule 606(b) is to prevent juror tampering or to prevent a single juror from destroying a verdict. In *State v. Osborn*, 337 Ark. 172, 988 S.W.2d 485 (1999), our supreme court stated:

> Further, if after being discharged and mingling with the public, jurors are permitted to impeach verdicts which they have rendered, it would open the door for tampering with jurors and would place it in the power of a dissatisfied or corrupt juror to destroy a verdict to which he had deliberately given his assent under sanction of an oath.

Id. at 175, 988 S.W.2d at 486-87 (quoting 75B AM. JUR. 2d, *Trial* § 1900 (1992)). In the case before us, a single juror filed an affidavit one week after the jury was discharged and attempted to explain that the jury's verdict was mistakenly recorded. Although there is no evidence that appellant procured the affidavit in this case, the possibility of improper influence or motives is certainly increased where the affidavit is filed by only one juror, one week after the verdict was rendered. We also note that, in many of the cases from other jurisdictions cited by appellant, either the entire jury panel or more than one juror filed an affidavit attesting to the mistake.

Third, our recent holding in *Machost v. Simkins, supra*, while not directly on point, is similar enough that it may be cited for the proposition that Rule 606(b) bars juror testimony that attempts to explain a mistake in the verdict. In *Machost*, the plaintiff sought damages for injuries she suffered in an automobile accident.

Liability was admitted by the defendant, and the plaintiff unquestionably incurred $10,000 in reasonable and necessary medical expenses. The jury returned a verdict for $2,000. The next day, the plaintiff filed a motion for a new trial accompanied by a juror affidavit. The affidavit asserted that the jury had assumed that the defendant's liability for the $10,000 in medical bills had been resolved, and they therefore mistakenly awarded plaintiff only $2,000 for pain and suffering. We held that consideration of the juror affidavit would be improper because such affidavits should be considered only to show that the jury was subject to extraneous prejudicial information or an improper outside influence.

Finally, we believe that Arkansas law required appellant to poll the jury or otherwise attempt to correct the verdict before the jury was discharged. Our courts have adhered to an inviolate rule that corrections to a jury verdict must be made before the jury is dismissed. Arkansas Code Annotated section 16-64-119 (1987), provides:

> (a) When the jury has agreed upon its verdict, they must be conducted into court, their names called by the clerk and the verdict rendered by their foreman.
>
> (b) When the verdict is announced either party may require the jury to be polled, which is done by the clerk or court asking each juror if it is his verdict. If any one answers in the negative, the jury must again be sent out for further deliberation.
>
> (c) The verdict shall be written, signed by the foreman, and read by the court or clerk to the jury, and the inquiry made whether it is their verdict.
>
> (d)(1) If any juror disagrees, the jury must be sent out again.
>
> (2) *If no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case.*

(Emphasis added.) This statute has been cited for the proposition that a trial court should not make substantive corrections to a jury verdict after the jury has been discharged. *See Coran v. Keller*, 295 Ark. 308, 748 S.W.2d 349 (1988).

Additionally, several Arkansas cases have held that the time to correct an irregularity or inconsistency in a jury verdict is prior

to the discharge of the jury.[5] *See Spears v. Mills*, 347 Ark. 932, 69 S.W.3d 407 (2002); *Fisher v. Valco Farms*, 328 Ark. 741, 945 S.W.2d 369 (1997); *Wal-Mart Stores v. Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991); *Center v. Johnson*, 295 Ark. 522, 750 S.W.2d 396 (1988); *see also Barnum v. State*, 268 Ark. 141, 144, 594 S.W.2d 229, 231 (1980) (holding that a jury "may amend its verdict to conform to its finding" at any time "before they have separated and before the verdict has been entered of record and the jury discharged"). *Spears v. Mills, supra*, in particular contains several strong statements to the effect that corrections to a verdict must be made before the jury is discharged. In *Spears*, the jury was asked to determine what amount of damages the plaintiff sustained as the result of defendant's repairs; the jury answered "0." The attorneys declined to poll the jury, and the jury was discharged. Several minutes later, while the jurors were still in the courthouse, the foreman informed the bailiff that the jury may have misunderstood the damage interrogatory. The entire jury came back to the courtroom, was polled by the court, and ten members explained that the verdict read in court was not their verdict. The trial court then sent the jury out for further deliberations, and they returned with a $5,900 verdict. On appeal, our supreme court stated that "a review of this court's cases on the subject demonstrates that it has only permitted the jury to correct or amend its verdict prior to the time it is discharged." *Id.* at 939, 69 S.W.3d at 412. The court also acknowledged that there were

> conflicting interests at stake when a verdict does not reflect the true intention of the jury. On the one hand, there is the interest of the parties, as well as society in general, in having a verdict that is a true reflection of the jury's intention. On the other hand, there is the need for finality and for measures that ensure the sanctity of the jury and its deliberations. By requiring that any corrections or amendments be completed prior to the jury's discharge, this court made it clear that *the paramount consideration is that the jury be free from even the appearance of taint or outside influences.*

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[5] Appellant contends that the jury's verdict in this case was not "irregular" or "inconsistent." We do not believe that those terms should be given too fine a definition. Certainly it is irregular or inconsistent for a jury to award punitive damages unaccompanied by a compensatory award; further, such an irregularity or inconsistency would be obvious from the face of the verdict and capable of correction before the jury was discharged.

Id. at 939-40, 69 S.W.3d at 412-13 (emphasis added). Finally, the court noted that it had never strayed from its holdings disallowing correction of a verdict after the jury's discharge. The court stated:

> The reason for this strict or absolute rule is to avoid even the appearance of any possible taint to the jury's verdict. Thus, even though the trial court here found that the individual jurors had not discussed the matter with anyone other than fellow jurors, the fact that the jurors had been discharged and had left the presence and control of the court gives at least the appearance that they may have been influenced by outside pressures. Indeed, the trial court acknowledged this appearance of impropriety when it refused to impose the jury's second verdict.
>
> In sum, neither section 16-64-119 nor this court's long-standing precedent permit the trial court to recall the jury after discharge and poll the individual jurors based on a claim that the jury misunderstood the instructions. Nor does Arkansas law allow the jury to correct or amend its verdict once it has been discharged from the case and left the presence and control of the court.

Id. at 941, 69 S.W.3d at 413-14.

Our supreme court has clearly expressed its adherence to a "strict and absolute" rule that a jury's verdict may not be corrected after the jury has been discharged. Further, the court has unequivocally stated that the prevention of possible taint or undue influence on jurors supersedes a possible need to correct a verdict after the jury has been discharged.

In light of the foregoing, we conclude that Rule 606(b) prohibited consideration of the juror affidavit in this case and that the trial court was correct in refusing to amend the verdict.

We turn now to appellant's alternative argument that a new trial should have been granted. Appellant cites two cases from our supreme court in which a new trial was ordered when the jury awarded punitive damages but no compensatory damages. In *Takeya v. Didion*, 294 Ark. 611, 745 S.W.2d 614 (1988), the appellant sued the appellee for battery, and the jury awarded her $75,000 in punitive damages but no compensatory damages. The supreme court held that a new trial should have been granted because the jury "obviously" decided that the appellee was guilty of battery and that the jury "did not know that if it awarded

punitive damages without awarding compensatory damages the judgment would be set aside." *Id.* at 614, 745 S.W.2d at 616. In *Hale v. Ladd*, 308 Ark. 567, 826 S.W.2d 244 (1992), the jury returned a verdict in favor of appellant on her outrage claim against appellee and awarded her $7,500 in punitive damages but no compensatory damages. The supreme court held that a new trial should have been granted and stated:

> The jury expressly found for the plaintiff on the tort of outrage and reenforced that finding by an award of punitive damages. Thus we readily conclude, as did the jury, that the evidence supporting the claim of outrage clearly preponderates in favor of the plaintiff, Suzanne Hale. Her testimony that she sustained pecuniary as well as emotional injury attributable to the harassment was not refuted or even challenged.

Id. at 570, 826 S.W.2d at 246.

The case at bar contains strong similarities to *Takeya* and *Hale*. As in *Hale*, the jury expressly found in appellant's favor on each count and "reenforced" those findings by an award of punitive damages. Further, like the jury in *Takeya*, this jury obviously found appellees guilty of the charged conduct and did not know that, if it awarded punitive damages without awarding compensatory damages, the judgment could be set aside. Appellees, however, argue that this issue should be governed by *Olmstead v. Moody*, 311 Ark. 163, 842 S.W.2d 26 (1992). There, the supreme court upheld the denial of a new trial even though the jury awarded the plaintiff $27,000 in punitive damages unaccompanied by a compensatory award. However, in that case, unlike the case at bar and unlike *Hale* and *Takeya*, the jury did not find the defendant totally at fault; it found that the plaintiff and the defendant were each fifty percent negligent. Thus, *Olmstead* is readily distinguishable because the jury in that case found the parties equally at fault and, under those circumstances, the plaintiff would not have been entitled to compensatory damages.

Appellees argue further that no new trial was warranted because the evidence justified a zero compensatory verdict. The trial court was persuaded by this argument and denied the new trial on the basis that the evidence "could have supported" a finding of zero compensatory damages. In cases where a new trial is requested due to an error in the amount of recovery, the trial court must determine whether a fair-minded juror could have reasonably

fixed the award at the challenged amount. *Machost v. Simkins, supra.* When the issue appealed is primarily one of damages, the denial of a motion for a new trial will be reversed only if the trial judge's ruling was a clear and manifest abuse of discretion. *Pearson v. Henrickson*, 336 Ark. 12, 983 S.W.2d 419 (1999).

In making their argument that the evidence supported a finding of zero compensatory damages, appellees point to the following: 1) some customers who breached their contracts paid appellant liquidated damages; 2) some customers who breached their contracts did so because of appellant's poor service; 3) the calculations of appellant's economic expert, Dr. Charles Venus, were called into question by appellees' expert, Phillip Taylor. None of these points is well taken. Although some of appellant's customers paid liquidated damages, those payments amounted to considerably less than the damages testified to by Dr. Venus. Further, Dr. Venus testified that he deducted the amount of liquidated damages received by appellant when he calculated appellant's losses. In any event, on a tort claim such as intentional interference with contractual relations, a plaintiff may recover damages over and above what the breached contract contemplated. *See generally Restatement (Second) of Torts* § 774A, comment d (1979).

As for allegations of appellant's poor service, ten customers testified to various service problems with appellant. However, the jury found that appellees intentionally interfered with appellant's contracts and therefore obviously did not believe that all of appellant's customers terminated their contracts solely because of poor service. Further, the testimony of ten customers regarding bad service does not necessarily support a finding of zero damages; appellant's contracts were prematurely terminated by thirty-three companies, and appellant sustained further damage from appellees' infringement on its franchises.

Finally, while Dr. Venus's calculations were questioned by appellees' expert Phillip Taylor, Taylor did not testify that appellant sustained zero damages; he testified that he disagreed with Venus's manner of calculation and that Venus's figures were "overstated." Moreover, Taylor acknowledged that appellant's volume of business had been reduced by $100,000 to $200,000 since appellees entered the market.

In light of the above, we reject the notion that a fair-minded juror could have awarded no compensatory damages after having found in favor of appellant on all counts. We therefore hold that the trial court abused its discretion in denying a new trial, and we reverse and remand on that basis.

Appellant asks us to award a new trial on damages only. This we cannot do. Even though the errors in this case pertain only to damages, a new trial must include both liability and damages issues. *See Smith v. Walt Bennett Ford*, 314 Ark. 591, 864 S.W.2d 817 (1993). Appellant acknowledges this authority but asks us to overrule it. However, the court of appeals may not overrule decisions made by the supreme court. *See Superior Fed. Bank v. Mackey*, 84 Ark. App. 1, 129 S.W.3d 324 (2003). Therefore, a new trial is awarded as to both liability and damages.

In light of our remand for a new trial, we do not find it necessary to address appellant's remaining issues regarding nominal damages and attorney fees. The complexion of these issues will very likely change depending upon the findings made and the damages awarded, if any, following a new trial. Therefore, any opinion we offer on these issues now would be purely advisory, and our appellate courts do not issue advisory opinions. *See Allison v. Lee County Election Comm'n*, 359 Ark. 388, 198 S.W.3d 113 (2004).

Reversed and remanded.

PITTMAN and VAUGHT, JJ., agree.

Tiana Marie DOROTHY *v.* Patrick James DOROTHY

CA 04-32 199 S.W.3d 107

Court of Appeals of Arkansas
Opinion delivered December 1, 2004

[redacted]

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

No response.

SAM BIRD, Judge. By decree of the Crawford County Circuit Court on October 21, 2001, Patrick James Dorothy was granted a divorce from Tiana Marie Dorothy and was awarded custody of their two children. In this one-brief case, Ms. Dorothy appeals only the award of custody. She contends (1) that the trial court erred in taking jurisdiction because jurisdiction was not established pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, codified at Ark. Code Ann. § 9-19-101 *et seq.*, and the decree did not contain language conferring jurisdiction pursuant to the UCCJEA; (2) that the trial court abused its discretion when denying her motion to continue the case; (3) that the trial court clearly erred in awarding custody to appellee where the court made no finding about the children's welfare and best interests pursuant to section 9-13-101(a)(1)(A), and it was not in their best interests and welfare; and (4) that the trial court erred in sustaining Mr. Dorothy's objection to testimony that he failed to provide support for the minor children during the parties' separation. We affirm on all points.

Jurisdiction

As her first point on appeal, Ms. Dorothy contends that the trial court erred in taking jurisdiction because jurisdiction was not established pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, codified at Ark. Code Ann. § 9-19-101 *et seq.*, and the decree did not contain language conferring jurisdiction pursuant to the UCCJEA. She asserts that Arkansas was not the home state of the children, and that Arkansas courts did not have subject-matter jurisdiction over the child-custody action.

Our supreme court has stated that under the UCCJA, the predecessor of the UCCJEA, child-custody jurisdiction is a matter of subject-matter jurisdiction. *Moore v. Richardson*, 332 Ark. 255, 964 S.W.2d 377 (1998). It has subsequently stated that the UCCJEA is the exclusive method for determining the proper forum in child-custody proceedings involving other jurisdictions. *Greenhough v. Goforth*, 354 Ark. 502, 126 S.W.3d 345 (2003).[1]

[1] The UCCJEA was enacted to replace the former chapter entitled the Uniform Child Custody Jurisdiction Act (UCCJA), which dated back to 1979. *Seamans v. Seamans*, 73 Ark. App. 27, 37 S.W.3d 693 (2001). The preamble of the latter states in pertinent part, "The

Courts from other jurisdictions have recognized that the threshold requirements under the UCCJA concern subject-matter jurisdiction, and that such jurisdiction can be raised at any time by the parties or *sua sponte* by a court of review and cannot be conferred by the parties. *Biscoe v. Biscoe*, 443 N.W.2d 221 (Minn Ct. App. 1989) (citing *Campbell v. Campbell*, 180 Ind. App. 351, 352, 388 N.E.2d 607, 608 (1979); *Smith v. Superior Court of San Mateo County*, 68 Cal. App. 3d 457, 461, 464 n.3, 137 Cal. Rptr. 348, 351, 353 n.3 (1977)). Subject-matter jurisdiction relates to the competence of a court to hear a matter, and custody determinations are status adjudications not dependent upon personal jurisdiction over the parents. *Consford v. Consford*, 271 A.D.2d 106, 711 N.Y.S.2d 199 (2000). A state may have jurisdiction to enter a dissolution decree, but such does not necessarily confer jurisdiction to make a child-custody determination. *Stevens v. Stevens*, 682 N.E.2d 1309 (Ind. Ct. App. 1997). Rather, jurisdiction over custody matters having an interstate dimension must be independently determined by application of that state's version of the Uniform Act: when a state has adopted a version of the Uniform Child Custody Jurisdictional Act, jurisdiction over the issue of custody is determined by application of the Uniform Act, even if jurisdiction over the dissolution action is undisputed. *Id.* The Act governs all custody cases, and it is not necessary to file a separate action under the Act to invoke its rules. *In the Marriage of Schoeffel*, 268 Ill. App.3d 839, 644 N.E.2d 827 (1994), (stating that a party's request for custody in New York action for divorce was sufficient to trigger application of the Act although the party did not mention the Act).

Our supreme court set forth this overview of the UCCJEA in *Arkansas Department of Human Services v. Cox*, 349 Ark. 205, 211-12, 82 S.W.3d 806, 811 (2002):

> The UCCJEA as codified in Arkansas is comprised of three subchapters. Subchapter one provides general provisions, including

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general purposes of the subchapter are to . . . avoid jurisdictional competition and conflicts with courts of other states in the matter of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being." *Id.*; Ark. Code Ann. § 9-13-201 (repealed 1999). This court has said that the UCCJA and the federal Parental Kidnaping Prevention Act (PKPA), found at 28 U.S.C. § 1738A (1981), govern state conflicts over child custody jurisdiction. *Seamans, supra.* The UCCJEA has revised the UCCJA in part to incorporate the home state preference of the PKPA and also to clarify the rules for original, modification, and enforcement jurisdiction. *Id.*

> definitions. Subchapter two sets out jurisdiction and the method whereby the courts of this state issue a child-custody determination order. Section 9-19-201 provides the criteria used to determine whether a state has jurisdiction to make an "initial child-custody determination." "Initial determination" means the first child-custody determination. Ark. Code Ann. § 9-19-102(8) (Repl.2002). Under § 9-19-201(a) as applied to the facts of this case, a court of this state has jurisdiction to make an initial child-custody determination if it is the home state of the child.

At issue in the point of appeal we now consider is jurisdiction of the trial court and the criteria used to determine whether Arkansas had jurisdiction to make the determination of child custody. Section 9-19-201(a) (Repl. 2002) guides our decision:[2]

> (a) Except as otherwise provided in § 9-19-204 [temporary emergency jurisdiction], a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) this State is the home State of the child on the date of the commencement of the proceeding, or was the home State of the child within six (6) months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) a court of another State does not have jurisdiction under subdivision (a)(1) of this section, or a court of the home State of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under § 9-19-207 or § 9-19-208, and:
>
> (A) the child and the child's parents, or the child and at least one (1) parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

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[2] This section provides mandatory jurisdictional rules for the original child custody proceeding. It generally continues the provisions of the UCCJA § 3. However, there have been a number of changes to the jurisdictional bases.

> 1. *Home State Jurisdiction.* The jurisdiction of the home State has been prioritized over other jurisdictional bases.

Ark. Code Ann. § 9-19-201, UNIFORM LAW COMMENTS (Repl. 2002).

(B) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) all courts having jurisdiction under subdivision (a)(1) or (2) of this section have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under § 9-19-207 or § 9-19-208; or

(4) no court of any other State would have jurisdiction under the criteria specified in subdivision (a)(1), (2), or (3) of this section.

(b) Subsection (a) of this section is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

Additionally, section 9-19-102 sets forth definitions that are pertinent to the issues we now consider:

(3) "Child-custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

(4) "Child-custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under subchapter 3 of this chapter.

. . . .

(7) "Home state" means the State in which a child lived with a parent or a person acting as a parent for at least six (6) consecutive

months immediately before the commencement of a child-custody proceeding. In the case of a child less than six (6) months of age, the term means the State in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(8) "Initial determination" means the first child-custody determination concerning a particular child.

We now consider whether the trial court in the present case erred in taking jurisdiction over the matter of child custody. Ms. Dorothy states in her brief that the children were picked up in Iowa by appellee or his mother in May or June of 2003 for what was supposed to be summer visitation. The record reveals that at the trial of this matter on October 14, 2003, the trial court solicited further information about where Ms. Dorothy and the children had lived:

THE COURT: Who else lives with you in this house you have now?

DEFENDANT, MS. DOROTHY: My boyfriend.

THE COURT: Is it your house or his house?

DEFENDANT, MS. DOROTHY: It's both of ours.

THE COURT: What, are you renting it?

DEFENDANT, MS. DOROTHY: Yes.

THE COURT: And it's in Iowa?

DEFENDANT, MS. DOROTHY: Yes.

THE COURT: How long have you lived in Iowa?

DEFENDANT, MS. DOROTHY: I've lived there since the beginning of February.

THE COURT: Six or seven months maybe?

DEFENDANT, MS. DOROTHY: Correct.

THE COURT: Where did you live before that?

DEFENDANT, MS. DOROTHY: In Arizona.

THE COURT: How long did you live in Arizona?

DEFENDANT, MS. DOROTHY: Two and a half years.

THE COURT: Where did you live before that?

DEFENDANT, MS. DOROTHY: Arkansas.

THE COURT: How long did you live in Arkansas?

DEFENDANT, MS. DOROTHY: Six months, I believe.

THE COURT: When were you in Colorado then?

DEFENDANT, MS. DOROTHY: There was a period for a month that I went to stay with my dad because he wanted to see the children and I thought it would be better, however it wasn't.

Clearly, the trial court's questions of Ms. Dorothy elicited the evidence that was necessary to a determination of the court's jurisdiction over the matter of child custody. Ms. Dorothy's answers revealed that the children had lived in Iowa only from some time in February 2003 until the end of the school year in May or June, and thus had not lived in any state for six consecutive months immediately before appellee filed his complaint for divorce and custody on July 18, 2003, at which time the child-custody proceeding commenced. Thus, the children had no home state under the UCCJEA when the proceeding was commenced, and Arkansas had jurisdiction over child custody by the default provision of Arkansas Code Annotated section 9-19-201(a)(4) (Repl. 2002).

The decree of divorce issued by the trial court sets forth the court's finding that it had "jurisdiction of the parties and subject matter of this cause." Ms. Dorothy argues, however, that the trial court was required to make a specific finding of subject-matter jurisdiction, but she cites no authority for this proposition and does not make a convincing argument. An issue will not be addressed

on appeal where there is no citation to authority or convincing argument. *Norman v. Norman*, 347 Ark. 682, 66 S.W.3d 635 (2002). We hold that the trial court properly assumed jurisdiction to determine child-custody in this case.

Continuance

As her second point on appeal, Ms. Dorothy contends that the trial court abused its discretion when denying her motion to continue the case. On September 11, 2003, after she had answered appellee's complaint for divorce and request for a hearing, the trial court set trial for October 14, 2003. On October 7, 2003, Ms. Dorothy requested a month's continuance in order to obtain funds for a retainer and to find an attorney. The trial court denied her request, pointing out that the case was filed in July, that she was served in August, and that she filed her pro se answer on September 8, 2003. Ruling that was ample time to have obtained an attorney, the court denied Ms. Dorothy's request but stated that it would consider a continuance in the event that she should obtain counsel and should counsel request time to prepare.

The court may, upon motion and for good cause shown, continue any case previously set for trial. Ark. R. Civ. P. 40(b). The granting or denial of the motion for continuance is a matter within the discretion of the trial court. *City of Dover v. City of Russellville*, 346 Ark. 279, 57 S.W.3d 171 (2001). Here, we hold that the trial court did not abuse its discretion in denying appellant's motion for continuance.

Welfare and Best Interest of the Children

Ms. Dorothy contends that the trial court clearly erred in awarding custody to appellee where the court failed to make a finding of what the welfare and best interests of the children were pursuant to section 9-13-101(a)(1)(A), and it was not in the best interests and welfare of the children. Arkansas Code Annotated section 9-13-101(a)(1)(A) (Repl. 2002) states that in an action for divorce, the award of custody of a child of the marriage shall be made . . . solely in accordance with the welfare and best interest of the child.

Ms. Dorothy argues that Mr. Dorothy had an unstable past, and that she did not; that she was the children's primary caretaker; that she had no drug or alcohol problems; and that she moved in

order to secure a better home and job. Mr. Dorothy testified, however, that when the children were living with their mother, they were in several schools during the year, living with several different men, one of whom appellant met on the internet before moving to Arizona. He said that the children were currently enrolled in school in Crawford County where his parents resided, and that the children attended church. He stated that the parties had been separated since January 2000; that they had no understanding or visitation agreement; and that the children were with him for various time periods over the last three and a half years, beginning with a six-month period and including when she asked him to take the children at summertime and when she was getting ready to move in with another man. Mr. Dorothy said that he contacted the children every time he got the chance, when Ms. Dorothy called and he knew where she was. He said that he had driven all the way to Arizona, Colorado, and Iowa, to pick up the children, and that Ms. Dorothy did not meet him halfway. He said that he would marry his girlfriend with whom he and the children were living if it were to be in the best interest of the children.

Ms. Dorothy testified that she played sports and did homework with the children, and had been their primary care giver since birth. She said that she tried to have Mr. Dorothy served with divorce papers from Arizona, but that he falsified his address and the papers were not delivered correctly. She said that she had lived in Arizona for a total of two and a half years, leaving there once for a month; then she stayed in Colorado for a little while; and currently was in Iowa. She said that the children had been in two schools in Arizona because they moved into a new house, and they went to one school in Iowa and one in Colorado. She said that she currently lived with her boyfriend in a four-bedroom home across from a school.

In our de novo review, all issues of law or fact raised in a custody proceeding are before this court for our determination. *Pierce v. Pierce*, 73 Ark. App. 339, 43 S.W.3d 192 (2001). Here, the trial court stated from the bench that the children needed to be kept in a wholesome environment, and that the court was not impressed with either of the parties living with people they were not married to. The court gave appellee a week to either marry his girlfriend or have her move out. It is clear to us that the trial court determined that the best interests and welfare of the children would be served by a wholesome environment, and that such an

environment would exist with Mr. Dorothy. We hold that the trial court did not clearly err in awarding custody to him.

Excluded Testimony

Ms. Dorothy contends that the trial court erred in sustaining Mr. Dorothy's objection to testimony that he failed to provide support for the minor children during the parties' separation. The ruling was made at trial when Ms. Dorothy, who appeared pro se, asked Mr. Dorothy to testify as to how much support he had given her in the last three-and-a-half years. His counsel objected, "The parties were married. The testimony had been that she led a transient lifestyle moving from place to place, and she's asking questions that were not covered on direct." The court sustained the objection, ruling that the issue of support was not relevant to the time that the parties were separated because Ms. Dorothy had not requested support from Mr. Dorothy, nor had an order for support been entered.

Ms. Dorothy challenges the trial court's ruling that the excluded testimony was not relevant. She cites *Wilson v. Wilson*, 67 Ark. App. 48, 991 S.W.2d 647 (1999), where the trial court considered it relevant to consider whether the father had failed to voluntarily support the children during the parents' separation in determining that the mother was the caretaker of the children and that the father had separated himself from their lives. Appellant cites no authority, however, nor presents any convincing argument that the trial court is required to consider such evidence as relevant in every case. Additionally, we note Mr. Dorothy's testimony that the children were in his physical custody for a significant portion of the time that the parties were separated. Under the evidence presented to the trial court, we hold that it did not err in excluding testimony regarding any lack of support by Mr. Dorothy during the times that the children were with Ms. Dorothy.

Affirmed.

ROBBINS and ROAF, JJ., agree.

Paul HENDRICKSON *v.* Randall CARPENTER
and Nita Carpenter

CA 04-0038 199 S.W.3d 100

Court of Appeals of Arkansas
Opinion delivered December 1, 2004

Gibson & Hashem, P.L.C., by: *Paul W. Keith*, for appellant Paul Hendrickson.

Harrelson, Moore, & Giles, LLP, by: *Steve Harrelson*, for appellee Randall Carpenter.

Gibson Law Office, by: *C.S. "Chuck" Gibson, II*, for appellee Nita Carpenter.

OLLY NEAL, Judge. Appellant Paul Hendrickson appeals from a decision of the Drew County Circuit Court dismissing his claim to recover funds expended for the benefit of the appellees Randall Carpenter and Nita Carpenter. On appeal, he alleges that the trial court erred when it found that his complaint was barred by a three-year statute of limitations.

The facts of this case are as follows. On June 4, 1992, appellant agreed to guarantee an $80,000 loan by Union Bank and Trust Company of Monticello to the appellees. A year and a half later, on December 27, 1993, appellant purchased the note from the bank. Following appellant's purchase of the note, the appellees continued to make payments on the note until June 14, 1999. On December 10, 2002, appellant filed a complaint seeking to be reimbursed $136,150. In her reply, appellee Nita Carpenter acknowledged that appellant was the guarantor on the note but disputed the amount due. However, in his reply, appellee Randall Carpenter made a 12(b)(6) motion to dismiss asserting that (1) the statute of limitations had run and (2) appellant was attempting to enforce "an alleged collateral suretyship promise without a sufficient writing nor a signature of the person to be charged evidencing a contract." The trial court found that appellant was seeking contribution and that the matter was controlled by a three-year statute of limitations, and therefore, appellant's cause of action was barred. From that decision comes this appeal.

Rule 12(b)(6) of the Arkansas Rules of Civil Procedure provides that:

> Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion:
>
> (6) failure to state facts upon which relief can be granted.

In reviewing a trial court's decision on a motion to dismiss under Ark. R. Civ. P. 12(b)(6), we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *Martin v. Equitable Life Assurance Soc'y*, 344 Ark. 177, 40 S.W.3d 733 (2001). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Id.*

Our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Arkansas Dep't of Envtl. Quality v. Brighton Corp.*, 352 Ark. 396, 102 S.W.3d 458 (2003). We look to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. *Id.*

In his complaint, appellant alleged the following:

> 3. This is a claim brought by Plaintiff to recover certain funds advanced to or for the benefit of Defendants Carpenter.
>
> . . . .
>
> 5. Plaintiff paid the sum of $80,000 to Union Bank & Trust Company pursuant to his guaranty of a note owing by Defendants Carpenter to Union Bank. Attached is a copy of Plaintiff's check used to satisfy said note together with copies of receipts given by the bank in connection with this payment.

In an October 1, 2003, order, the trial court applied Rule 12(b)(6) and found that the complaint alleged a cause of action. In the order the trial court also found that:

> This is an action by a surety who claims that he paid an obligation which he and defendants owed and is entitled to contribution.
>
> Pursuant to Hazel, et al v. Sharum, et al., 182 Ark. 557, S.W.2d 315 (1930), in a case similar to the one at bar, the Arkansas Supreme Court stated all of the signers of the note in question were joint obligors. They were jointly and severally liable to the bank for the whole amount of the note. Each was liable for the whole amount. The right of action for contribution accrues when one surety pays more than his share of the common liability. In most cases it is said that the contract for contribution between sureties is one which the law implies for their mutual protection and indemnity. Nearly all cases agree, however, that no cause of action arises until payment by one of their common debtors is made and the statute of limitation begins to run against an action to enforce contribution at the time of such payment; and the three-year statute of limitations is held applicable. Cooper v. Rush, 138 Ark. 602, 212 S.W. 94 (1919)[.] In this case, the promissory note allegedly executed between Union Bank & Trust Company and the obligors is eligible. However, for

> purpose [sic] of this proceeding, it is the assumption that the promissory note was executed by defendants as makers and plaintiff as guarantor. It is the Court's opinion that each signer of the note is an obligor to the bank. There is no allegation of an assignment of the promissory note by the bank to the plaintiff. Thus, the Court assumes that defendant [sic] ceased making payments to plaintiff on June 14, 1999. The record shows that this action was filed December 10, 2002. The right of action for contribution is an implied obligation, one which is not in writing between the parties hereto and the Court finds that the three-year limitation statute controls. Accordingly, this action is barred by the three-year statute of limitations.

Appellant argues that he was seeking subrogation as an accommodating party and not contribution. Although this court gives great deference to findings of fact by the trial court due to the trial court's superior position to determine credibility issues, it does not give such deference to matters of law, in that the trial court stands in no better position to apply the law than this court. *Acord v. Acord*, 70 Ark. App. 409, 19 S.W.3d 644 (2000).

A guarantor is one who makes a contract, which is distinct from the principal obligation, to be collaterally liable to the creditor if the principal debtor fails to perform. *First Commercial Bank, N.A., v. Walker*, 333 Ark. 100, 969 S.W.2d 146 (1998). A party is entitled to contribution when he is jointly and severally liable on a note, and subsequently pays the entire obligation. *See Wroten v. Evans*, 21 Ark. App. 134, 729 S.W.2d 422 (1987). Subrogation is an equitable remedy that rests upon principles of unjust enrichment and attempts to accomplish complete and perfect justice among parties. *Morris v. Arkansas Dep't of Fin. & Admin.*, 82 Ark. App. 124, 112 S.W.3d 378 (2003). A party's subrogation rights arise when one not primarily bound to pay a debt, or remove an incumbrance, nevertheless does so; either from his legal obligation, as in the case of a surety, or to protect his own secondary right; or upon the request of the original debtor, and upon the faith that, as against the debtor, the person paying will have the same sureties for reimbursement as the creditor had for payment. *Welch Foods v. Chicago Title Ins. Co.*, 341 Ark. 515, 17 S.W.3d 467 (2000).

The trial court erred when it relied on *Hazel v. Sharum, supra.* The parties in *Sharum, supra.* were co-makers on the note at issue. Co-makers on a note are jointly and severally liable.

See 12 Am. Jur.2d *Bills and Notes* § 439 (1997). In the present case, if we treat the facts alleged in the complaint as true and view them in the light most favorable to appellant, then appellant was a guarantor. As guarantor, appellant was not jointly and severally liable for the payment of the appellees' note. When appellant paid the note, he assumed the position of the bank. *See Blackford v. Dickey*, 302 Ark. 261, 789 S.W.2d 445 (1990) (stating that the person paying will have the same sureties for reimbursement as the creditor had for payment). Therefore, the loan papers between appellees and the bank constituted evidence of the agreement between appellant and appellees. Thus, a written agreement existed between the parties. Arkansas Code Annotated section 16-56-111(a) (Supp. 2003) provides that actions to enforce a written obligation shall commence within five years after the cause of action shall accrue. The trial court erred when it found that appellant was seeking contribution and that the cause of action was barred by a three-year statute of limitations. Therefore, we reverse and remand the decision of the trial court.

Reversed and remanded.

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

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I agree that the trial court misinterpreted the *Hazel* case and that it erred in concluding that appellant was entitled to contribution on the promissory note. However, unlike the majority, I disagree that these errors require reversal. This case is before us after denial of a motion to dismiss under Arkansas Rule of Civil Procedure 12(b)(6). Arkansas is a fact-pleading state. Ark. R. Civ. P. 8. As such, appellant was required to state sufficient facts to show entitlement to relief. We must decide whether the trial court erred in holding that appellant failed to state sufficient facts to entitle him to proceed with his claim. I would hold that the trial court properly dismissed appellant's claim because (a) appellant failed to attach a copy of the promissory note to his pleadings as expressly required by Arkansas's pleading requirements, and (b) he failed to state facts to support *any* legal theory entitling him to recovery.

Although not addressed by the majority, it is crucial at the outset to understand the effect of the nature of the appellant's pleading obligation. If appellant sufficiently pled that he satisfied

appellee's debt to the Union Bank pursuant to a written obligation, then the five-year statute of limitations under Arkansas Code Annotated § 16-56-111 (Supp. 2003) governs his action, and his complaint is not time-barred. If appellant's pleadings assert that he satisfied the debt pursuant to an implied (unwritten) agreement, then he might be entitled to recover, based on equitable subrogation. Consequently, his complaint would be governed by the three-year statute-of-limitations under Arkansas Code Annotated § 16-56-105(3)(1987), and therefore, his complaint would be time-barred.

Thus, in order to properly reverse and allow appellant to proceed with his claim in the face of the three-year statute-of-limitations, the majority *must* hold that appellant alleged in his pleadings that he either had an independent *written* agreement with appellees to act as guarantor or that he, by some *written* agreement, obligated himself to the Union Bank, allowing him to rise to the rights of the bank when appellees defaulted. Appellant plainly failed to attach the promissory note to his pleadings and he failed to state sufficient facts alleging that he entered into a written contract with the bank that obligated him to pay in the event of appellees' default on the promissory note. Further, appellant failed to allege that he had a written agreement with appellees that required them to repay him for any payment made to the bank if they defaulted. Accordingly, appellant's pleadings do not show that he was entitled to the five-year statute of limitations.

Although the majority fails to address appellee Randall Carpenter's argument in this regard, I agree that Arkansas Rule of Civil Procedure 10(d) requires a complainant to attach a copy of the written agreement upon which he bases his claim to his pleadings. *See Ray & Sons Masonry Constr., Inc. v. U.S. Fidelity & Guaranty*, 353 Ark. 201, 114 S.W.3d 189 (2003) (affirming the grant of JNOV, in part, where the claimant failed to attach to his pleadings the contract upon which he claimed a subcontractor was liable).[1] On its face, Rule 10(d) makes no exceptions to the requirement for Rule 12(b)(6) motions. The only exception to this

[1] Although *Ray and Sons, supra*, did not involve a 12(b)(6) motion, the case is still instructive, in that the Arkansas Supreme Court stated that the term "shall" in Rule 10(d) is mandatory, which means that the claim does not stand if the written agreement is not attached to the pleadings. In the instant case, appellant belatedly attached the illegible promissory note to his brief-in-response to appellee Randall Carpenter's motion to dismiss. However, a brief-in-support of a pleading is not a pleading. Arkansas Rule of Civil Procedure distin-

requirement under Rule 10(d) is that the party may demonstrate "good cause" for not attaching the agreement. Appellant did not even broach the issue of good cause in his pleadings or in the hearing below.

The majority, by a reasoning process I have yet to comprehend, characterizes appellant's legal theory as "subrogation as an accommodating party." The majority cites general law governing subrogation, guarantors, and sureties, asserts that equitable subrogation is an equitable theory of recovery, and maintains that appellant stepped into the shoes of Union Bank when he satisfied the promissory note.[2] Then, without explicitly declaring that appellant is entitled to recovery as an accommodation party or pursuant to equitable subrogation, the majority holds that the statute of limitations governing written agreements governs appellant's claim because the promissory note between appellees and Union Bank evinces an agreement between appellant and the bank.

By this process, the majority either ignores or fails to discern the patent flaws in appellant's pleadings. In short, appellant did not plead sufficient facts to entitle him to recover on the written note as an accommodation party or based upon an implied agreement pursuant to an equitable-subrogation theory. While the trial court is to accept as true appellant's allegation that he acted as guarantor, this begs the question as to whether appellant acted as guarantor pursuant to a *written* agreement or an *implied* agreement. It is not enough to assert that an agreement existed, where the very nature of the agreement determines whether appellant's claim is time-barred. In any event, the trial court's dismissal should be affirmed

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guishes between "pleadings" and "motions." Rule 7(a) specifies which pleadings are allowed and Rule 7(b) governs the submission of motions and other papers. Rule 7(a) recognizes the following as pleadings: complaints, answers, counterclaims, replies to counterclaims, answers to cross-claims, third-party complaints and third-party answers. Rule 7(a) states specifically that "[n]o other pleadings shall be allowed." Thus, a brief-in-response to a motion to dismiss is not a pleading and appellant's attachment of the illegible promissory note to the same does not satisfy Rule 10(d).

[2] As we review this appeal following dismissal on the pleadings rather than after summary judgment or trial on the merits, I do not understand how my colleagues can conclude that appellant succeeded to the rights of Union Bank, particularly when none of us is able to read the promissory note from appellees to the Bank and absent any other written agreement in the record.

because no matter which legal theory applies, appellant has failed to sufficiently state a claim for Rule 12(b)(6) purposes.

First, although appellant cites law governing accommodation parties in his brief, he never alleged below that he signed the promissory note in any capacity, or was an accommodation party; nor does he develop this argument on appeal in any fashion. Instead, appellant merely cites Arkansas Code Annotated § 4-3-419(e)(Repl. 2001), part of the Arkansas Uniform Commercial Code (UCC), and then, without applying UCC law to any facts, he argues that he is entitled to recover based upon *equitable subrogation*. But equitable subrogation has nothing in common with being an accommodation party on a note. Appellant's argument is internally inconsistent. An accommodation party has rights arising from a written obligation, whereas equitable subrogation arises from an implied obligation. Instead of affirming the trial court's decision that appellant's claim must be dismissed for failure to state a claim, the majority reverses on the ground that appellant is entitled to proceed because he stepped into Union Bank's rights to recover on the promissory note that even the majority must concede appellant did not append to his pleadings. We do not allow litigants to develop arguments on appeal and we do not make their arguments for them. *Carter v. Four Seasons Funding Corp.*, 351 Ark. 637, 97 S.W.3d 387 (2003).

This is *not* a case involving recovery on a promissory note under the UCC. If it were, appellant's claim must fail because he neither produced the original note nor satisfied the UCC requirements for proving lost negotiable instruments. *McKay v. Capital Resources Co. Ltd.*, 327 Ark. 737, 940 S.W.2d 869 (1997); Ark. R. Civ. P. 10(d). The *only* way appellant's claim can survive a 12(b)(6) motion is if it states facts to support that appellant was entitled to recover based upon a *written* agreement because any claim based upon an implied agreement would clearly be barred by the three-year statute of limitations.

Unfortunately, appellant's complaint does not state, and cannot be fairly read to infer, that appellant signed the promissory note or signed any other written agreement between him and Union Bank that would entitle him to rise to the rights of the bank upon appellees' default of the note. How can appellant be entitled to recover on the promissory note when he did not allege in his complaint that he signed the promissory note? How can his pleadings be interpreted to support such a theory when he failed to attach the promissory note showing his signature? How can we

justly hold that appellant alleged the facts needed to recover as an accommodation party in the face of a record that shows he never produced any writing in his pleadings that would entitle him to relief on that theory? The majority ducks these legitimate concerns with resounding silence.

Further, nothing in the complaint states whether appellant's agreement with appellees was written or implied. Thus, despite the majority's bald assertion that "the loan papers between appellees and the bank constituted evidence of the agreement between appellant and appellees," nothing in the complaint alleges or even allows an inference that appellant entered into a written agreement with appellees. Rather, the complaint merely asserts that *appellees* were obligated to pay *Union Bank* pursuant to a promissory note and that appellant agreed to act as *guarantor* on appellees' obligation under the note. However, the note was not attached to the complaint.

The upshot of the majority opinion is that our pleading rules are satisfied by merely inserting the word "guarantor" in a complaint, without also asserting whether the complaining party acted based on a written or an implied obligation and without attaching any written agreement to the complaint. Such a pleading does not provide a trial court with sufficient facts regarding the basis upon which a complainant seeks to recover. It is axiomatic that if a trial court cannot determine a complainant's basis for recovery, then the complainant has not stated an adequate claim under Rule 12(b)(6) and therefore, should not be allowed to proceed with his or her claim. Accordingly, appellant is not entitled to proceed on the promissory-note theory.

Second, appellant's pleadings do not establish his entitlement to proceed based upon an equitable-subrogation theory. Subrogation allows recovery when a person pays the debt of another but was not legally obligated to do so. The elements of subrogation are as follows: 1) a party pays in full a debt or an obligation of another or removes an encumbrance of another 2) for which the other is primarily liable, 3) *although the party is not primarily or technically bound to do so*, 4) in order to protect his own secondary rights, to fulfill a contractual obligation, or to comply with the request of the original debtor, 5) without acting as a volunteer or an intermeddler. *St. Paul Fire & Marine Ins. Co. v. Murray Guard, Inc.*, 343 Ark. 351, 356, 37 S.W.3d 180, 183 (emphasis added).

Equitable subrogation is given a liberal application and is broad enough to include every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which that other party should have paid. *Id.* Equitable subrogation requires no writing or agreement in most instances. *Id.* Conventional subrogation, by contrast, is founded on an understanding or agreement. *Id.*

Here, appellant does not plead facts to entitle him to recover on an equitable subrogation theory. According to his own allegations, he merely paid a debt that he was already obligated to pay. Moreover, even if appellant had sufficiently pled a cause of action for recovery under equitable subrogation, his claim would be time barred by the three-year statute of limitations.

This is not a case in which a party may recover under alternative legal theories. The fatal problem with appellant's pleadings is that the only legal theory that he pled, equitable subrogation, is inconsistent with his assertion that the statute of limitations governing written agreements *also* applies to his claim. Thus, in reversing the dismissal of appellant's claim, the majority is allowing appellant to obtain the benefit of a statute-of-limitations governing a written agreement, by which he would be legally obligated to pay, when the sole theory he advances is an equitable theory of recovery based on an implied agreement when there is *no* legal obligation to pay. Appellant cannot have it both ways: either he was legally required to pay the debt pursuant to a written contract (for which the five-year statute-of-limitations would apply), or he paid a debt that he was not required to pay pursuant to an implied agreement (under which his claim is barred by the three-year statute-of-limitations.)

Finally, as a practical matter, I do not see how the trial court is to proceed on remand. A defendant should not be required to defend, and a trial judge should not be compelled to entertain, a lawsuit where it is apparent from the pleadings that the complainant does not state facts to establish his legal claim. The precise purpose of Rule 12(b)(6) is to nip in the bud those claims, like appellant's, that do not properly assert a basis for relief. Given the decision reached today, I do not envy the trial judge who, on remand, must somehow retain jurisdiction over a matter that is clearly not what appellant alleges it to be, but which the majority has yet to classify within any other legal theory upon which appellant might avoid being barred by limitations.

I respectfully dissent.

Billy DODSON *v.* STATE of Arkansas

CA CR 03-1332 199 S.W.3d 115

Court of Appeals of Arkansas
Opinion delivered December 1, 2004

James Law Firm, by: *William O. "Bill" James, Jr.*, for appellant.

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

TERRY CRABTREE, Judge. Billy Dodson was found guilty in a jury trial of manufacturing methamphetamine, possession of drug paraphernalia with intent to manufacture methamphetamine, and possession of methamphetamine with intent to deliver. As a result of these convictions, he was sentenced to ten years in prison. Appellant contends on appeal that his convictions are not supported by substantial evidence and that the trial court erred in denying his motion to suppress. We hold that the evidence is sufficient to sustain his convictions, but we reverse the denial of the motion to suppress.

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Dye v. State,* 70 Ark. App. 329, 17 S.W.3d 505 (2000). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Walley v. State,* 353 Ark. 586, 112 S.W.3d 349 (2003). In determining whether a finding of guilt is supported by substantial evidence, we review the evidence, including any that may have been erroneously admitted, in the light most favorable to the verdict. *Dye v. State, supra.*

The evidence presented at trial, when viewed in the appropriate light, reflects that on June 20, 2002, Officer Jack Fitzhugh of the Cabot Police Department was dispatched to appellant's home after appellant reported setting a fire in the front yard. Officer Fitzhugh extinguished the fire and observed that the burn pile contained items used to manufacture methamphetamine, such as three one-gallon cans of Coleman camp fuel, matchboxes with the striker plates removed, bottles of Drano, a bottle of Heet, assorted coffee filters, and blister packs from cold medication. Appellant volunteered that he was burning his wife's methamphetamine lab because he was mad at her. Appellant was also heard to say that, if arrested, he would try to hang himself in jail and feign mental illness so that he would be found not guilty or only get probation. There was testimony that appellant's hands were stained with iodine.

In short order, other officers arrived at the residence, and a search warrant was subsequently obtained. In a kitchen cabinet, officers found a mason jar containing methamphetamine oil, coffee filters that had a white powdery substance on them, a Pyrex dish, paint thinner, an empty bottle of Heet, and a coffee grinder. A mason jar was found in the hallway that contained iodine and was

topped with a coffee filter that was stained with iodine. In the living room, they found camp fuel, an empty salt container, and Red Devil Lye.

In the master bedroom, the officers found a Kraft cheese box that contained .2809 grams of methamphetamine, coffee filters, and plastic corner bags. The closet in the master bedroom contained matchboxes with the striker plates removed, empty blister packs, a spatula, a Pyrex plate, tin foil, Heet bottles, hydrogen peroxide bottles, iodine, a box of syringes, freezer bags, alcohol swabs, packages of latex gloves, eight feet of tubing, and a bottle of brake fluid. On a night-stand, there was a mason jar that contained a bilayer solution. Another mason jar with saturated coffee filters was found on a filing cabinet. This cabinet contained yet another mason jar that had several Actifed pills inside. They also found a phone bill with appellant's name on it.

In the southwest bedroom, more Actifed cold pills were found. A coffee filter containing a white powder and a professional brand of drain opener were found in a closet. In the north bedroom, across the hall from the master bedroom, there were extensive iodine stains on the floor. It was said that it was not a normal amount of stain one would expect from just one "cook." There was a total of fifteen boxes of various brands of decongestant found in the house. Additionally, there was testimony relating the various items found to the process of manufacturing methamphetamine.

Kelly Dodson, appellant's wife, testified that she married appellant in February 2002, some four months prior to the search. She said that they lived at the residence, which had been her home prior to the marriage, but she stated that she had left several days before the search because appellant had been physically and emotionally abusive to her. She testified that between March and June 2002, appellant cooked methamphetamine an average of four or five times a week; that he sold it to others or traded methamphetamine for auto parts; that he had once traded methamphetamine for a Ford Probe; that she had accompanied him to purchase the ingredients for making methamphetamine; and that there were times when others would bring the ingredients for appellant to make methamphetamine in exchange for their getting some of the methamphetamine he produced. Ms. Dodson admitted that she had used methamphetamine and had been "strung out" for quite some time, but that she was now a recovering addict. In a plea bargain, she had pled guilty to attempt to manufacture metham-

phetamine, possession of drug paraphernalia, and possession of methamphetamine, for which she was placed on probation for six years.

Appellant contends that the evidence is not sufficient to sustain his conviction for possession of drug paraphernalia with intent to manufacture methamphetamine because the State did not produce the evidence necessary to show actual or constructive possession. We disagree.

To convict one of possessing contraband, the State must show that the defendant exercised control or dominion over it. *Abshure v. State,* 79 Ark. App. 317, 87 S.W.2d 822 (2002). However, neither exclusive nor actual possession is necessary to sustain a charge of possessing contraband; rather, constructive possession is sufficient. *Id.* Constructive possession may be implied when the contraband is in the joint control of the accused and another; however, joint occupancy alone is insufficient to establish possession or joint possession. *Id.* The State must establish: (1) that the accused exercised care, control, and management over the contraband; and (2) that the accused knew the matter possessed was contraband. *Id.* Control and knowledge may be inferred from the circumstances where there are additional factors linking the accused to the contraband. *Id.* This control and knowledge can be inferred from the circumstances, such as proximity of the contraband to the accused; the fact that it is in plain view; and the ownership of the property where the contraband is found. *Id.*

In this case, appellant admitted that he was burning what he, himself, described as a methamphetamine lab. Items associated with the production of methamphetamine were scattered throughout the house where appellant resided, some of it in plain view, and a large cache was found in the master bedroom. Appellant's hands were stained with iodine, an ingredient used in the manufacturing process, and there were obvious iodine stains on the floor in one of the bedrooms. Ms. Dodson testified that appellant manufactured methamphetamine on a regular basis and that he sold or traded the methamphetamine he produced. On this record, we cannot conclude that there is no substantial evidence to support the guilty verdict.

Appellant also contends that there is insufficient evidence to support his conviction for manufacturing methamphetamine because there was no HCL generator discovered in the search. There

was, however, a substance identified as methamphetamine oil found in the house. There was testimony that the production of methamphetamine oil was the second-to-last stage in the process of manufacturing methamphetamine and that the final stage involved the application of an HCL generator to methamphetamine oil in order to reduce the methamphetamine in the oil to a powder, its useable form. There was further testimony that tubing and the substances necessary to make an HCL generator were among the items discovered.

The term "manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. Ark. Code Ann. § 6-64-101(m) (Repl. 1997). We have upheld methamphetamine-manufacturing convictions where not all of the ingredients necessary for the production of methamphetamine were present. In *Cherry v. State,* 80 Ark. App. 222, 95 S.W.3d 5 (2003), there was no lithium found, but we concluded that its absence was adequately explained by testimony that the substance was consumed during the manufacturing process. In *Aydelotte v. State,* 85 Ark. App. 67, 146 S.W.3d 392 (2004), anhydrous ammonia was not found, but we determined that there was sufficient evidence of manufacturing based on testimony that the manufacturing process had been completed and on evidence establishing that anhydrous ammonia had been used in the production process. Anhydrous ammonia was also missing in *Smith v. State,* 68 Ark. App. 106, 3 S.W.3d 712 (1999), yet we determined that the evidence was sufficient because the testimony showed that the manufacturing process had begun and that the appellant was expecting the delivery of the ammonia to complete the process. In the case at bar, although the manufacturing process was not finished, it had proceeded to all but the final stage, and the components necessary for completion had been assembled. We hold that there is substantial evidence to support appellant's conviction for manufacturing methamphetamine.

Appellant's final sufficiency argument concerns his conviction for possession of methamphetamine with intent to deliver. He contends that there is no evidence of the intent to deliver. Notwithstanding this argument, the methamphetamine that was discovered weighed .2809 grams, and there is a statutory

rebuttable presumption that one in possession of a stimulant drug weighing in excess of 200 milligrams possesses the contraband with the intent to deliver. Ark. Code Ann. § 5-64-401(d) (Supp. 2003). Given the presumption and the testimony that appellant produced methamphetamine for sale, we cannot say there is no substantial evidence to support the conviction.

Appellant's last point on appeal is that the trial court erred in denying his motion to suppress. This motion was made on the ground that the search was conducted at night although the warrant did not authorize a nighttime search. We find merit in this argument.

At the suppression hearing, it was disclosed that the officers first arrived at appellant's residence shortly after 7:00 p.m. After Officer Fitzhugh conducted a protective sweep of the house,[1] Detective John Dodd left at approximately 7:20 p.m. to obtain a warrant. The warrant was executed at 8:35 p.m.

The privacy of citizens in their homes, secure from nighttime intrusions, is a right of vast importance which is attested not only by our rules but also by our state and federal constitutions. *Garner v. State,* 307 Ark. 353, 820 S.W.2d 446 (1991); *Carpenter v. State,* 36 Ark. App. 211, 821 S.W.2d 51 (1991). Our rules of criminal procedure provide that a search conducted at night, which is set between the hours of 8:00 p.m. and 6:00 a.m., is permitted only if the issuing magistrate finds the existence of one of three exigent circumstances found in Rule 13.2(c).[2] Rule 13.2(c) also requires the search warrant to contain an appropriate order authorizing a nighttime search. *Hale v. State,* 61 Ark. App. 105, 968 S.W.2d 627 (1998); *Carpenter v. State, supra.* The search in this instance clearly violated the rule because it was conducted at night and the warrant contained no authorization for a nighttime search.

Even though the search violated Rule 13.2(c), our law provides that a motion to suppress should be granted only if the violation is considered "substantial." Ark. R. Crim. P. 16.2(e).

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[1] Appellant did not challenge the legality of this search in his motion to suppress.

[2] Those circumstances are that the place to be searched is difficult of speedy access; that the objects to be seized are in danger of imminent removal; and that the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy.

Illegal nighttime searches are typically regarded as substantial violations. *See Richardson v. State,* 314 Ark. 512, 863 S.W.2d 572 (1993); *Garner v. State,* 307 Ark. 353, 820 S.W.2d 446 (1991); *State v. Martinez,* 306 Ark. 353, 811 S.W.2d 319 (1991); *Hall v. State,* 302 Ark. 341, 789 S.W.2d 456 (1990); *Zeiler v. State,* 46 Ark. App. 182, 878 S.W.2d 417 (1994); *Ramey v. State,* 42 Ark. App. 242, 857 S.W.2d 828 (1993). In *Brothers v. State,* 261 Ark. 64, 546 S.W.2d 715 (1977), however, the court found no material departure from the rule where the search began at "about 8 p.m." By contrast, in *State v. Martinez,* 306 Ark. 353, 811 S.W.2d 319 (1991), a search that began at 9:00 p.m. was considered a substantial violation. In this case, the warrant was executed at 8:35 p.m. This was well beyond the 8:00 p.m. deadline and is a lapse of time that cannot be regarded as negligible. We hold that the rule was substantially violated.

We must also consider whether the executing officers acted in good faith under *United States v. Leon,* 468 U.S. 897 (1987). *Richardson v. State, supra.* The test to be applied under *Leon* is an objective one, *Fouse v. State,* 337 Ark. 13, 989 S.W.2d 146 (1999), and the objective standard requires officers to have a reasonable knowledge of our rules. *Richardson v. State, supra.* The warrant did not authorize a search at night, and it appears that the officers did not even seek permission for a nighttime search. Yet, they executed the search after 8:00 p.m. We cannot say that the good-faith exception salvages this search. *See State v. Martinez, supra.*

Reversed and remanded.

GRIFFEN and BAKER, JJ., agree.

Jaclin BOUDREAUX *v.* Jacob MAUTERSTOCK

CA 04-316 199 S.W.3d 120

Court of Appeals of Arkansas
Opinion delivered December 1, 2004

Eubanks, Welch, Baker & Schulze, by: *Darryl E. Baker* and *J.G. schulze*, for appellant.

Danny M. Rasmussen, for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Jaclin Boudreaux appeals from the trial court's order changing her minor daughter's surname from Boudreaux to Mauterstock. On appeal, Boudreaux argues that the trial court's decision is clearly erroneous. We reverse.

Jaclin Boudreaux and Jacob Mauterstock are the parents of Kaylee, born November 30, 1997. The parties have never married, and paternity was established in April 1999. The April 1999 order established that Jacob owed child support, and he was ordered to make payments to the Office of Child Support Enforcement and to provide health insurance for Kaylee. Jacob, however, did not maintain contact with Jaclin or Kaylee, and had not established a relationship with Kaylee until 2001, when Jaclin and Kaylee returned to Arkansas from Florida and Jaclin initiated contact with Jacob. Since Jaclin and Kaylee's return to Arkansas, Jacob has established a positive relationship with Kaylee, exercising regular visitation with her and paying child support.

On June 24, 2002, Jacob filed an amended petition for change of custody, asserting that since July 2001, he has had

physical custody of Kaylee fifty percent of the time; that he enjoys a more stable lifestyle; and that he had learned to care for and nurture Kaylee. The amended petition also requested that Kaylee's last name be changed from Boudreaux to Mauterstock.

At the hearing on the petition, the trial court heard testimony from several witnesses related to the change of custody issue. Jacob testified that he is now married; that he and his wife, Erica, have a son; that he pays child support and medical expenses; and that he and Jaclin have a cordial relationship and have no problems cooperating with each other regarding visitation. There was no additional testimony presented by Jacob or any of the witnesses called on his behalf regarding his request for name change.

During presentation of her case in defense of the request for change of custody and name change, Jaclin testified only that she did not believe that Kaylee's name should be changed to Mauterstock; that Kaylee has had the name Boudreaux for six years; that Kaylee told her that she did not want her name to be changed to Mauterstock; and that there was no reason that Kaylee's name should be changed.

At the conclusion of the hearing, the trial court continued custody of Kaylee with Jaclin, but modified the visitation schedule. The trial court held that Kaylee's name should be changed from Boudreaux to Mauterstock, stating, "[I]f there was ever going to be a name change, now would be the time to do it. Keelee [sic] is not going to get any younger. You know, if we go on longer and decide at a later time then those negative issues would arise so I'm going to grant the motion to change her last name to Mauterstock." Counsel for Jaclin requested further findings from the trial court on the name change issue, and the trial court found:

> [s]he clearly wants Mr. Mauterstock to have a relationship with the child . . . he has had a relationship with the child. In fact, part time having half custody of the child. We looked at those circumstances that you talked about, we've all discussed that neither one of them have a negative connotation with either last name. There would be no embarrassment to the child to have either last name. While she's had the name for almost six years, if we were to change it when she's twelve years old, that might be a little different, but you know, the only people that she's been Boudreaux with are her family. She's had little time at school. That can be done at school without a great deal of difficulty. He's paid child support, he is

> trying to maintain a relationship with his child and it is real hard for someone to understand that this is my daddy but he has a different last name than I do.

Regarding the last finding, counsel for Jaclin requested that the trial court consider that changing Kaylee's name to Mauterstock would have the same effect on her because she would then have a different last name from her mother. The trial judge responded that the decision would remain; however the trial court's order stayed implementation of the name change pending this appeal.

Where an order has been entered changing a minor child's surname, the proper question on appeal is whether the party has demonstrated that such a change is in the best interest of the child considering factors enumerated in *Huffman v. Fisher*, 337 Ark. 58, 987 S.W.2d 269 (1999). The factors are: (1) the child's preference; (2) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (3) the length of time the child has borne a given name; (4) the degree of community respect associated with the present and proposed surnames; (5) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; (6) the existence of any parental misconduct or neglect. *Id.* This list is not exhaustive, and the trial court may consider other relevant factors when determining which surname would be in the child's best interest. *Bell v. Wardell*, 72 Ark. App. 94, 34 S.W.3d 745 (2000).

In cases involving change of a minor child's surname, the moving party has the burden of demonstrating that the change is in the child's best interest. Where there is a full inquiry into the implication of the *Huffman* factors and a determination is made with due regard to the best interest of the child, the trial court's decision will not be reversed unless it is clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id.*

With these principles in mind, we consider the case before us. In this instance, Mauterstock presented no evidence regarding his request for name change other than what could be gleaned from the testimony regarding his petition for change of

custody. There was no evidence whatsoever presented on several of the factors to be considered by the trial court. Moreover, the mere fact that the child would have a last name different from her father does not establish that it is in her best interest that her name be changed. Accordingly, Mauterstock had the burden of proving that a name change is in Kaylee's best interest, and, considering the *Huffman* factors, Mauterstock did not go forward with evidence sufficient to meet that burden. The trial court did not have before it an adequate inquiry into the implications for the minor child of the name change, and the decision granting the name change under these circumstances is thus clearly erroneous.

Reversed.

BIRD and ROBBINS, JJ., agree.

Jamie MANN *v.* ARKANSAS PROFESSIONAL BAIL BONDSMAN LICENSING BOARD

CA 04-236 199 S.W.3d 84

Court of Appeals of Arkansas
Opinion delivered December 1, 2004

Wilber Law Firm, P.A., by: *Norman C. Wilber*, for appellant.

Mike Beebe, Att'y Gen., by: *Alice Lightle*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Jamie Mann, a bail bondsman, appeals from the Pulaski County Circuit Court's decision following an appeal to that court from the Arkansas Professional Bail Bondsman Licensing Board. On September 18, 2000, the

Board revoked Mann's license after finding that he had violated Ark. Code Ann. § 17-19-210(a)(3) (Repl. 1995), which states that the Board may suspend or revoke a license if the licensee has committed a fraudulent or dishonest act or practice, or has demonstrated incompetence or untrustworthiness. The circuit court affirmed the Board's finding that Mann had violated the statute but modified the penalty to a suspension of his license for one year. We affirm the Board's finding that he violated the statute. Because the Board has not appealed the modification of its decision, we do not disturb the circuit court's reduction of the penalty.

Sharon Patton was arrested in Fulton County on drug charges in June 2000 and was released on her own recognizance. On June 28, 2000, Mrs. Patton called Daniel Brown of First Arkansas Bail Bonds, Inc. (First Arkansas), and told him that she would need a bond because she was required to turn herself in to the sheriff's office the next day. On June 29, 2000, on behalf of First Arkansas, Mr. Brown wrote a $30,000 bond for Mrs. Patton. She and her friend, James Foster, signed a promissory note, security agreement,[1] and indemnity agreement. Mrs. Patton and her husband, Richard Patton, also gave First Arkansas a mortgage on their real property in Fulton County to secure the bond.

Mrs. Patton agreed to meet Mr. Brown at his office at 6:00 p.m. on June 30, 2000, to pay the bond's $3,000 premium. Mrs. Patton, however, did not appear at Mr. Brown's office as they had agreed. Later that night, Mr. Foster called Mr. Brown and told him that another bonding company had written a second bond for Mrs. Patton and had canceled the First Arkansas bond.

Mann is an employee of Affordable Bail Bonds, Inc. (Affordable). Mann, on behalf of Affordable, wrote the second $30,000 bond for Mrs. Patton, on a long-term payment plan, on June 30, 2000. On July 1, 2000, Mrs. Patton wrote a letter to Mr. Brown, in which she stated: "On the date of conversation, I exercised my lawful right to change bail bond agents within the 3 day civil rights limitations. Since no money was exchanged on the above mentioned bond, I did have this right."

Mr. Brown filed a complaint against Mann with the Board on July 10, 2000, which stated in part:

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[1] The security agreement covered several types of personal property, including vehicles, tools, household goods, and bank accounts.

> On July 1, 2000, Brad Parnell who is an agent with First Arkansas Bail Bond called Sharon Patton to question her about what had happened. She told him that Affordable Bail Bonds had agreed to write the bond on a long term payment plan and all she had was $800.00 and she gave that to them. She also stated that according to Jamie Mann, she had civil rights and she could void our contract within three days. . . .
>
> . . . .
>
> On July 6, 2000 I contacted Sharon Patton again to get the matter resolved. I asked her to explain to me what had happened. She stated "Jamie Mann called me and asked if I had paid any money to First Arkansas and I replied no, I am on my way to pay them $800.00." He advised her not to pay us any money because our contract was no good if no money has changed hands. He the [sic] advised her to go to the jail and surrender herself and he would write the bond on a long term payment plan on the premium.

The Board notified Mann of the complaint, and he filed a responsive affidavit in which he denied any wrongdoing. After sending Mann notice of probable cause to conduct a hearing, the Board conducted a hearing on September 8, 2000. Its decision included the following findings of fact:

> 7. Later that night [June 30, 2000], Mr. Brown received a call from co-signer James Foster stating that another bonding company had written a second bond for Mrs. Patton and the other bail bondsman had "canceled the bond" written by Dan Brown and First Arkansas.
>
> 8. On July 1, 2000, Mr. Brown and Brad Parnell, another agent for First Arkansas, learned that Jamie Mann and Affordable had written the second bond for Mrs. Patton on a long-term payment plan. Mr. Brown and Mr. Parnell also learned that Respondent Jamie Mann had advised Mrs. Patton that she had "civil rights" and could void her contract with First Arkansas within three days of the day the bond was written.
>
> 9. On July 1, 2000, Mrs. Patton forwarded a letter to Mr. Brown stating she was exercising "her lawful right to change bail bond agents within the three day civil rights limitations" and stating she had this right since no money had exchanged hands on the bond written by Mr. Brown.

10. Respondent Jamie Mann encouraged Mrs. Patton to surrender herself so her bond with First Arkansas would be canceled and he could bond her out a second time. Respondent Jamie Mann provided legal advice to Mrs. Patton regarding the consequences of attempting to cancel her bond with Mr. Brown and First Arkansas.

11. Mr. Brown and First Arkansas never agreed to have Mrs. Patton's bond written by Mr. Brown on June 29, 2000 canceled.

The Board concluded that Mann had violated Ark. Code Ann. § 17-19-210(a)(3) and revoked his license. It did not hold Affordable responsible for Mann's acts. Mann appealed the Board's decision to the circuit court, which found that substantial evidence supported the Board's findings of fact and its conclusion that Mann had violated Ark. Code Ann. § 17-19-210(a)(3). It found the revocation of Mann's license, however, to be "unduly harsh" and modified the penalty to a one-year suspension. Mann appealed from the circuit court's decision; however, the Board has not filed a cross-appeal of the decision modifying its penalty.

Arkansas Code Annotated section 25-15-212(h) (Repl. 2002) provides that we may reverse or modify an administrative agency's decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the agency's statutory authority; (3) made upon unlawful procedure; (4) affected by other error or law; (5) not supported by substantial evidence of record; or (6) arbitrary, capricious, or characterized by abuse of discretion. *See Dep't of Human Servs. v. Parker*, 88 Ark. App. 222, 197 S.W.3d 33 (2004).

Our review is limited in scope and is directed not to the circuit court but to the decision of the administrative agency. *Tomerlin v. Nickolich*, 342 Ark. 325, 27 S.W.3d 746 (2000). It is not the role of the circuit courts or the appellate courts to conduct a *de novo* review of the record; rather, review is limited to ascertaining whether there is substantial evidence to support the agency's decision. *Id.* Substantial evidence has been defined as valid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion and force the mind to pass beyond conjecture. *Id.* The challenging party has the burden of proving an absence of substantial evidence. *Id.* To establish an absence of substantial evidence to support the decision, the chal-

lenging party must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion. *Id.* The question is not whether the testimony would have supported a contrary finding but whether it supports the finding that was made. *Id.* It is the prerogative of the agency to believe or disbelieve any witness and to decide what weight to accord the evidence. *Id.* We review the entire record in making this determination. *Id.* In reviewing the record, we give the evidence its strongest probative force in favor of the agency's ruling. *Van Curen v. Arkansas Prof'l Bail Bondsman Licensing Bd.*, 79 Ark. App. 43, 84 S.W.3d 47 (2002). Between two fairly conflicting views, even if the reviewing court might have made a different choice, the Board's choice must not be displaced. *Id.*

Administrative actions may be considered arbitrary and capricious when they are not supported by any rational basis or hinge on a finding of fact based on an erroneous view of the law. *Id.* To set aside an agency decision as arbitrary and capricious, the party challenging the action must prove that it was willful and unreasoned action, without consideration, and with a disregard of the facts and circumstances of the case. *Id.* The requirement that an administrative decision not be arbitrary and capricious is less demanding than the requirement that it be supported by substantial evidence. *Id.* An action is not arbitrary simply because the reviewing court would have found differently. *Id.* If the Board's decision to revoke Mann's license is supported by substantial evidence, it necessarily follows that it is not arbitrary and capricious. *Id.*

Bail bondsmen and bail-bond companies are required to conduct their bail-bond businesses in conformity with the statutes governing the profession, Ark. Code Ann. § 17-19-101 through 17-19-402 (Repl. 2001 and Supp. 2003), and the rules and regulations promulgated pursuant to Ark. Code Ann. § 17-19-106 (Repl. 2001), the Arkansas Professional Bail Bond Company and Professional Bail Bondsman Licensing Act. The Act provides that the Board has the authority to administer and enforce the statutes, as well as the rules and regulations promulgated thereunder, in order to carry out its duty of licensing and regulating professional bail bondsmen and professional bail-bond companies. *See Arkansas Prof'l Bail Bondsman Licensing Bd. v. Frawley*, 350 Ark. 444, 88 S.W.3d 418 (2002).

Administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues affecting their agencies, and this recognition accounts for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency. *Arkansas Prof'l Bail Bondsman Licensing Bd. v. Oudin*, 348 Ark. 48, 69 S.W.3d 855 (2002). Because decisions regarding the licensing of bond companies and their employees turn on executive wisdom, it is appropriate to limit the scope of review on appeal. *Tomerlin v. Nickolich, supra.*

With these principles in mind, we consider Mann's argument on appeal that the Board's findings are not supported by substantial evidence. Mann asserts that the simple act of knowingly writing a second bond is not expressly prohibited by statute or regulation. Mann also contends that the Board violated his due-process rights in revoking his license because his actions were not prohibited by law. The abstract and addendum do not demonstrate that the Board ruled on this argument. Failure to obtain a ruling will preclude even a constitutional issue's being considered on appeal. *Technical Servs. of Ark., Inc. v. Pledger*, 320 Ark. 333, 896 S.W.2d 433 (1995).

Arkansas Code Annotated section 17-19-210(a)(3) provides that the Board may revoke a bondsman's license if he has committed any fraudulent or dishonest acts or practices or has demonstrated his incompetence or untrustworthiness to act as a licensed bondsman. Mann denied having done anything improper or untrustworthy but admitted that he had agreed to write Mrs. Patton's second bond and had completed the paperwork, "short of writing the bond," when he met her at the jail on the evening of June 30, 2000. He argued that he had not actually written the second bond before the first bond "was surrendered" and denied telling Mrs. Patton that she had the legal right to cancel the first bond.

At the hearing, Mrs. Patton was less sure of Mann's advice than she had been when the Board's investigator interviewed her about her "civil rights," and about his encouragement to surrender herself on First Arkansas's bond so that it would be canceled. She admitted that she had told the investigator on July 31, 2000, that Mann had been aware of the original bond and that he had informed her that, if she had not yet given Mr. Brown any money,

she had a "three-day civil right" to change bondsmen. Mr. Foster also admitted at the hearing that he had previously informed the investigator about a discussion of this alleged right with Mann.

Obviously, the Board did not believe Mann's denial of having told Mrs. Patton that she could cancel the first bond within three days. In light of Mrs. Patton's and Mr. Foster's reluctant admissions that they had told the Board's investigator that Mann had done so, and deferring to the Board's prerogative to assess the credibility of the witnesses and weigh the evidence, we hold that the Board's findings that Mann encouraged Mrs. Patton to cancel her first bond and that he violated the statute are supported by substantial evidence.

Mann further contends that, even if there is substantial evidence that he violated the statute, the revocation of his license was an abuse of the Board's discretion. He asserts that a more appropriate penalty would have been a fine as permitted by Ark. Code Ann. § 17-19-211 (Repl. 2001). In response, the Board states that revocation was appropriate because Mann's license had been suspended within the previous twenty-four months. At the hearing, the assistant attorney general asked the Board to find Mann guilty and "revoke his license, just as [it] did before." Arkansas Code Annotated section 17-19-210(d) provides: "If the board finds that one (1) or more grounds exist for the suspension or revocation of a license and that the license has been suspended within the previous twenty-four (24) months, then the board shall revoke the license." The issue of his earlier suspension, however, was not fully developed before the Board, and therefore, we will not consider it.

With regard to the Board's decision to revoke Mann's license, we note that the Board has not appealed from the circuit court's modification of the revocation to a one-year suspension, which was within the circuit court's powers set forth in Ark. Code Ann. § 25-15-212(h). *See Baxter v. Arkansas State Bd. of Dental Exam'rs*, 269 Ark. 67, 598 S.W.2d 412 (1980); *Arkansas State Bd. of Pharmacy v. Isely*, 13 Ark. App. 111, 680 S.W.2d 718 (1984). The Board, of course, had the burden of appealing from the circuit court's reduction of the penalty but failed to do so. Because it did not file a cross-appeal, we are without jurisdiction to address the argument made in its brief that this court should reinstate its penalty, the revocation of Mann's license. *Brown v. Minor*, 305 Ark.

556, 810 S.W.2d 334 (1991). *See also Boothe v. Boothe*, 341 Ark. 381, 17 S.W.3d 464 (2000); *Slaton v. Slaton*, 336 Ark. 211, 983 S.W.2d 951 (1999); *Egg City of Ark., Inc. v. Rushing*, 304 Ark. 562, 803 S.W.2d 920 (1991). *See also Wren v. Sanders Plumbing Supply*, 83 Ark. App. 111, 117 S.W.3d 657 (2003); *McHalffey v. Nationwide Mut. Fire Ins. Co.*, 76 Ark. App. 235, 61 S.W.3d 231 (2001); *Broadhead v. McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986). In *Van Curen v. Arkansas Professional Bail Bondsman Licensing Board, supra*, we affirmed the circuit court's affirmance of the Board's revocation of the bondsman's license but refused to address that portion of the circuit court's decision reversing the Board's directive that the bondsman return a bond premium because the Board had not cross-appealed from that aspect of the court's decision.

Accordingly, we hold that the effect of the Board's failure to cross-appeal from the circuit court's reduction of the revocation of Mann's license to a one-year suspension is to leave the court's modification of the penalty intact. *See also Arkansas State Bd. of Pharmacy v. Isely, supra* (declining to address the two findings of the Board that the circuit court found to be supported by substantial evidence because neither party had appealed on those issues). We thus need not address Mann's argument that the revocation of his license was an abuse of the Board's discretion.

For these reasons, we affirm the Board's decision as modified by the circuit court.

Affirmed.

ROBBINS and BIRD, JJ., agree.