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Randolph McDONALD *v.* STATE of Arkansas

CA CR 03-957 210 S.W.3d 915

Court of Appeals of Arkansas
Opinion delivered June 22, 2005

Laura Lee Cunningham, for appellant.

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

JOHN MAUZY PITTMAN, Chief Judge. The appellant in this criminal case entered a conditional plea of guilty pursuant to Ark. R. Crim. P. 24.3(b) to possession of methamphetamine found in a search of his automobile conducted after his arrest. On appeal, he asserts that there was no valid basis to perform an inventory of his automobile and argues that the trial court therefore erred in denying his motion to suppress evidence obtained from the automobile following his arrest. We affirm.

The record shows that the owner of Johnson's Automotive called police to report that appellant had driven by that business several times, leading the owner to suspect that appellant would attempt to remove one of appellant's automobiles from impound after the business closed for the night. A check disclosed that there were outstanding warrants for appellant's arrest for violation of the Arkansas Hot Check Law and for failure to pay child support, and an officer was dispatched to make contact with him. The officer saw appellant driving on Route 23 and attempted to stop him by engaging the emergency lights and siren of his patrol car. Appellant indicated by waving his hand and pointing out the window that he saw the officer but, instead of stopping in a nearby parking lot as directed, he continued driving, turned onto Benton Street, and parked on the street in front of his home. Appellant exited his car and was arrested on the outstanding warrants. Officers immediately performed an inventory of appellant's automobile at the scene and discovered in a jacket in the front seat the methamphetamine that he was convicted of possessing in this case.

On appeal, appellant contends that there was no reasonable need to secure his automobile and its contents because it was parked in front of his home, and that the items discovered in his car therefore should have been suppressed as the fruits of an illegal search. Where the validity of a warrantless search is in issue, this court makes an independent determination, based on the totality of the circumstances, whether the evidence obtained by means of a warrantless arrest or search should be suppressed. The trial court's

finding will not be set aside unless it is found to be clearly against the preponderance of the evidence. As the preponderance of the evidence turns heavily on the question of credibility, we defer to the superior position of the trial court in making the determination of which evidence is to be believed. *Folly v. State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989).

As a general rule, all searches conducted without a valid warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. *Kirk v. State*, 38 Ark. App. 159, 832 S.W.2d 271 (1992). The burden is on the State to establish an exception to the warrant requirement. *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998); *Izell v. State*, 75 Ark. App. 377, 58 S.W.3d 400 (2001).

One recognized exception is the so-called "inventory search" of an automobile, which permits police officers to conduct a warrantless inventory of a vehicle that is being impounded in order to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger. *Bratton v. State*, 77 Ark. App. 174, 72 S.W.3d 522 (2002); *see* Ark. R. Crim. P. 12.6(b). However, the police may impound a vehicle and inventory its contents only if the actions are taken in good faith and in accordance with standard police procedures or policies; an inventory "may not be used as a guise for 'general rummaging to discover incriminating evidence.' " *Bratton v. State*, 77 Ark. App. at 177-78, 72 S.W.3d at 525 (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)). Although the fact that a vehicle is legally parked does not necessarily negate the need to take the vehicle into protective custody, *Folly v. State, supra*, factors such as hazard to public safety, possibility of vandalism, and the risk of theft are to be considered when determining whether protective custody is necessary. *Izell v. State, supra.*

In the present case, we need not decide whether the State demonstrated circumstances justifying an inventory because a search of the passenger compartment of appellant's automobile was clearly permitted under the facts of this case as an incident of appellant's arrest. We will affirm the trial court if it is correct even though the court states the wrong reason for its ruling, and this principle has been applied in cases where the issue was the validity of a search. *See, e.g., Moya v. State*, 335 Ark. 193, 981 S.W.2d 521 (1998); *McKenzie v. State*, 69 Ark. App. 186, 12 S.W.3d 250 (2000); *Hicks v. State*, 28 Ark. App. 268, 773 S.W.2d 113 (1989).

The United States Supreme Court has held that, when a police officer makes a lawful custodial arrest of an automobile's occupant or recent occupant, the Fourth Amendment allows the officer to search the vehicle's passenger compartment and containers found therein as a contemporaneous incident of arrest. *New York v. Belton*, 453 U.S. 454, 460-61 (1981). The justification for the search is not that the arrestee has no privacy interest in the vehicle's passenger compartment but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have. *Id.* This rule is not limited to situations where the police officer makes contact with the occupant while the occupant is inside the vehicle, but also applies in cases where a recent occupant of a vehicle is first contacted and arrested in close proximity to the vehicle. *Thornton v. United States*, 541 U.S. 615, 622 (2004). Our review of the totality of the circumstances leads us to conclude that the officer initiated contact with appellant while appellant was occupying his vehicle, and that appellant was clearly at least a recent occupant of his vehicle and in close proximity to his vehicle when he was placed under arrest; indeed, he had just stepped out of the car after being stopped by the officer. The search of the passenger compartment of that vehicle clearly was authorized under both *New York v. Belton, supra*, and *Thornton v. United States, supra*, and thus was permissible under the federal constitution.

Likewise, we think that the search of the vehicle incident to appellant's arrest was proper under Arkansas law. As Judge Hart correctly notes in her dissent, article 2, section 15 of the Arkansas Constitution provides protection against unreasonable searches similar to that of the Constitution of the United States, and Arkansas courts are not bound by the federal interpretation of the Fourth Amendment when interpreting our own law. However, the Arkansas Supreme Court has considered this precise issue and expressly declined to depart from federal interpretation in the vehicular search-incident-to-arrest context, noting that it has long followed the rule enunciated in *New York v. Belton* and has found it to provide a practical and workable rule. *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995); *see State v. Sullivan*, 348 Ark. 647, 650-51, 74 S.W.3d 215, 217-18 (2002). Consequently the term "unreasonable search" as employed in article 2, section 15 of the Constitution of Arkansas is to be interpreted in the same manner the United States Supreme Court interprets the Fourth Amendment to the Constitution of the United States. *Stout*, 320 Ark. at

555-56, 898 S.W.2d at 460. Furthermore, the *Stout* court expressly rejected the argument that the Arkansas Rules of Criminal Procedure provide greater protection against unreasonable searches than does the Fourth Amendment in this context. The court noted that, although Rule 12.4, standing alone, does provide a more narrow definition of a reasonable search than does *Belton,* Rule 12.1 embraces the *Belton* rationale and allows the search of the passenger compartment of a car incident to a lawful custodial arrest without regard to whether the circumstances warrant a reasonable belief that the vehicle contains things connected with the offense for which the arrest was made. *Stout*, 320 Ark. at 556, 898 S.W.2d at 460-61.

Judge Neal, in his dissent, asserts that there must be some relationship between the vehicle and the reason for the arrest to support a valid search of the vehicle incident to the occupant's arrest. No authority for this assertion is cited, and it is therefore difficult to address with specificity, but we note that the United States Court of Appeals for the Eighth Circuit appears to be unaware of any such principle. In circumstances similar to those presented here, that court upheld the search of the automobile recently driven by a man arrested on an outstanding arrest warrant for assault as a valid search incident to his arrest. *United States v. Poggemiller*, 375 F.3d 686 (8th Cir. 2004). In any event, the qualification that Judge Neal would place upon the *Belton* rule is plainly one that neither the United States Supreme Court nor the Arkansas Supreme Court has ever stated. Rather, *Belton* unqualifiedly holds that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Belton*, 453 U.S. at 460.

In his dissent, Judge Griffen argues that the search of a vehicle may be conducted as an incident of the occupant's arrest only where there is reasonable cause to believe that the search will yield evidence of a crime. He is wrong. There is a distinction, apparently widely misunderstood, between the various legal principles governing searches of moveable vehicles. One such set of principles, established by the United States Supreme Court in *Carroll v. United States*, 267 U.S. 132 (1925), has been called the "automobile exception" to the warrant requirement. The permissible scope of a search conducted pursuant to the automobile exception is dependent upon circumstances like those that the dissenting judges assert are required in the present case:

> [T]he scope of the warrantless search authorized by [the automobile] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

United States v. Ross, 456 U.S. 798, 825 (1982). The automobile exception, however, is not involved in the present case. Neither is the plain view doctrine being relied upon, *see McDonald v. State,* 354 Ark. 216, 119 S.W.3d 41 (2003), or the principles applicable when the occupant of the vehicle consents to the search, *see Duncan v. State,* 304 Ark. 311, 802 S.W.2d 917 (1991).[1]

Judge Griffen also argues that this case is similar to *Izell v. State*, 75 Ark. App. 377, 58 S.W.3d 400 (2001), where this court held that a search of a car parked in a driveway was not a valid search incident to arrest. However, the appellant in that case was inside his parents' home when he was arrested, and had been for thirty to forty-five minutes before the police arrived and were admitted inside. To the extent of its holding regarding search incident to arrest, *Izell* is distinguishable from the case now before us.

Despite the assertions to the contrary made by some of the dissenting judges, the law upon which we rely is well-established and has been in effect for many years. In *Chimel v. California*, 395 U.S. 752 (1964), the United States Supreme Court declared that, when an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape, and to search for and seize any evidence on the arrestee's person in

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[1] "Unfortunately, lawyers and judges who have taken the words 'automobile exception' literally have created considerable confusion about the parameters of the *Carroll* decision and its progeny. The exception is neither limited to automobile searches, nor does it cover all searches of automobiles. . . . Many warrantless searches of movable vehicles are properly analyzed only in terms of other exceptions to the Fourth Amendment's warrant requirement. For example, . . . a search of all or part of an automobile may be justified *independently* of the automobile exception if conducted *incident to a lawful arrest,* in performing a stop and frisk of a car's occupants, under the authority of the plain view doctrine, while inventorying a car, or upon the consent of car's occupant. Other constitutional searches of automobiles may not involve the Fourth Amendment at all." Charles H. Whitebread & Christopher Slobogin, *Criminal Procedure* 179-80 (3d ed. 1992) (emphasis added) (internal footnotes omitted).

order to prevent its concealment or destruction. In *United States v. Robinson,* 414 U.S. 218 (1973), the Supreme Court reversed a decision of the District of Columbia Court of Appeals holding that a search made incident to arrest was unreasonable because the officer's interest in self-protection could have been met by only a frisk of the arrestee, and because there was no evidence to be found given that he was arrested for driving while his license was revoked. Noting that its fundamental disagreement with the court of appeals arose from the latter's suggestion that it was necessary to litigate, in every case, the issue of whether a search incident to arrest was necessary to secure evidence or ensure officer protection, the *Robinson* Court wrote that:

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. *A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.* It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Robinson, 414 U.S. at 235 (emphasis added). Stated another way, a search incident to a lawful custodial arrest may be made consistent with the Fourth Amendment "whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence." *United States v. Chadwick,* 433 U.S. 1, 14 (1977).

In *New York v. Belton,* 453 U.S. 454 (1981), the Supreme Court extended the doctrine in *Robinson* to allow the search of the entire passenger compartment of a vehicle as a contemporaneous incident of a valid arrest of an occupant or recent occupant of the vehicle. In so doing, it clearly explained the factors upon which its decision was based:

> Although the principle that limits a search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in specific cases. Yet, as one commentator has pointed out, the protection of the Fourth and Fourteenth Amendments "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." LAFAVE, "CASE-BY-CASE ADJUDICATION" VERSUS "STANDARDIZED PROCEDURES": THE ROBINSON DILEMMA, 1974 S.Ct.Rev. 127, 142. This is because "Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.' " Id., at 141. In short, "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213-214 So it was that, in *United States v. Robinson*, 414 U.S. 218, the Court hewed to a straightforward rule, easily applied, and predictably enforced: "[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.*, at 235. In so holding, the Court rejected the suggestion that "there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Ibid.*

Belton, 453 U.S. at 458-59. For the same pragmatic reasons, the Supreme Court in *Thornton v. United States*, 541 U.S. 615 (2004), refused to adopt a different rule to apply in cases where the suspect is arrested outside a vehicle he recently occupied:

> Under petitioner's proposed rule, an officer approaching a suspect who has just alighted from his vehicle would have to determine whether he actually confronted or signaled confrontation with the

> suspect while he remained in the car, or whether the suspect exited his vehicle unaware of, and for reasons unrelated to, the officer's presence. This determination would be inherently subjective and highly fact specific, and would require precisely the sort of ad hoc determinations on the part of officers in the field and reviewing courts that *Belton* sought to avoid. *Id.*, at 459-460, 101 S.Ct. 2860. Experience has shown that such a rule is impracticable, and we refuse to adopt it. So long as an arrestee is the sort of "recent occupant" of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest.

Thornton, 541 U.S. at 623. The Arkansas Supreme Court adopted the rationale of *Belton* as applicable to the Arkansas Constitution precisely because it was a practical and workable rule. *See Stout v. State, supra*; *State v. Sullivan, supra.*

The dissenting judges, perhaps hungering for that "heady stuff upon which the facile minds of lawyers and judges eagerly feed" described by the *Belton* Court, would reject the simple, straightforward, easily-applied, and predictably-enforced standard enunciated in that case in favor of a standard so nebulous that they themselves cannot precisely define it. Their position is not the law.

The trial court reached the right result, and we therefore affirm.

Affirmed.

ROBBINS, VAUGHT, CRABTREE, and BAKER, JJ., agree.

HART, GLADWIN, GRIFFEN, and NEAL, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. I wholeheartedly agree with Judge Neal's well-reasoned dissent and share his philosophy concerning the role of the courts as that of being the protector of our individual liberties. I write separately to note one additional problem.

The majority purports to affirm the trial court for reaching the right result, even though it states the wrong reason. This is certainly a legitimate convention, and indeed, one that we are bound to follow. However, if we resort to this practice it is incumbent upon us to make sure that we review the entire body of relevant law and select the correct principle of law to rely upon.

In relying on *New York v. Beltron*, 453 U.S.454 (1981) and *Thornton v. United States*, 541 U.S. 615 (2004), the majority has ignores the fact that our supreme court tends to interpret Article 2,

section 15, of the Arkansas Constitution in a manner that provides greater protection to the people of this state than the United States Supreme Court's interpretation of the Fourth Amendment. *See, e.g., Woolbright* v.State, 357 Ark. 63, 160 S.W.3d 315 (2004) (knock and talk); *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004) (knock and talk); *Griffin v. State*, 347 Ark. 788, 67 S.W.3d 582 (2002) (nighttime search); *State v. Sullivan*, 348 Ark. 647, 74 S.W.3d 215, (2002) (pretextual arrest). Had the majority not ignored Arkansas law, undoubtedly they would have noted that the search of Mr. McDonald's car did not comport with Rule 12.4 of the Arkansas Rules of Criminal Procedure.

Rule 12.4 states:

> (a) If, at the time of the arrest, the accused is in a vehicle or in the immediate vicinity of a vehicle of which he is in apparent control, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are connected with the offense for which the arrest is made, the arresting officer may search the vehicle for such things and seize any things subject to seizure and discovered in the course of the search.
>
> (b) The search of a vehicle pursuant to this rule shall only be made contemporaneously with the arrest or as soon thereafter as is reasonably practicable.

Simply stated, nowhere in the record is there an indication that the police had any belief, much less a reasonable one, that Mr. McDonald's car contained anything connected with the hot check charges for which he was being arrested. Accordingly, the methamphetamine that the police discovered in their unlawful search should have been suppressed, and this case should have been reversed.

I respectfully dissent.

WENDELL GRIFFEN, Judge, dissenting. I agree with Judge Neal that the cases cited by the majority do not justify affirmance because in each of those cases, there was a nexus between the vehicle and the arrest that is sorely lacking in the instant case. Therefore, I join his dissent.

I also write separately to emphasize that by affirming a search where there was no nexus between the vehicle and the arresting conduct and where there was no need to safeguard the vehicle or

its contents, the majority has created a new and dangerous precedent which seems to allow police to conduct an at-will search of the vehicle of any recent occupant who is arrested near the vehicle. The majority affirms the search here on the minimal facts that "appellant was clearly at least a recent occupant of his vehicle and in close proximity to his vehicle when he was placed under arrest." In doing so, it transforms appellant's arrest for hot checks and non-payment of child support into a pretext for an illegal search for drugs — illegal because the search was neither justifiable as a search incident to arrest or as an inventory search.

I cannot join the majority's decision because it lowers the State's burden of proof required to demonstrate that a warrantless search has been reasonably conducted and ignores the requirements of our federal and state law and rules of criminal procedure. The majority condones the search of a vehicle where the defendant was arrested outside the vehicle, where he gave no consent to have the vehicle searched, where there was no nexus between the vehicle and the criminal conduct upon which the arrest is based *or any other crime*, where there was no objective basis to believe that the vehicle posed a threat to the public or to the officers, and where there was no reason to believe the search was necessary to safeguard the vehicle or its contents. *See Knowles v. Iowa,* 525 U.S. 113 (1998); Ark. R. Crim. P. 12.1; Ark. R. Crim. P. 12.4; Ark. R. Crim. P. 12.6.

Because a warrantless search of a vehicle is presumptively unconstitutional, the burden is on the State to show legal justification for the warrantless search. *Saul v. State,* 33 Ark. App. 160, 803 S.W.2d 941 (1991). There are two historical rationales for the search incident to arrest exception to the warrant requirement, neither of which is present in this case: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. *Knowles v. Iowa, supra.* The United States Supreme Court adopted a bright-line rule regarding warrantless searches incident to lawful arrests in *New York v. Belton,* 453 U.S. 454 (1981). The *Belton* court held that when a police officer has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. However, the scope of the search must be strictly tied to and justified by the circumstances. *Id.* Moreover, an arrest may not be used as a pretext to search for evidence of other crimes; where the search and not the arrest is the officer's true objective, the search is not a

reasonable one within the meaning of the Constitution. *Richardson v. State*, 288 Ark. 407, 706 S.W.2d 363 (1986); *Izell v. State*, 75 Ark. App. 377, 58 S.W.3d 400 (2001).

We have heretofore never interpreted *Thornton v. United States*, 541 U.S. 615 (2004), *New York v. Belton, supra, United States v. Chadwick*, 433 U.S. 1 (1977), or *United States v. Robinson*, 414 U.S. 218 (1973), in the manner that the majority does today, which divorces an officer's authority to conduct a warrantless search of a vehicle from the applicable laws and rules of criminal procedure governing such a search. Neither *Chadwick* nor *Robinson* involved the search of an automobile. As Judge Neal notes in his dissent, in *Thornton* and *Belton* the vehicles were related to the criminal activity that led to the stop or arrest in those cases. Thus, neither *Thornton* nor *Belton* stand for the bald proposition that an officer may search the vehicle of a person who is arrested near his vehicle simply because the person "was clearly a recent occupant of his vehicle."

Prior to today's decision, our jurisprudence concerning searches of vehicles incident to arrest or inventory searches has typically involved situations in which operation of the vehicle itself provided probable cause, such as during the commission of a traffic violation; or where the defendant gave consent to search, the officer saw something in plain view in the vehicle, or the officer smelled an incriminating odor. *See, e.g., MacDaniel v. State*, 337 Ark. 431, 990 S.W.2d 515 (1999) (suspect stopped for crossing center line, officer smelled marijuana, and the defendant gave consent to search); *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995) (suspect stopped for crossing center line and officer saw marijuana roach in plain view in the front seat). The majority cites the general law governing searches incident to arrest, but, tellingly, cites no Arkansas case in which we have upheld a search, as either a search incident to arrest or as an inventory search, where the vehicle was not related to the conduct for which a defendant was being arrested or to any other crime. Indeed, it appears that we have never before affirmed a search incident to arrest merely because the suspect was a recent occupant of his vehicle and was near his vehicle at the time of the arrest.

Searches and seizures performed incidental to an arrest are governed generally by Arkansas Rule of Criminal Procedure 12.1; searches of vehicles performed incidental to an arrest are governed specifically by Rule 12.4. However, an examination of those rules

reveals none of the factors that would justify a warrantless search in the instant case. Rule 12.1 provides:

> Rule 12.1 Permissible purposes.
>
> An officer who is making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused for the following purposes only:
>
> (a) to protect the officer, the accused, or others;
>
> (b) to prevent the escape of the accused;
>
> (c) to furnish appropriate custodial care if the accused is jailed; or
>
> (d) to obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in conjunction with the offense.

Rule 12.4, in turn, provides:

> Rule 12.4. Search of vehicles; permissible circumstances.
>
> (a) If, at the time of the arrest, the accused is in a vehicle or in the immediate vicinity of a vehicle of which he is in apparent control, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are connected with the offense for which the arrest is made, the arresting officer may search the vehicle for such things and seize any things subject to seizure and discovered in the course of the search.
>
> (b) The search of a vehicle pursuant to this rule shall only be made contemporaneously with the arrest or as soon thereafter as is reasonably practicable.

The majority briefly acknowledges the existence of these rules and states that Rule 12.1 allows the search of a passenger car "without regard to whether the circumstances warrant a reasonable belief that the vehicle contains things connected with the offense for which the arrest was made." This is a dangerously incomplete statement of the requirements of this rule. If an officer

has no reasonable cause to believe that items subject to seizure will be found in the car, then he may not search the car unless one of the other factors listed in the rule are present — the search is necessary to protect the officer, the accused, or others; to prevent the escape of the accused; or to furnish appropriate custodial care if the accused is jailed. The majority here, for all of its citations to authority, fails to demonstrate how any of the factors under 12.1 or 12.4 are met in this case.

In this case, appellant was arrested based on outstanding warrants for hot checks and non-payment of child support, but was convicted of possession of methamphetamine found in his jacket, which was located in his vehicle. The officers testified that they knew where appellant lived, so that when appellant waved they understood he was going to his house; Chief Earl Hyatt further stated that appellant had a tendency, when being stopped, to try to get to his house. Thus, the officers knew where appellant was going. There is not even the slightest indication that appellant was attempting to evade apprehension, flee, or disregard the officer's directive to stop. Appellant parked his vehicle on the street in the vicinity of his private residence and had been inside his home for thirty to forty-five minutes before he was arrested. Officer James Loudermilk testified that on the street where appellant lives most of the houses do not have off-street parking and that most people park on the side of the road, as appellant did. Loudermilk also testified that appellant did not give consent for the officers to search the car.

On these facts, it is clear that the search was not justified as a search incident to an arrest because none of the factors listed in *Knowles, supra*, Rule 12.1, or Rule 12.4 are present. First, there is no proof that the vehicle posed a safety threat to the police or to the public that would require its impoundment. The officers provided no testimony that the search of the vehicle was necessary to disarm appellant; *in fact, Hyatt began the inventory search before Loudermilk concluded his protective pat-down of appellant.* Moreover, neither officer testified that the vehicle was parked in an unsafe manner, in a location that made it dangerous to leave unattended, or was illegally parked. Instead, they testified that the vehicle was parked in the vicinity of appellant's home, on the side of a public street, consistent with the manner in which other residents who lived in the neighborhood parked their vehicles.

Second, there was no proof that the search was necessary to prevent appellant from escaping. He was already detained. Third,

because the vehicle was parked near appellant's home, there was no reason to search the vehicle to provide custodial care.

Fourth, appellant was arrested on warrants for hot checks and non-payment of child support, but the officers had no reason to believe that the vehicle contained any evidence related to those offenses; nor did the officers have reason to believe the vehicle contained evidence related to any other offenses. *Cf. Haygood v. State*, 34 Ark. App. 161, 804 S.W.2d 470 (1991) (affirming search of vehicle incident to arrest where, based on a reliable informant's tip, officers had reasonable cause to believe that the automobile contained items subject to seizure). Especially important, appellant's vehicle was not involved in any traffic violation. Loudermilk testified that he had not received any information that appellant was engaged in any illegal activity in driving by the automotive store and that he had received no reports that appellant was driving erratically. Hyatt did not recall whether appellant's tags had expired and said that he was not concerned about appellant's registration.

It is true that drugs, weapons, and other contraband are commonly found in vehicles and on a defendant's person or in his belongings. However, that reality does not prove that the officers in this case had a reasonable belief that evidence relating to the hot-check charges and non-payment of child support charge would be found in appellant's vehicle. The pretextual nature of the search in this case is vividly demonstrated by simply asking, on the instant facts, what evidence could any officer have reasonably believed would be found in appellant's vehicle that was related to the hot-check and non-payment charges? Is there any objective basis for thinking the officers would find a checkbook registry documenting that appellant had a negative balance at the time he wrote the specific checks that were returned for insufficient funds? What evidence the officers could have reasonably believed they would find relating to non-payment of child support, or any other charge, is even more difficult to fathom. The majority opinion fails to shed any light on this subject or to otherwise demonstrate how the search in this case is affirmable as a valid search incident to arrest. Respectfully, I contend that the majority opinion is silent because anything that might have been written to justify the search would have required sheer speculation.

This case is similar to *Izell v. State, supra.* In that case, we reversed a warrantless search where the defendant's vehicle was parked on private property, he was arrested on a minor offense, he

had already been restrained and patted down, and therefore, he posed no danger to the officers or to any evidence in the vehicle. We held that the arrest was neither a valid search incident to arrest nor a valid inventory search because no probable cause existed to assume the vehicle was related to any criminal activity, and because the vehicle, was, in fact, unrelated to the charge for which the defendant was being arrested — violation of a chancery court order prohibiting him from associating with his former girlfriend. *Id.*[1] We further held that because the vehicle was on private property, it posed no risk to public safety and was not likely to be in danger of tampering.

The only appreciable differences between the *Izell* case and the instant case is that appellant here was not arrested on private property and was arrested in the vicinity of his vehicle. However, those differences are not dispositive. First, even though the vehicle was not on private property, I am unaware of any rule or case law that states unless a vehicle is located on private property, then *ipso facto*, it is automatically in need of safeguarding, regardless of the attendant circumstances. Even where a vehicle is stopped on a public road or highway and searched under the exigent circumstances exception to the warrant requirement, the State must still prove probable cause to believe the search of the vehicle will yield contraband or evidence useful for prosecution of a crime. *Chambers v. Maroney,* 399 U.S. 42 (1975); *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980). In any event, there was no testimony by the officers that would establish that the vehicle or its contents needed safeguarding due to the location or manner in which it was parked. *Cf. Stephens v. State*, 342 Ark. 151, 28 S.W.3d 260 (2000) (affirming a search incident to arrest for hot-check charges where the defendant was arrested at a grocery store). Thus, the fact that the vehicle was located on a public street did not justify an inventory search in this case, especially where the vehicle was located in the vicinity of appellant's home.

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[1] The police may perform an inventory search of a vehicle where a defendant is arrested at his home under certain circumstances. *Fultz v. State,* 333 Ark. 586, 972 S.W.2d 222 (1998) (affirming inventory search of vehicle in plain view where police officers were lawfully on the defendant's premises and in close proximity to husband's vehicle at time of her arrest, where the husband had previously admitted that he used vehicle to transport methamphetamine, and indicated to officers that there may have been a gun in vehicle). The *Fultz* facts are obviously not applicable here, where, *inter alia,* there was no indication that the vehicle was related to any criminal activity.

Second, the fact that appellant was arrested near his vehicle is not dispositive because a suspect's proximity to a vehicle, even when combined with his recent occupancy of the vehicle, does not provide a reasonable belief that the vehicle contains contraband, fruits of a crime, evidence of the commission of the offense for which the accused has been arrested, or other things criminally possessed or used in conjunction with the offense. If that were the rule, then any recent occupant of a vehicle who is arrested near his vehicle, for any reason, would be subject to having his vehicle searched, and our current applicable federal and state laws concerning warrantless seizures would be meaningless. While that is the apparent rule that the majority would adopt, it is clearly not countenanced under the authorities noted herein.

Third, the majority attempts to distinguish *Izell* because the defendant in that case had been inside his parent's home for thirty to forty-five minutes before he was arrested. However, that fact does not minimize the applicability of the *Izell* case to the instant facts. The *Izell* court did not solely rely on the fact that the defendant was not a recent occupant of his car when he was arrested; the court also explicitly relied on the fact that there was no probable cause to believe that the vehicle contained any evidence of a crime because the *Izell* defendant was being arrested on a charge unrelated to his vehicle.

Thus, by affirming on the minimal facts that appellant was arrested near his car and was a recent occupant of his car, the majority here creates a new and draconian standard for analyzing the warrantless searches of automobiles that allows the State to sustain such searches on a lesser showing of proof than is required under federal law and Arkansas law. In short, the search of the vehicle in this case cannot be justified as a search incident to arrest because none of the factors supporting such a search were present.

Additionally, although not addressed by the majority, the search cannot be justified as an inventory search. The law governing inventory searches has been succinctly summarized as follows:

> It is well-settled that police officers may conduct a warrantless inventory search of a vehicle that is being impounded in order to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger. *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987); *see also, Welch v. State*, 330 Ark. 158, 955 S.W.2d 181 (1997). An inventory search, however,

> may not be used by the police as a guise for "general rummaging" for incriminating evidence. *Florida v. Wells*, 495 U.S. 1, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990); *Welch v. State, supra.* Hence, the police may impound a vehicle and inventory its contents only if the actions are taken in good faith and in accordance with standard police procedures or policies. *See Colorado v. Bertine, supra*; *Florida v. Wells, supra*; *Welch v. State, supra.* In *Welch v. State*, we clarified that these standard procedures do not have to be in writing, and that they may be established by an officer's testimony during a suppression hearing.

Benson v. State, 342 Ark. 684, 688, 30 S.W.3d 731, 733 (2000). Additionally, Arkansas Rule of Criminal Procedure Rule 12.6(b), governing inventory searches, provides: "A vehicle impounded in consequence of an arrest, or retained in official custody for other good cause, may be searched at such times and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents."

Typically, we have upheld an inventory search on the basis that it was reasonably necessary for safekeeping purposes because the vehicle was stopped or abandoned in a public place. *See, e.g.*, *Asher v. State*, 303 Ark. 202, 795 S.W.2d 350 (1990) (affirming inventory search of vehicle where driver was removed from the accident scene in semi-conscious state); *Cooper v. State*, 297 Ark. 478, 763 S.W.2d 645 (1989) (affirming inventory search of vehicle where narcotics suspect fled scene after attempting to shoot officer); *Lipovich v. State*, 265 Ark. 55, 576 S.W.2d 720 (1979) (affirming inventory search where the vehicle, reported as stolen, was found abandoned and was a hazard on a public highway); *Bratton v. State*, 77 Ark. App. 174, 72 S.W.3d 522 (2002) (affirming inventory search of a vehicle that had been involved in accident and left disabled on road after the defendant had been transported to hospital); *Colyer v. State*, 9 Ark. App. 1, 652 S.W.2d 645 (1983) (affirming inventory search where the driver, a transient, was arrested on outstanding warrants and for being drunk on the highway, and where the vehicle lacked a license and was stuck in mud).

Inventory searches have also been affirmed where the search of the vehicle is related to the alleged criminal activity. *Chambers v. Maroney, supra* (affirming where the police had probable cause to believe that the robbers, carrying guns and fruits of crime, had fled the scene in the vehicle that was impounded and searched at the station house); *Lewis v. State*, 258 Ark. 242, 523 S.W.2d 920 (1975)

(affirming the warrantless search of an automobile where the search was closely related to reason defendant was arrested, the reason the automobile was impounded, and the reason it was being retained); *Cf. Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978) (reversing the warrantless seizure of a truck because the defendant was arrested for transporting controlled substances and there was no evidence that the particular truck had been used to transport controlled substances).

However, I found no other cases where we have affirmed an inventory search absent the need to safeguard the vehicle and its contents or where there was no connection between the vehicle and the crime for which the suspect was being arrested. Here, as noted previously, there was no evidence that the vehicle needed safeguarding, that it posed a public-safety hazard, or that it contained any evidence related to the hot-check and non-payment of child support charges. Accordingly, there is simply no evidence that it was "reasonably necessary" for the officers in this case to conduct an inventory search of appellant's vehicle for the purpose of safekeeping the vehicle or its contents.

While the police may impound a vehicle and inventory its contents without a warrant where the actions are taken in good faith and in accordance with standard police procedures, *Welch v. State*, *supra*, that does not appear to be what transpired in this case. In reversing in *Izell v. State*, *supra*, we found that the police department's policy of inventorying vehicles did not save the illegal search because the circumstances necessary to trigger the policy never existed in that case. Similarly, here there is no evidence that the search was performed pursuant to any established departmental policy, because there is no proof that the police department had implemented a policy directing a search of a vehicle in this situation. To the contrary, Hyatt testified that the departmental policy was to perform inventory searches where a person is arrested outside of his vehicle and where "the vehicle was out on public property or out somewhere." Clearly, that was not the case here, where appellant's vehicle was parked on the street in the vicinity of his home.

This decision is especially troubling for another reason. Public respect for the law, and the people who perform the important work of law enforcement, is closely related to public confidence that the people who enforce our laws are themselves accountable for respecting civil liberties. When police officers and agencies disregard civil liberties, well-established rules of criminal

procedure, and their own internal practices, the public is entitled to look to courts and judges for vindication of those basic liberties.

It is a deeply troubling situation when courts and judges uphold police conduct that violates fundamental civil liberties and do so in the face of longstanding judicial precedent. When the public cannot trust the police to respect civil liberties or trust courts and judges to uphold those liberties, a society runs dangerously close to becoming a police state. No police officer, agency, judge or court ever admits preference for a police state. Rather, liberty is lost, as Judge Neal's dissent observes, by degrees. Today's decision is not a mere wayward step down a slippery slope; it is a running, head-first leap into an unconstitutional abyss. Even the members of the majority cannot fathom the depth of the judicial hole that this decision creates. We should not expect the public to respect a decision so clearly out-of-step with all known standards for judging the validity of warrantless vehicular searches.

In responding to my dissent, the majority has misapprehended my position. First, the majority states that my position is "wrong," then cites to the automobile exception, which it then concedes is inapplicable. Nowhere in my opinion do I assert that the automobile exception applies in this case. Next, the majority asserts that I argue that "the search of a vehicle may be conducted as an incident of the occupant's arrest only where there is reasonable cause to believe that the search will yield evidence of a crime." Nowhere in my argument do I assert this proposition.

Instead, while noting that we have yet to affirm a search in which the vehicle was not related to the arresting conduct, I consistently argue that the search in this case is not supported under federal or state law, including our rules of criminal procedure. While the majority waxes eloquent about the history of searches incident to arrest, it conveniently discounts the fact that we have never before upheld a search where none of the factors under our rules of criminal procedure are present. What we have done is applied Rule 12.1 and 12.4 in light of *Belton*, *Thornton*, and other applicable federal and state law. Despite the majority's assertion, this approach is neither an "ad hoc standard" or a "nebulous" standard that "is not the law." Rather, the standards cited are based on longstanding rules of law mandated by the United States Supreme Court and by the Arkansas Supreme Court. If these rules of law constitute "heady stuff," it is "heady stuff" approved by our highest state court, and the highest court in our land. It is incumbent upon law enforcement officers and judges to

respect this "heady stuff." Moreover, it is the sworn duty of judges to examine nuances of time, place, and circumstance to determine whether a person's Fourth Amendment rights have been violated.

Given the facts of this case and applicable federal and state law, I am at a loss to see how the majority concludes that the warrantless search in this case was justified merely because appellant was a recent occupant of his vehicle and was arrested near his vehicle. I respectfully dissent.

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

OLLY NEAL, Judge, dissenting.

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. Their motto should be obsta principiis.[1]

— *Boyd v. United States*, 116 U.S. 616 (1886).

I respectfully dissent in this case. In the cases cited by the majority, where the court has found lawful searches incident to arrest, the vehicle involved somehow factored into the circumstances surrounding the arrest. *See Thornton v. United States*, 541 U.S. 615 (2004) (petitioner slowed his vehicle down so as to avoid driving next to officer); *New York v. Belton*, 453 U.S. 454 (1981) (trooper observed vehicle traveling at an excessive rate of speed). Arkansas cases seem to have followed this same principle. *See State v. Earl*, 333 Ark. 489, 970 S.W.2d 789 (1998) (officer observed truck run a stop sign); *Campbell v. State*, 294 Ark. 639, 746 S.W.2d 37 (1988) (vehicle identified by victim as the one his robbers occupied); *Thornton v. State*, 85 Ark. App. 31, 144 S.W.3d 766 (2004) (tag belonged to a truck and not the automobile to which it was affixed); *Kearse v. State*, 65 Ark. App. 144, 986 S.W.2d 423

[1] *Obsta principiis* means "withstand beginnings; resist the first approaches or encroachements." BLACK'S LAW DICTIONARY 1107 (8th ed. 2004).

(1999) (appellant was speeding); *Kimery v. State*, 63 Ark. App. 52, 973 S.W.2d 836 (1998) (officer initiated stop because appellant turned off the road without signaling).

Here, appellant was arrested on child-support and hot-check warrants, and his vehicle in no way factored into Officer Loudermilk's reasoning for the arrest. Loudermilk testified that, after appellant exited his vehicle that appellant parked in front of his home, he arrested appellant because of the outstanding warrants and not because of any traffic infractions he had witnessed. Hence, as a watchful guardian of the constitutional rights of our citizens, I cannot agree that the basis used by the majority — lawful search incident to arrest — was applicable in this situation, especially considering that the vehicle played no role in the conduct resulting in the arrest. Allowing such a basis to support an affirmance in this case is a deviation, however slight, from my obligation to safeguard the constitutional rights of our citizens. The court's duty is to protect those rights, not to encroach upon them and dilute their protections every chance it sees fit.

I am authorized to state that Judges HART, GLADWIN, and GRIFFEN join me in this dissent.

Tony HORTON *v.* Roy Gene HORTON

CA 04-1365 211 S.W.3d 35

Court of Appeals of Arkansas
Opinion delivered June 22, 2005

Batchelor & Batchelor, by: *Fines F. Batchelor, Jr.*, for appellant.

Eddie N. Christian, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. Appellant and appellee were divorced on August 31, 2004, after thirty-one years of marriage. The only issues at the divorce hearing were alimony and property division. The trial court awarded appellant $300 per month alimony and, in the course of the property division, declared that the couple's home was marital property, despite it having been deeded to appellant in 1982. Appellant now argues that: 1) the amount of alimony was too low; 2) the trial court failed to divide the parties' property equally or state reasons for making an unequal division; 3) the trial court erred in declaring the parties' home to be marital property. We reverse and remand on the basis of appellant's third argument.

The evidence surrounding the ownership of the parties' home was as follows. Appellee deeded the home to appellant in 1982. According to appellant, she filed for divorce around that time when she discovered that appellee had a child with another woman. She said that her attorney advised her to have the home deeded to her, and she further said that appellee told her that the house was a gift to make sure that she would not be "out on the street" with two children. The deed was filed on October 15,

1982, the same day that it was signed by appellee. The record as abstracted contains no evidence regarding the circumstances of the parties' reconciliation after the deed was executed or any evidence as to the manner in which the house was maintained or paid for thereafter. Appellee testified only that he had agreed to deed the house to appellant and that he would not dispute that the house had remained in appellant's name since the deed was executed. He agreed with his attorney's statement that "there may be some problems with regard to the house because you've deeded that house to her."

The trial court ruled that the parties' home was marital property. Appellant, citing *Smith v. Smith*, 6 Ark. App. 252, 640 S.W.2d 458 (1982), contends that, based on the foregoing evidence, the house remained her separate property after it was deeded to her in 1982. We agree.

In *Smith,* the parties separated, and the husband filed for divorce. Later, they reconciled on the condition that the husband convey his interest in the marital home to the wife, which he did. The parties separated again about five months later, and the wife filed for divorce. The husband then asked the court to set aside the deed. The trial court refused, and this court affirmed, ruling that there was no evidence of an agreement that the property would belong to the wife only if the reconciliation was successful, and there was no evidence of any agreement that the husband would regain an interest in the property. Likewise, in the present case, there is no evidence that appellant would retain the property only under certain circumstances or that appellee would regain an interest in the property.

Moreover, we observe that there are other cases even closer factually to the case at bar because they involve a gift of the marital home from one spouse to another. In *Cole v. Cole*, 53 Ark. App. 140, 920 S.W.2d 32 (1996), the husband, a truck driver, had a drinking problem and had been charged with DWI. The wife, fearing that he would cause an accident and that they would "lose everything," asked him to put the house in her name. He did so but later, during their divorce proceeding, said that he merely "went along" with his wife and did not realize that he was signing away his rights in the house. The supreme court observed that the deed was filed of record in the same month that it was signed; that, although the husband continued to live in the house after the conveyance, the wife paid the mortgage, taxes, and insurance from an account that was determined to be her separate property; and

that there was no evidence that the wife ever said that she would deed the property back to the husband. While *Cole* contains a factor that is missing in the case at bar — evidence as to who paid the household expenses following the conveyance — it does point up the significance of the immediate recording of the deed and the lack of an agreement that the property would be deeded back to the donor spouse.

In *Lyons v. Lyons*, 13 Ark. App. 63, 679 S.W.2d 811 (1984), the husband was living in California and the wife was living in Arkansas. Following telephone and letter communications, the husband agreed to deed their marital residence to the wife. Upon the parties' divorce, he asked that the deed be set aside. He testified that he made the conveyance to "get some peace and quiet" from his wife's demands. This court ruled that:

> The chancellor found that [husband] voluntarily executed the deed, and although the court did not specifically find that there was a gift intended, it would have been justified in so doing. There was ample evidence from which the chancellor could have found that there was an actual delivery of the subject matter of the gift with a clear intent to make an immediate, unconditional and final gift accompanied by an intent to release all future dominion and control. A gift acquired by either spouse subsequent to the marriage is excluded from the definition of martial property by the provisions of Ark. Stat. Ann. § 34-1214(B)(1) (Supp. 1983) [now Ark. Code Ann. § 9-12-315(b)(1) (Repl. 2002)].

Id. at 66, 679 S.W.2d at 813-14 (case citations omitted).

Finally, in *Dennis v. Younts*, 251 Ark. 350, 472 S.W.2d 711 (1971), the husband and wife separated in the spring of 1962, when the husband began living with another woman. On July 19, 1962, the husband deeded the marital home to his wife because he "felt sorry" for her. The pair resumed cohabitation in 1964 and lived on the property until the wife's death in 1967. Thereafter, her children by a former marriage claimed the property by virtue of the 1962 deed. The husband asserted that the deed was part of a property settlement prior to divorce and that it should be canceled because a reconciliation occurred and the parties resumed their marital relationship. The chancellor upheld the deed, and the supreme court affirmed. The court noted that the record contained no evidence that the deed was executed as part of a property settlement agreement in contemplation of divorce, and there was

no evidence that the wife agreed to do anything as an inducement or consideration for the transfer. Rather, the evidence showed that the husband deeded the house because, in the words of the trial court, he "moved in with another woman and got to feeling bad about his wife." In short, the supreme court said, the husband made a gift of the property to his wife.

In the case before us, there is no evidence that the parties entered into a property settlement agreement or reconciliation agreement. There is also no evidence that appellant agreed to do anything as an inducement or consideration for the transfer. The only proof regarding the parties' intentions is that appellee made a gift to appellant so that appellant and her children would have a place to live after appellee became involved with another woman. The law presumes a gift when the donor registers legal title in a family member's name. *See Perrin v. Perrin,* 9 Ark. App. 170, 656 S.W.2d 245 (1983). Further, the deed was immediately recorded, and there was no discussion of appellant's deeding the property back to appellee. Finally, appellee, in his own testimony, seemed resigned to the conclusion that he was not entitled to the property. He testified that he was basically asking the court to award him his business, his business assets, and his pension, and to make a division of debt; he understood that there might be some "problems" with the house because he had deeded it to appellant. Given these circumstances, we believe that the trial court clearly erred in declaring the home to be marital property rather than appellant's separate property.

Appellee relies on the case of *Ward v. Ward,* 249 Ark. 1001, 463 S.W.2d 90 (1971), but that case is distinguishable from the case at bar. In *Ward,* the parties were divorced in 1965 and, by virtue of their property settlement agreement, the wife quitclaimed the home to the husband. Thereafter, the decree was set aside and the parties resumed the marriage. The deed was not recorded by the husband until 1969, after the wife learned that he had a young girlfriend. In the ensuing divorce action, the trial court ruled that the home was marital property. The supreme court affirmed, holding that the "only inference from the parties' conduct is that they intended to abrogate the property settlement at the time they caused the divorce decree to be set aside." *Id.* at 1004, 463 S.W.2d at 92. Unlike the situation here, *Ward* involved a deed that was part of a property settlement and divorce decree that were later set aside. Further, the grantee in *Ward* waited four years to record his

deed and did so only when it looked as though another divorce proceeding was forthcoming. These factors are strong indicators that the parties in *Ward* did not intend for the deed to remain viable after the 1965 divorce decree was set aside. No such factors are present in this case.

Based on the foregoing, we reverse the trial court's finding that the home was marital property. Because our reversal will very likely affect the overall property division as well as the alimony award — alimony and property division being complementary devices that a trial judge employs to make the dissolution of a marriage as equitable as possible, *see Cole, supra* — we reverse and remand the case in its entirety for reconsideration in light of our holding herein.

Reversed and remanded.

CRABTREE, J., agrees.

BAKER, J., concurs.

KAREN R. BAKER, Judge, concurring. I concur in the majority's decision to reverse and remand this case. However, I write to address the trial court's rather troubling decision to deny appellant's request to restore her former name because she chose to seek alimony. The court's response to appellant's request, as set forth in the divorce decree, was as follows:

> The Court finds it is somewhat ironic that [appellant] requested that her name be changed to the name she bore before this marriage, while on the other hand requesting that [appellee] be ordered to pay her alimony. Based upon this Court's grant of alimony to [appellant] and [appellant's] request for alimony, the [appellant's] request for name change is denied. That if the respective attorneys can reach an agreement in this matter, then the Court would be inclined to enter an Order approving the name change, however, if the attorneys cannot agree, then that request is denied by the Court.

Appellant does not appeal this portion of the divorce decree, so I find no fault with the majority for not addressing it. However, I believe that the trial court's mistaken apprehension that appellant may not have her former name restored because she chose to seek alimony should not pass without comment.

Nowhere in our case law or statutory law do I find any link between the restoration of a party's name and an award (or lack of an award) of alimony. The purpose of alimony, as our courts have

stated many times, is to rectify, insofar as is reasonably possible, the frequent economic imbalance in the earning power and standard of living of the divorced parties in light of the particular facts of each case. *See Powell v. Powell*, 82 Ark. App. 17, 110 S.W.3d 290 (2003); *Holaway v. Holaway*, 70 Ark. App. 240, 16 S.W.3d 302 (2000). Pursuant to that purpose, the trial court ruled that appellant, who has been totally disabled since 1992, should receive alimony. Yet, as the result of seeking that to which she was legally entitled, appellant was denied her reasonable request for a name change. These two matters — alimony and restoration of a former name — are separate and distinct issues with separate and distinct inquiries; a ruling on one has no bearing on the other.

Furthermore, our name-change statutes, Ark. Code Ann. §§ 9-2-101 and 102 (Repl. 2002), place no condition on a name change other than that "good reasons" be shown. In fact, our name-change statutes are merely supplementary to the common law, *see Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988), which provides that an adult has the right to change his or her name absent fraud, misrepresentation, or interference with the rights of others. *See generally* 57 AM. JUR. 2D *Name* §§ 2, 16 (2d ed. 2001); 65 C.J.S. *Names* § 21 (2000).

Appellant, as an adult acting without a fraudulent purpose, was entitled to have her name changed as she requested, whether or not she sought an award of alimony. I recognize that Ark. Code Ann. § 9-12-318 (Repl. 2002) provides that the trial court "may" restore the wife's former name. However, where fraud or other illegal purpose is absent, I cannot conceive of a situation where it would not be an abuse of discretion to deny a name-change request in a divorce action. Certainly, a wife should not be forced to effectively "purchase" her former name by foregoing the alimony to which she may be legally entitled, nor should her name be used as a bargaining chip in negotiations of monetary matters, as the decree suggests.

Cardrick Deon FLOWERS *v.* STATE of Arkansas

CA CR 04-701 210 S.W.3d 907

Court of Appeals of Arkansas
Opinion delivered June 22, 2005

Patrick J. Benca, for appellant.

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

ROBERT J. GLADWIN, Judge. A Jefferson County jury found Cardrick Deon Flowers guilty of aggravated robbery, theft of property, and possession of firearms by certain persons. He was sentenced to an aggregate term of forty years' imprisonment. He raises two points on appeal: (1) the uncorroborated testimony of an accomplice was insufficient to support his convictions; and (2) the trial court erred in denying his motion for mistrial when the prosecutor made an improper remark in closing argument regarding his decision not to testify. We affirm.

A jury trial was held on February 18 and 19, 2004. Danielle Dante Shaw, an employee at a McDonald's restaurant in Pine Bluff, testified that on March 5, 2003, at approximately 11:00 p.m., she took out the trash as the restaurant prepared to close. She saw a car with three male occupants drive around the restaurant. When she had finished with the trash and was going back inside the restaurant, she noticed the same car going into the Total gas station and only one male was inside the car at that point. As she was closing the back door of the restaurant, a man grabbed the door, put a gun in front of her face, and told her not to say anything. The man turned her around, stuck the gun against her back, and told her to take him to the manager and the money. Once inside, he suddenly pushed her toward the sink area, and he and another man ran past her into the front area of the restaurant. Shaw ran out a side door and called the police. According to her, the first man, later identified as appellant, wore a black jacket and had pulled his shirt over his face revealing only his eyes. She also described him as very dark and skinny. She did not get a good look at the second man.

Kenneth J. Lee, Jr., another employee at McDonald's, testified that he was cleaning the grill when two men came inside the restaurant with Shaw in front of them. Lee identified a silver Ruger handgun and testified that the man who held that gun, later identified as Vic Norman, wore a black "bubble" jacket with a hood over his head. He stated that the other man, appellant, carried a black gun and wore a thin, dark blue or black jacket with his t-shirt pulled over half of his face. While Norman kept his gun pointed at Lee, appellant went to the front of the store and came back with the manager. Both robbers went into an office with the manager and then ran out the back door. Appellant carried till drawers, and Norman carried a bag that he pulled money out of and stuffed in his pockets. Lee said the men ran toward the Total gas station, which was near the Comfort Inn.

Yalonda Smith testified that she was working at the restaurant's drive-through window that night and saw a white Lincoln drive around the restaurant twice. She was sitting with the manager and Lee's girlfriend at the front of the restaurant when appellant, who had his t-shirt pulled over his nose, approached with a gun in his hand. Appellant told the manager to take him to the money. Yalonda and the manager walked toward the back of the store, and she saw another man, Norman, with a silver gun. Yalonda described him as skinny and very dark complected and

said that he wore a "puffy" black coat. She was ordered to lie down on the floor, and the manager went inside an office to open the safe.

Shenita Smith was at McDonald's that night to pick up her boyfriend Lee. She was sitting with the manager when appellant, who had his shirt pulled over his face, walked up and told them to open the safe. When neither one of them moved, appellant pointed his gun at them and told them again to open the safe. When the manager and Yalonda began walking toward the back of the store, Shenita suddenly ran out a side door that had not been locked and dialed 911 on a cell phone that the manager had slipped to her. She described appellant as tall, "kind of buff," stocky, and muscular. She said he had a black gun. Shenita said that from where she had been sitting, she could see another man near the back door and that he had a coat on with a hood covering his head.

Lawrence Joseph Warfield, the manager at McDonald's, testified that he was sitting at a table completing a truck order when appellant approached, pointed a gun at him, and told him to take him to the safe. Warfield said that appellant wore a thin black jacket and a white t-shirt that he used to cover part of his face. When he took the man to the safe, Warfield saw a second man, Norman, with a silver gun. He said that Norman wore a black "puffy" coat. Warfield opened the safe, and the men removed cash drawers that contained approximately $1,200. Warfield described Norman as "a skinny fellow" and more dark complected than appellant.

Vic Norman, an inmate at Cummins Prison, testified that he entered into a plea negotiation with the State in which he agreed to testify against his co-defendants in exchange for twenty years' imprisonment for aggravated robbery. Norman said that, on the night in question, appellant called him and asked him to go to Pine Bluff to see Alvin Akins. The two men traveled in a white Lincoln. Norman stated that he left Little Rock with a nine-millimeter Ruger and wore a navy blue or black "goose jacket," a jersey, and jeans. The two men picked up Akins, and they drove around Pine Bluff drinking some alcohol they had purchased. Appellant, who had been driving, became inebriated to the point that Akins got behind the wheel. The three men drove into the McDonald's parking lot, saw someone taking out the trash, and decided to rob the restaurant. According to Norman, he and appellant entered the restaurant with guns. At trial, Norman identified the guns that he and appellant carried that night. Norman stayed in the back of the

restaurant, while appellant went to the front. Norman said that he covered his face with the hood of his coat. They forced the manager to open the safe, took the money and cash drawers, and ran out the back door to an area behind the Comfort Inn. They got back into the vehicle with Akins, and the police arrived shortly afterwards. Although the police ordered the men to stop, Akins did not stop the car until it was blocked by police with a patrol unit, at which point Akins put the car in reverse. Akins then fled on foot, and the police opened fire. Norman exited the car with his gun and was also shot at by the police. At trial, Norman identified the jersey he wore and noted the hole from the gunshot wound he received.

Officer Buddy L. Earnest with the Pine Bluff Police Department testified that a police car blocked the robbers' Lincoln and that the driver put the car into reverse and narrowly missed hitting him as well as two other officers. The driver made a U-turn; the car jumped a curb; and the car was driven into a field where it got stuck in the mud. Earnest saw Norman exit the vehicle from the front passenger's seat.

Todd Parent, formerly an officer with the Pine Bluff Police Department, testified as to the same events Officer Earnest described, but he saw both Norman and the driver, Akins, exit the Lincoln. In his pursuit of Akins, Parent ran past the Lincoln and noticed appellant slumped over in the back seat. Thinking that appellant was shot and critically injured, Parent continued to pursue Akins. After Akins was taken into custody, appellant was apprehended.

Adam Owings, formerly an officer with the Pine Bluff Police Department, arrived on the scene with Parent. His testimony was similar to Parent's, but he identified the blue-and-white jersey worn by Norman, who had pointed a gun at him. Lieutenant James F. Cooper with the Pine Bluff Police Department testified that he found a .22 pistol on the floorboard of the driver's seat of the white Lincoln Town Car. Officer Rick Bunting with the Pine Bluff Police Department testified that he found appellant hiding inside a dumpster and that appellant had been shot in the shoulder on the back.

Cathy Ruhl and Johnny Bumpass, crime scene technicians, identified several exhibits from their processing of the crime scene. Specifically, they identified several articles of clothing and two guns, which the witnesses who were employees of McDonald's had previously identified as those belonging to appellant and Norman.

The State then rested, and appellant's counsel moved for a directed verdict on each count. Appellant argued that, other than the "testimony of the accomplice Mr. Vic Norman," there was no independent corroborating evidence to link appellant to the crimes. The State argued that Norman's testimony had been corroborated, and the court agreed. The trial court denied the motion, finding that the "accomplice's testimony" had been sufficiently corroborated by other evidence. After discussing other matters, appellant's counsel submitted a jury instruction on accomplice testimony, which the court accepted.

Robert Eugene Flowers, appellant's father, testified next. Flowers testified that the Lincoln belonged to him and that appellant had borrowed the car on the night in question. He stated that he knew his son was a convicted felon but that he had a .22 derringer under the front seat of the car. According to Flowers, appellant did not know the gun was there. He stated that, had he been home when appellant borrowed the car, he would have removed the gun.

Appellant renewed his motion for a directed verdict, and the trial court denied the motion. The trial judge then instructed the jury, including the instruction about accomplices. The judge specifically stated, "Now, it is contended that the witness, Vic Norman, was an accomplice." During closing arguments, the prosecutor said:

> What you need to understand, at this time, the only people who truly know everyone that's involved in what has gone on and what has transpired is (sic) the defendant and his two accomplices. They are the only ones.

Appellant objected, arguing that the prosecutor had commented on the fact that he did not take the stand and testify. The prosecutor began to argue, but the trial judge interrupted, stating, "We're going to make a record on that. I'm going to let him finish. You've got a minute to wrap it up and we'll talk about that. I'm going to let him finish his argument." After the State finished its closing argument, the jury retired to deliberate. At that point, appellant moved for a mistrial based on the prosecutor's improper remarks. The State responded that it was simply rebutting appellant's argument. The prosecutor contended that, if his comment

referred to appellant's failure to testify, it was unintentional and that he simply meant that appellant and his accomplices were the only people who could possibly know what happened. In the meantime, the jury returned with its verdict, convicting appellant of aggravated robbery, theft of property, and possession of firearms by certain persons.

In the sentencing phase of the trial, the jury heard testimony from appellant's mother, Idelle Flowers. The judge instructed the jury; the State and appellant made closing arguments in regard to sentencing; the judge made a final instruction; and another hearing took place. Counsel for appellant asked for an opportunity to argue in support of her motion for mistrial. The judge discussed a two-prong test and reserved the right to decide on the mistrial "because what [the jury] ultimately decide[s] would certainly seem to me to be a factor in determining the second part of that two-prong test." The jury then announced its agreement as to sentencing, and the jury was dismissed. A hearing on the mistrial motion and sentencing was held on March 18, 2004. The trial judge found:

> [T]hat the comments by the prosecutor at that time were inappropriate and that they were indicative of bringing to the attention of the Court, I mean, the trier of fact, the jury, the fact that the defendant did not testify.
>
> Now, in examining the — examining the case law and examining the exact language that was used during the closing argument, the offensive language in this case, the Court, again, has compared that with the language that is mentioned in all of the cases that are reported that have the exact language and certainly mentioned in there and the Court is of the opinion, at this point, that the prosecutor was probably saved by a timely objection. It appears that the very next comment probably would have put those comments over the edge and would have caused the Court to have no recourse other than to declare a mistrial.
>
> The Court is of the opinion that the offending language is not sufficient to grant a mistrial. . . .

I. Accomplice Corroboration

On appeal to this court, appellant argues that the uncorroborated testimony of an accomplice was insufficient to support his

convictions. Appellant concedes that the crime was independently established but argues that the remaining evidence did not tend to connect him with its commission. Appellant admits that the evidence put him in proximity of the crime but contends that there was not substantial evidence of his guilt, other than Norman's testimony.

The State, relying on *Windsor v. State*, 338 Ark. 649, 1 S.W.3d 20 (1999), contends that appellant's argument is not preserved because Norman was never declared by the court to be an accomplice and because it is not clear from the jury's verdict forms whether it considered Norman to be an accomplice. The defendant bears the burden of proving that a witness is an accomplice whose testimony must be corroborated. *Windsor, supra.* A defendant must either have the trial court declare a witness to be an accomplice as a matter of law or submit the issue to the jury for determination. *Id.* In *Windsor,* Windsor never requested at trial that a witness be declared an accomplice, did not request that the witness's status be submitted to the jury for determination, and did not even request a jury instruction to the effect that the testimony of an accomplice requires corroboration. Accordingly, our supreme court held that Windsor's failure to have a witness declared an accomplice or to have the jury consider it precluded Windsor from raising the witness-corroboration rule on appeal.

The facts, however, in the case at bar are more akin to the facts in *Brown v. State*, 82 Ark. App. 61, 110 S.W.3d 293 (2003), where the Arkansas Court of Appeals noted that it was clear from the record that the court, the defense counsel, and the prosecutor all accepted the fact that certain witnesses were accomplices. In that case, the court unambiguously found certain witnesses to be accomplices, regardless of the omission of an express declaration to that effect. Here, not only did the defense counsel, the prosecutor, and the court refer to Norman as an accomplice, a jury instruction on accomplice testimony was submitted to the jury. A defendant must *either* have the trial court declare a witness to be an accomplice as a matter of law *or* submit the issue to the jury for determination. *Windsor v. State*, 338 Ark. at 656, 1 S.W.3d at 24 (emphasis added). Appellant's argument is therefore preserved for review on appeal; however, his challenge to the sufficiency of the evidence must nevertheless fail.

When reviewing the sufficiency of the evidence, we determine whether there is substantial evidence to support the

verdict, viewing the evidence in a light most favorable to the State. *Tate v. State*, 357 Ark. 369, 167 S.W.3d 655 (2004). Arkansas Code Annotated section 16-89-111(e)(1) (1987) provides that a person cannot be convicted of a felony based upon the testimony of an accomplice, unless that testimony is "corroborated by other evidence tending to connect the defendant with the commission of the offense." Corroboration is not sufficient if it merely establishes that the offense was committed and the circumstances thereof. *Martin v. State*, 346 Ark. 198, 57 S.W.3d 136 (2001). It must be evidence of a substantive nature since it must be directed toward proving the connection of the accused with a crime and not directed toward corroborating the accomplice's testimony. *Id.* The corroborating evidence need not be sufficient standing alone to sustain the conviction, but it must, independent from that of the accomplice, tend to a substantial degree to connect the accused with the commission of the crime. *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982). The test is whether, if the testimony of the accomplice were completely eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *Marta v. State*, 336 Ark. 67, 983 S.W.2d 924 (1999). The corroborating evidence may be circumstantial so long as it is substantial; evidence that merely raises a suspicion of guilt is insufficient to corroborate an accomplice's testimony. *Gordon v. State*, 326 Ark. 90, 931 S.W.2d 91 (1996).

■■ The evidence established that appellant had borrowed the Lincoln getaway car from his father on the night of the robbery. Witnesses from McDonald's testified regarding the role appellant played in the robbery and described his clothing and weapon, which items were collected at the scene. Appellant's jacket had blood stains on it and a hole corresponding to the location of the gunshot wound he received. Appellant was found hiding inside a dumpster near the site where the Lincoln became stuck in the mud. The presence of an accused in the proximity of a crime in a manner suggestive of joint participation is a relevant factor in determining an accomplice's connection to a crime. *Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999). Moreover, evidence of flight to avoid arrest may be considered by the jury as corroborative of guilt. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001). In the case at bar, evidence other than Norman's testimony

tends to establish the crime, and, to a substantial degree, connect appellant with its commission.

II. Motion for Mistrial

Next, appellant contends that the trial court erred in denying his motion for mistrial because the prosecutor improperly remarked on his decision not to testify. The law is well settled that to preserve an issue for appeal, a defendant must object at the first opportunity. *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000). Similarly, motions for mistrial must be made at the first opportunity. *Id.* The policy reason behind this rule is that a trial court should be given an opportunity to correct any error early in the trial, perhaps before any prejudice occurs. *Id.*

Here, appellant immediately objected to the prosecutor's remark but did not at that time request a mistrial; instead, appellant waited until after the prosecutor had finished his closing argument. When an objection to a statement during closing argument is sustained, an appellant has been given all the relief requested; consequently, there is no basis to raise the issue on appeal unless the appellant requests an admonition to the jury or a mistrial. *Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999). On the other hand, when an objection to the prosecutor's closing argument is clearly overruled, an objection without a request for further relief is sufficient to preserve the argument for review. *See id.* In the case at bar, the trial court's ruling was unclear, and, of course, the burden of obtaining a ruling is on the movant. *See Jenkins v. State*, 60 Ark. App. 1, 959 S.W.2d 57 (1997).

Even if appellant's motion for mistrial were not untimely, the prosecutor's remarks were not an impermissible comment on appellant's failure to testify or even a veiled reference to such. The prosecutor's statement asserted only that appellant knew what he had done because he was guilty. Moreover, the jury was instructed that appellant had an absolute constitutional right not to testify and that the fact that he did not testify was not evidence of guilt and could not be considered. A mistrial is an extreme remedy and is proper only when an error is so prejudicial that justice cannot be served by continuing the trial and when it cannot be cured by an instruction. *Gates v. State*, 338 Ark. 530, 2 S.W.3d 40 (1999). The decision to grant a mistrial is within the sound discretion of the trial court. *Id.* Under these circumstances,

the trial court did not abuse its discretion in denying the motion, had the argument been preserved for appeal.

Affirmed.

HART and ROAF, JJ., agree.

Joseph TEASLEY *v.* HERMANN COMPANIES, INC., AIG Claim Services, Inc., and Commerce & Industry Insurance Company

CA04-439 211 S.W.3d 40

Court of Appeals of Arkansas
Opinion delivered June 22, 2005

John Barttelt, for appellant.

SAM BIRD, Judge. This one-brief appeal arises from a decision of the Workers' Compensation Commission denying

appellant and appellees' joint motion that the Commission approve a twenty-five percent attorney's fee to be paid by appellant's medical service providers on the total amount of his medical bills. Appellant, Joseph Teasley, contends that the Commission erred as a matter of law in finding that his attorney was not entitled to attorney's fees based upon the value of medical services provided to appellant. The case is one of first impression and requires statutory interpretation of Ark. Code Ann. § 11-9-715(a)(4) (Repl. 2002). We hold that the Commission's interpretation of the statute is correct, and we affirm its decision to deny appellant's request for an attorney's fee.

The facts of this case were not disputed in the proceedings that gave rise to this appeal. Joseph Teasley sustained a severe injury to his right hand on the morning of June 10, 2002, while working for the Hermann Companies.[1] He was taken first to Arkansas Methodist Hospital in Paragould, Arkansas, but was then air-lifted to receive out-of-state emergency care at Jewish Hospital in Louisville, Kentucky, where three of his five amputated fingers were surgically reattached in alternative positions that evening. He remained hospitalized until July 19, 2002. Appellees controverted his claim for workers' compensation benefits upon learning that his drug test was positive for marijuana metabolites, but they accepted liability immediately before a pre-hearing telephone conference on January 22, 2003.

On January 9, 2003, appellant's attorney filed a notice of attorney's lien that asserted a lien for attorney's fees and provided notification to the Commission and medical providers, pursuant to Ark. Code Ann. § 11-9-715, of his intent to charge attorney's fees for collection of all medical bills related to appellant's injury. The statute, subsequently interpreted by the Commission and now at issue on appeal, reads in pertinent part:

> (a)(1)(A) Fees for legal services rendered in respect of a claim shall not be valid unless approved by the Workers' Compensation Commission.

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[1] The notice of appeal shows Hermann Companies, Inc., as the employer/respondent. The Commission's order shows the employer/respondent as Hermann Companies. The law judge's order, which was adopted by the Commission, identifies the employer/respondent as Hermann Companies, Inc./Anchor Packaging. The brief before us names Anchor Packaging as employer/appellee.

> (B) Attorney's fees shall be twenty-five percent (25%) of compensation for indemnity benefits payable to the injured employee or dependents of a deceased employee. Attorney's fees shall not be awarded on medical benefits or services except as provided in subdivision (a)(4) of this section.
>
> . . . .
>
> (4) *Medical providers may voluntarily contract with the attorney for the claimant to recover disputed bills, and the attorney may charge a reasonable fee to the medical provider as a cost of collection.*

Ark. Code Ann. § 11-9-715(a) (Repl. 2002) (emphasis added).

In a motion for hearing filed on January 27, 2003, appellant requested that the Commission approve a twenty-five percent attorney's fee on the total of medical bills to be paid. The motion asserted that $133,224.87 in medical bills had been identified and that another $3,000.00 to $5,000.00 yet remained to be identified. On February 3, 2003, appellees filed a response to the motion, asserting that "claimant is not entitled to an award of attorney's fees under Ark. Code Ann. § 11-9-715 (Repl. 2002) and the lien filed in this case." Jewish Hospital filed a letter on February 28, 2003, stating that it had no contract with appellant's attorney and objecting to appellant's filing the lien and to payment of an attorney's fee under it.

Despite their initial opposition to an award of attorney's fees, appellees subsequently joined appellant in submitting to the administrative law judge a joint stipulation of facts and a joint brief in which they agreed that appellant's attorney was entitled to his requested fees pursuant to the statute. In an opinion dated July 14, 2003, the law judge found that the parties' agreed statement of law was inconsistent with the clear and unambiguous language of the statute.

The Commission's Decision

The law judge's opinion, affirmed and adopted by the Commission in its decision of January 23, 2004, included the following discussion:

> The sole issue presented for determination by the parties was whether the Workers' Compensation Commission had authority to

> award an attorney's fee on medical benefits under our law as amended by Act 1281 of 2001. It is my opinion that the Commission has the "authority" to approve and award a reasonable fee, but only if the medical providers have voluntarily contracted with the attorney for the claimant to recover disputed bills. Therefore, the real issue is whether the claimant's attorney is entitled to a fee on medical benefits in the instant case. Because no contract exists between the medical providers and claimant's attorney, it is herein concluded that he is not entitled to a fee as requested.

The Commission further found that attorney's fees on medical benefits are a matter of contract and that a claimant's attorney has no absolute right "to charge a reasonable fee to the medical provider as a cost of collection." Noting the shift in appellees' position on the issue of attorney's fees, the Commission also found that the parties could not create an obligation on a third party without its agreement.

The Commission set forth the history of the present legislation regarding attorney's fees in workers' compensation cases:

> Since the creation of the Workers' Compensation Act in 1949, only the parties to the litigation have been responsible for attorney's fees. Prior to Act 290 of 1986, respondents were responsible for all controverted attorney's fees. The fee schedule did not change in 1986; however, claimants became responsible for one-half (½) of the fee out of benefits payable to them. The fees were only allowed on compensation controverted and awarded. Act 1015 of 2001 substantially increased the fee schedule for attorney's fees to twenty-five percent (25%) for indemnity benefits only. Again, claimants and respondents were equally responsible for claimants' attorney's fees. The amendment further provided that the fees only applied to indemnity benefits and that attorney's fees *shall* not be awarded on medical benefits except as provided by subdivision (a)(4).

(Citations omitted.)

The Commission recognized that a rational argument could be made that the 2001 amendment, increasing attorney's fees on indemnity benefits only but still providing claimants' attorneys an opportunity to contract with medical providers to recover disputed bills, was a compromise between labor and management. The Commission found that "medical providers may either voluntarily contract with the claimant's attorney or elect alternative means of collection."

Whether the Commission erred as a matter of law in finding that appellant was not entitled to attorney's fees based upon the value of medical services provided to him

Appellant contends that the Commission incorrectly interpreted Ark. Code Ann. § 11-9-715 to mean that the Commission's authority to approve and award a reasonable fee exists only if medical providers have voluntarily contracted with the claimant's attorney to recover disputed bills. He argues that the legislature, by amending the statute in 2001, intended to address problems and inequities that existed for years, and that the purpose of the amendment was to increase fees for attorneys who represent injured workers. Appellant asserts that the statute gave him the absolute right to charge the medical provider a reasonable fee as a cost of collecting payment for medical services, and he asserts that it was the statutory duty of the Commission to approve his reasonable fee.

Much of appellant's argument centers around the use of the conjunctive "and" in Ark. Code Ann. § 11-9-715(a)(4): "Medical providers may voluntarily contract with the attorney for the claimant to recover disputed bills, and the attorney may charge a reasonable fee to the medical provider as a cost of collection." The Commission's opinion included the following discussion of this word:

> It must be noted that "and" is a coordinating conjunction in Subdivision (a)(4). Coordinating conjunctions are meant to join logically comparable elements, without turning one element into a modifier of the other. *See, The Random House Handbook*, 4th Ed. The legislature did not use the conjunction "or" which indicates an alternative, "voluntarily contract or charge a reasonable fee." Again, the conjunction "and" is used as a word to express a logical modification, consequence, antithesis, or supplementary explanation. . . . The second half of the sentence in Subdivision (a)(4) modifies the potential contract. Claimant's attorneys may only contract for a reasonable fee. The twenty-five percent (25%) of attorney's fee asserted under our Act only applies to indemnity benefits and not to medical benefits, one-half (½) of which is the responsibility of the respondents and the other half the responsibility of the claimant out of benefits payable to him.

Appellant argues that the Commission's interpretation defies common sense and renders the second clause of subsection (a)(4) meaningless. He argues that two letters submitted by the parties,

written by individuals closely associated with workers' compensation legislation, clearly show the legislature's intent in the 2001 amendment to create a right to fees based upon the value of medical services. We agree with the Commission that any opinion expressed in these letters is not relevant to the interpretation of the statute's clear and unambiguous language.

We will not substitute our judgment for that of an administrative agency unless the decision of the agency is arbitrary, capricious, or characterized by an abuse of discretion. *American Standard Travelers Indem. Co. v. Post*, 78 Ark. App. 79, 77 S.W.3d 554 (2002). To reverse an agency's decision because it is arbitrary and capricious, it must lack a rational basis or rely on a finding of fact based on an erroneous view of the law. *Id.* Although an agency's interpretation of a statute is highly persuasive, we will not interpret the statute to mean anything other than what it says when it is not ambiguous. *Id.*

Arkansas Code Annotated section 11-9-704(c) (Repl. 2002) requires that we construe workers' compensation statutes strictly. Strict construction requires that nothing be taken as intended that is not clearly expressed, and its doctrine is to use the plain meaning of the language employed. *American Standard Travelers Indemnity Co., supra.* The basic rule of statutory construction, to which all other interpretive guides must yield, is to give effect to the intent of the legislature. *Id.* When a statute is clear, however, it is given its plain meaning, and the appellate court will not search for legislative intent; rather, that intent must be gathered from the plain meaning of the language used. *Cave City Nursing Home, Inc. v. Arkansas Dep't of Human Servs.*, 351 Ark. 13, 89 S.W.3d 884 (2002). A statute is ambiguous only where it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning. *Id.* In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *American Standard Travelers Indem. Co., supra.* The statute should be construed so that no word is left void, superfluous, or insignificant; and meaning and effect must be given to every word in the statute if possible. *Id.*

Here, appellant asserts a meaning to Ark. Code Ann. § 11-9-715(a)(4) that is counter to giving the word "and" its ordinary and usually accepted meaning in common language. The statutory provision is not open to two or more constructions, nor would reasonable minds disagree or be uncertain as to its meaning;

because its language is clear and unambiguous, there is no need to search for legislative intent further than the plain meaning contained in the words of the statute itself. Appellant's arguments do not convince us that the Commission's decision in this case was arbitrary, capricious, or characterized by an abuse of discretion. To the contrary, we find the Commission's decision highly persuasive. We hold that the Commission did not err in interpreting Ark. Code Ann. § 11-9-715(a)(4) to mean that, in the absence of a contract between appellant's medical providers and his attorney, the attorney was not entitled to attorney's fees based upon the value of medical services provided to him.

Appellant also asserts that Ark. Code Ann. § 16-22-304 creates an attorney's lien on the medical benefits in this case. The statute states in pertinent part: "This lien shall apply to proceedings before the Workers' Compensation Commission. The lien shall attach from the date a notice of claim is filed with the commission." Ark. Code Ann. § 16-22-304 (Repl. 1999). In its opinion, the Commission disagreed with the parties' joint argument that section 16-22-304 creates an attorney's lien on medical benefits. The Commission reasoned that the creation of an attorney's fee applies from and after service upon the "adverse party" in a cause of action; that medical providers, rather than being adverse parties, are unwilling participants in litigation not of their creation; and that respondents were the only party controverting benefits in this case.

Appellant's argument regarding Ark. Code Ann. § 16-22-304 is merely a one-sentence conclusory statement. Because his assignment of error is unsupported by convincing authority, it will not be considered on appeal. *See Jones Truck Lines v. Pendergrass*, 90 Ark. App. 402, 206 S.W.3d 272 (2005).

Affirmed.

VAUGHT, J., agrees.

GRIFFEN, J., concurs.

WENDELL GRIFFEN, Judge, concurring. I agree that Arkansas Code Annotated § 11-9-715 (a) (4) (Repl. 2002), as amended by Act 1281 of 2001, requires the result we reach in this case. However, I write separately to emphasize the inequity of the current workers' compensation scheme, which awards attorney's fees

for controverted indemnity benefits but completely insulates employers and workers' compensation insurers from liability for attorney's fees incurred for obtaining controverted medical benefits. The inequity of this scheme should not be ignored, particularly because it cuts against the long-recognized rationale under Arkansas workers' compensation law supporting how and why attorney's fees are paid in controverted cases.

It is no secret that the skyrocketing cost of medical treatment has become a national concern. Furthermore, the workers' compensation scheme was never intended to force injured workers to bear the total risk for obtaining reasonable medical attention and services for compensable injuries. The obligation to provide prompt and reasonably necessary medical treatment and services to an injured worker is imposed by law on an employer; just as it is the employer's duty to promptly and accurately provide indemnity benefits for periods of disability, the employer is obligated to promptly provide reasonably necessary medical treatment. Ark. Code Ann. § 11-9-508 (Supp. 2003).

Workers' compensation was not intended to be a litigious scheme; rather, it was intended to provide a means by which injured workers would receive compensation *without* resorting to litigation. Thus, it is well-settled that one purpose for allowing for the recovery of attorney's fees is to place the burden of litigation expense onto the party that made litigation necessary. *See Aluminum Co. of America v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976); *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). While the fee goes to the attorney, the *benefit* is to the claimant who has been forced to obtain an attorney to receive benefits for an injury that the Commission ultimately determines to be compensable. *Tyson Foods, Inc. v. Fatherree*, 16 Ark. App. 41, 696 S.W.2d 782 (1985) (noting that permitting attorney fees on the controverted portion of workers' compensation claims gives a claimant the ability to obtain adequate and competent legal representation in defense of award as well as in obtaining the award). Further, making an employer who has controverted a claim liable for the employee's attorney's fees serves the legitimate social purposes of discouraging oppressive delay in recognition of liability and deterring the arbitrary or capricious denial of claims. *Id.* Under the prior law, attorney's fees were simply calculated based on the amount controverted and awarded. *See Varnell v. Union Carbide*, 29 Ark. App. 185, 779 S.W.2d 542 (1989).

For approximately sixty years — from the adoption of our first workers' compensation act in 1939 until the passage of Act 1281 in 2001 — we recognized these legitimate social purposes by awarding attorney's fees, as a benefit to the worker, for controverted indemnity, medical, and rehabilitative benefits, where the worker was required to secure an attorney in order to obtain benefits. *See, e.g., Pickens-Bond Const. Co. v. Case*, 266 Ark. 323, 584 S.W.2d 21 (1979) (awarding attorney's fees where the employer controverted claims for nursing services, therapy equipment, mileage, and medical benefits); *Garner v. American Can Co.*, 246 Ark. 746, 440 S.W.2d 210 (1969) (awarding attorney's fees for medical benefits); *Ragon v. Great American Indem. Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954) (awarding attorney's fees based on medical services, hospitalization, and a percentage of the cash awarded to the claimant); *Harvest Foods v. Washam, supra* (awarding attorney's fees where claimant received indemnity benefits); *Owens Country Sausage v. Crane*, 268 Ark. 732, 594 S.W.2d 872 (Ark. App. 1980) (awarding attorney's fees where claimant was awarded costs of rehabilitation program).

Unfortunately, in the face of our long history of recognizing the compelling reasons for awarding attorney's fees on all controverted benefits, with the passage of Act 1281 of 2001, the Arkansas General Assembly absolved employers and workers' compensation insurers from exposure for controverting reasonably necessary medical treatment and services. Act 1281 amended Arkansas Code Annotated § 11-9-715(a)(1) and (2)(B)(ii) to specifically limit attorney's fees to the amount of compensation for indemnity benefits controverted and awarded. This amendment further added subdivision (a)(1)(B), which provided that "[a]ttorney's fees shall not be awarded on medical benefits or services except as provided in subdivision (a)(4) of this section." Section 11-9-715(a)(4), in turn, the subsection at issue in this case, allows attorneys to recover fees for the cost of collection of disputed medical bills only if medical providers voluntarily contract to allow for the recovery of such fees.

Thus, instead of being based on whether an employer controverted the claimant's entitlement to those benefits, the award of attorney's fees for medical benefits is now tied to the cost of collecting payment for disputed medical bills, which shifts the cost of litigation from the employer, the party responsible for the litigation. This is not a case of robbing Peter to pay Paul; the lamentable effects of Act 1281 go well beyond that to saddle both

the injured worker and medical providers with the cost of the employer's failure to provide reasonable medical services. First, it deprives injured workers of their sole remedy of obtaining an attorney's fee when the employer fails to pay for reasonable medical services as mandated under Arkansas law. Second, it shifts the responsibility to paying a claimant's attorney's fees from the employer to the party providing medical services.

The rationale for awarding attorney's fees for all controverted benefits did not suddenly change or become less compelling in 2001, when Act 1281 was passed. The current scheme, which allows an attorney to contract for fees for the collection of disputed medical bills, is woefully inadequate to preserve the more equitable attorney's fee benefit that claimants enjoyed under prior law. While I am obliged to follow the current law governing attorney's fees in workers' compensation cases, I am not obliged to ignore its inequities.

Donald Vern SAUL *v.* STATE of Arkansas

CA CR 04-683 211 S.W.3d 1

Court of Appeals of Arkansas
Opinion delivered June 22, 2005

Lisa C. Evans, Chief Deputy Public Defender, for appellant.

Mike Beebe, Att'y Gen., by: *Suzanne Antley*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. Donald Vern Saul appeals from his conviction for manufacturing methamphetamine. He argues that the trial court erred in denying his motion for directed verdict. He also contends that the trial court erroneously admitted evidence of a prior conviction for possession of drug paraphernalia and an arrest for shoplifting, that the trial court abused its discretion when it allowed police officers to testify as experts about whether methamphetamine was manufactured, that the trial court abused its discretion when it denied his motion for mistrial or continuance, and that the trial court abused its discretion when it refused to allow an adequate cross-examination of one of the State's witnesses. Because the trial court erroneously admitted proof of appellant's prior bad acts in violation of Ark. R. Evid. 404(b) (2004), we reverse appellant's conviction and remand for a new trial.

Facts

Appellant was charged with manufacturing methamphetamine after police found what the State alleged to be a methamphetamine lab in appellant's van. Detective Andy Lee of the Bentonville Police Department testified that he was trained at the

DEA Clandestine Lab School in Quantico, Virginia, on identifying the precursors of methamphetamine, identifying hazards, and taking precautions around methamphetamine labs. Detective Lee learned how to cook methamphetamine as part of his training. He described the process in detail to the jury and noted that he would expect to find red phosphorous, iodine crystals, peroxides, rubbing alcohol, Heet, tubing, glassware, funnels, coffee filters, solvents, HCl generators, muriatic acid, and rock or table salt in a lab. These items were common components used in the red-phosphorous method of manufacturing methamphetamine.

Detective Lee testified that he was running stationary radar on Southwest "I" Street on February 13, 2002, when he clocked appellant's van traveling forty-seven miles per hour in a thirty-five mile-per-hour zone. He initiated a traffic stop. During the stop, appellant produced his driver's license, an insurance card, and a certificate of title. Appellant explained that he had recently purchased the van and had not yet registered the vehicle. Detective Lee proceeded to search appellant's van.[1] As he opened the door, he smelled a strong chemical odor, which he identified as a clandestine-lab odor. In the back of the van was a blue plastic storage tub containing what Detective Lee immediately recognized as a methamphetamine lab. Detective Lee identified pictures of the items found in the van and explained their use in the manufacturing process. Introduced into evidence were pictures of discolored glassware, which was a result of burners heating the glass or iodine being put in the glass; coffee filters containing an unknown red sludge and funnels, which were normally used as a filtering system in the manufacturing process; stained, plastic tubing, which appeared to be used to manufacture methamphetamine; duct tape, which was commonly used to construct hydrogen chloride gas generators; two plastic bottles containing a bi-layered liquid substance, a one-gallon jar containing a tri-layered liquid, a Gatorade bottle containing a bi-layered liquid, and a glass jar containing a brown liquid, samples of which were sent to the Crime Lab for testing; match books, which were generally used to produce red phosphorous; a bottle of Red Devil Lye, which was used for the sodium hydroxide needed during the middle part of the cooking stage; two bottles of hydrogen peroxide, which were used to produce crystals; a one-gallon can of camping fuel and a one-gallon can of acetone, which were both

[1] The parties stipulated that Detective Lee conducted a lawful search of the van.

used to bring out the methamphetamine from the mixture produced; a stained tube wrapped with electrical tape, which Detective Lee did not know what it was used for but noted that it was probably attached to a vessel at one point; scissors, a knife, razor blades, balloons, and razor blade scrapers, which were used to cut and package methamphetamine; silver hand scales, which were commonly used to weigh the drugs for sale; a soda bottle with red tape wrapped around the top end of it, which would have been used as a HCl generator unless a person were using it to produce crystals; and Wesson oil, which was used to distribute heat and prevent burning of the solution. Detective Lee also identified a picture of a gas can with appellant's name on it. The gas can was found next to the storage bin. Detective Lee stated that, after the items were photographed, a disposal company, Environmental Management, was called to pick up the items.

On cross-examination, Detective Lee testified that he did not see anything consistent with the Nazi method of manufacturing methamphetamine. He later guessed that appellant used the red-phosphorous method. Detective Lee stated that he did not find a heat source. He also did not find any clean coffee filters, used in the "powering out" stage of the process, or any packaging materials or large sums of money. When questioned at the Bentonville Police Department, appellant denied that the items found were his. Detective Lee noted that he only fingerprinted the hazardous waste, that he could not fingerprint everything, and that he found no fingerprints. He also noted that the two bottles of hydrogen peroxide were both full. Detective Lee found no empty hydrogen peroxide bottles; however, he noted that iodine crystals were already present.

Matthew Sarver testified that he worked for the Arkansas State Crime Lab in 2002. While there, he received three months of in-house training and attended the DEA class on methamphetamine labs in Quantico. He noted that there were two ways to manufacture methamphetamine, and he described the processes to the jury. Sarver testified that the red-phosphorous method was used in this case. He identified a mixture of iodine and phosphorous, which he testified was a "reaction sludge" left over after a person cooks methamphetamine; tubing, which he testified was used for the HCl generator; pseudoephedrine; methanol; and a pill soak, which he testified was used early in the manufacturing process. Sarver tested exhibits and found organic solvent and acid. He also testified that the bi-layered liquid found at the scene was

consistent with the final stages in the manufacturing process. He tested a heat-sealed plastic bag containing stained coffee filters and stated that he found the substance to be iodine, one of the three main ingredients. Finally, he identified an HCl generator, bottle of Red Devil Lye, bottles of hydrogen peroxide, and a gallon of acetone, all used in the manufacturing process.

Sarver testified that he did not test every item Detective Lee sent to the Crime Lab and that he tested enough to get a sample from each step of the manufacturing process. He concluded that the items he tested were consistent with manufacturing methamphetamine. He mentioned that something was present from each step of the process and that methamphetamine was present as well. On cross-examination, Sarver testified that no heat source was sent for testing; however, it was possible to manufacture methamphetamine without a heat source. He noted that the manufacturing process took longer and produced a lower yield without a heat source.

Over appellant's objection, Detective Paul Woodruff of the Harrison Police Department testified that he was on duty on November 22, 1998, another occasion on which appellant was stopped. During a consent search of appellant's vehicle, officers found what appeared to be a methamphetamine lab. When Detective Woodruff arrived on the scene, he noted a strong chemical odor coming from appellant. The search of the vehicle yielded components used in the Nazi method of manufacturing methamphetamine. At that time, appellant stated that he was driving along a creek in Boone County when he saw some juveniles manufacturing methamphetamine. Appellant told Detective Woodruff that he knew the items were dangerous and took the items. Detective Woodruff stated that appellant's claim had flaws. First, he noted that there were spills on top of appellant's vehicle, indicating that someone was manufacturing on top of the vehicle. Second, receipts for pseudoephedrine and for lithium batteries were found in the vehicle. Appellant later pled guilty to possession of drug paraphernalia. On cross-examination, Detective Woodruff testified that he did not find any matches or iodine, but that he did not expect to find them because of the method being used in that case. He also noted that he did not find any peroxide or Red Devil Lye and that while police found boxes of Advil in appellant's vehicle, the receipt was for Equate pills.

Over appellant's objection, the jury also heard testimony from Officer Russ Allen of the Rogers Police Department. Officer

Allen testified that he was on duty on December 15, 2000, when he was called to the Wal-Mart Supercenter. When he arrived, he found that appellant had purchased some acetone, two cans of starting fluid, and some bananas. Ten boxes of antihistamine tablets were recovered from appellant's pants. On cross-examination, Officer Allen noted that the incident happened almost three years prior to trial and that he found no iodine, peroxide, tubing, Heet, batteries, or matches on appellant. He also found no drugs. After Officer Allen testified, the State rested its case.

Appellant testified that he lived in Harrison. He stated that he had never seen the blue plastic storage bin found by Detective Lee and denied using methamphetamine the day of his arrest. Appellant testified that he planned to go to dinner with his ex-wife and children. He stated that he drove to a job site in Highfill in his van that day. Appellant also stated that he submitted to a drug test when he arrived at the Benton County Jail and that he tested negative. On cross-examination, appellant stated that his tools were in the van and that the gas can should have had his name on it. He did not smell anything in the back of his van, and he denied that he normally carried chemicals in the back of his van. He acknowledged that he pled guilty to possession of drug paraphernalia in 1999. He repeated the statement that he gave to Detective Woodruff but testified that he pled guilty because he had a syringe on him. Appellant also claimed that he was arrested every time he was pulled over. For example, he testified that he was arrested on April 23, 2003, because he had bought Coleman fuel.

Kimberly Cunningham testified that she was a part owner of K.C. Construction, appellant's employer. She testified that appellant arrived at work at 8:00 a.m. on February 13, 2002, and left that day at approximately 5:30 p.m. She noted that appellant drove a van and that she never saw a storage bin inside the van. On cross-examination, Cunningham stated that she was aware of appellant's criminal history, that appellant was an excellent employee, and that she did not mind having convicted felons working for her.[2]

Appellant called Jeff Bland, a parole officer supervising appellant, who testified that he tested appellant the day he was

[2] Appellant proffered the testimony of Howard Cunningham, who was unavailable to testify that day. Cunningham would have testified that appellant was at the work site that day and that he never saw a blue storage bin in appellant's van.

arrested and that he tested negative. Appellant also called Colleen Gray, appellant's ex-wife, who testified that she planned to have dinner with appellant that day but that appellant never arrived at her house. After Gray's testimony, appellant rested his case.

The jury found appellant guilty of manufacturing methamphetamine. He was later sentenced to thirty years in the Arkansas Department of Correction. This appeal followed.

Appellant argues that the trial court erred in denying his motion for directed verdict. Because of double-jeopardy concerns, we consider challenges to the sufficiency of the evidence before addressing other arguments. *See Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). A motion for directed verdict is a challenge to the sufficiency of the evidence. *Whisenant v. State*, 85 Ark. App. 111, 146 S.W.3d 359 (2004). On appeal from a denial of a motion for directed verdict, the sufficiency of the evidence is tested to determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* In determining whether there is substantial evidence to support the verdict, we review the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id.* Substantial evidence is that evidence which is of sufficient force and character to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* The fact that evidence is circumstantial does not render it insubstantial; however, when circumstantial evidence is relied upon, it must exclude every other reasonable hypothesis other than the guilt of the accused. *Id.* The question of whether circumstantial evidence excludes other reasonable hypotheses is for the fact finder to determine. *Id.* In reviewing the sufficiency of the evidence, we consider evidence both properly and improperly admitted. *Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998).

Sufficiency of the Evidence

Appellant argues that the State presented insufficient evidence to prove that he manufactured methamphetamine. Arkansas Code Annotated section 5-64-401(a) (Supp. 2003) states that it is unlawful for a person to manufacture a controlled substance. "Manufacture" is defined as:

> the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or inde-

> pendently by means of chemical synthesis, and include any packaging or repackaging of the substance or labeling or relabeling of its container[.]

Ark. Code Ann. § 5-64-101(m) (Repl. 1997).

Appellant contends that he could not be convicted of manufacturing methamphetamine because there were deficiencies in the manufacturing process. He states that the police never found a heating element, a "critical element" in the process. However, the jury heard testimony that a heating element is not necessary to manufacture methamphetamine. Appellant attempts to discredit Sarver's testimony by stating that he was a chemist and not an expert in the detection of methamphetamine labs; however, such a fact would go to Sarver's credibility, not to the sufficiency of the evidence. 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, 987 S.W.2d 694 (1999); *Stewart v. State*, 89 Ark. App. 86, 200 S.W.3d 465 (2004). As such, the jury was free to accept or reject Sarver's assertion, and we cannot re-weigh the credibility of the evidence on appellate review. Appellant also notes that the police did not find any used bottles of hydrogen peroxide, no used striker plates, no baggies for packaging the finished product, or clean coffee filters to filter the finished product. However, we have affirmed convictions for manufacturing methamphetamine when less than all of the necessary components were present. *See, e.g.*, *Cherry v. State*, 80 Ark. App. 222, 95 S.W.3d 5 (2003) (affirming a conviction when no lithium, a necessary component in the method used by the appellant in that case, was found at the appellant's residence); *Smith v. State*, 68 Ark. App. 106, 3 S.W.3d 712 (1999) (affirming a conviction when appellant's home contained all but one of the necessary components and appellant had expected the arrival of the missing ingredient and had begun the cooking process). Appellant's van contained components of various stages of the manufacturing process. In addition, Detective Lee testified that appellant's van had a chemical odor consistent with manufacturing methamphetamine. Appellant also notes that the police found no finished product in the search of his van. However, many of the components found in appellant's van contained methamphetamine residue. The drug does not have to be in its final form before one can be convicted of

manufacturing methamphetamine. *See Lee v. State*, 297 Ark. 421, 762 S.W.2d 790 (1989) (affirming a conviction for manufacturing when there was ample evidence that processing and preparation of the drug took place).

Finally, appellant argues that there was insufficient evidence to prove that the items found in the van belonged to him. The State presented sufficient evidence to prove that appellant constructively possessed the items in the storage bin. When seeking to prove constructive possession, the State must establish that the defendant exercised care, control, and management over the contraband. *George v. State*, 356 Ark. 345, 151 S.W.3d 770 (2004). This control can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found. *Id.* In this case, the items were found in appellant's van, along with a gas can with appellant's name on it, which appellant admitted was his. While appellant presented witnesses who testified that they saw nothing in his van all day, the jury was free to reject their testimony. *See Ridling v. State*, 360 Ark. 424, 203 S.W.3d 63 (2005). The State presented sufficient evidence to prove that appellant manufactured methamphetamine. The trial court did not err in denying appellant's motion for directed verdict.

Prior Bad Acts

Appellant argues that the trial court abused its discretion when it allowed the State to introduce evidence of his prior conviction for possession of drug paraphernalia and his prior arrest for shoplifting antihistamine tablets. Specifically, he contends that both prior bad acts were inadmissible under Ark. R. Evid. 404(b). We agree. Rule 404(b) of the Arkansas Rules of Evidence states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court, and we will not reverse absent

a showing of manifest abuse. *Holt v. State*, 85 Ark. App. 308, 151 S.W.3d 1 (2004). Evidence offered pursuant to Rule 404(b) must be independently relevant. *Id.* Evidence is independently relevant if it tends to prove a material point and is not introduced solely to prove that the defendant is a bad person. *Id.* However, even if independently relevant, evidence of other crimes may still be excluded under Rule 403 if the probative value of that evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *Id.*

Appellant argues that neither act was independently relevant to a material issue in the case against him and that the probative value of the evidence of the prior bad acts was substantially outweighed by the danger of unfair prejudice. In *Holt v. State, supra*, we reversed a conviction for possession of methamphetamine with intent to deliver when the trial court allowed evidence that the appellant was arrested for possessing syringes, one of which tested positive for marijuana, one year prior to the arrest for which he was being tried. In that opinion, we cited several other opinions where the trial court erred in admitting prior bad acts. *See id.* (citing *Evans v. State*, 287 Ark. 136, 697 S.W.2d 879 (1985) (superceded by statute on a separate issue) (reversing and remanding where it could not be said that merely because two burglaries occurred on the same night and involved items of similar nature, the State should be allowed to reference the other burglary); *Rios v. State*, 262 Ark. 407, 557 S.W.2d 198 (1977) (reversing and remanding when the trial court admitted evidence of other drug deliveries to prove that the appellant made a drug delivery on the date in question); *Sweatt v. State*, 251 Ark. 650, 473 S.W.2d 913 (1971) (reversing a conviction for selling LSD when the trial court allowed testimony showing that the appellant previously sold marijuana from his apartment)).

While the State argues that the prior bad acts were admissible to establish "motive, intent, plan, knowledge, and the absence of mistake or accident," it appears that the bad acts were introduced for no reason other than to show that appellant shows a propensity toward manufacturing methamphetamine. The only issues in this case were whether the materials found in appellant's van could be used to manufacture methamphetamine and whether those materials belonged to appellant. Appellant's prior possession conviction and shoplifting arrest were not relevant to either of these issues other than to show that appellant had been involved to

some extent in the manufacture of methamphetamine in the past.[3] This is "the very type [of evidence] that Rule 404(b) was designed to prohibit." *Hamm v. State*, 91 Ark. App. 177, 184-85, 209 S.W.3d 414, 419 (2005).

Furthermore, we do not consider the error in this case harmless. Where evidence of guilt is overwhelming and the error slight, this court can declare the error harmless and affirm. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002). The State called witnesses for the sole purpose of establishing these prior bad acts and discussed them in both its opening statement and closing argument. When excised from the case, the only evidence remaining is the fact that the methamphetamine lab was found in appellant's vehicle. Because the trial court erroneously admitted evidence of prior bad acts and because that error was not harmless, we reverse appellant's conviction and remand this case for a new trial.

Testimony About the Manufacturing Process

As it is the only other issue likely to come up on remand, the only other issue we address is appellant's contention that the trial court abused its discretion when it allowed Detective Lee to testify as an expert and offer opinions about whether methamphetamine was manufactured. Appellant contends that Detective Lee's testimony was highly prejudicial and completely unnecessary for the jury to understand the case. Whether a witness qualifies as an expert in a particular field is a matter within the trial court's discretion, and we will not reverse such a decision absent an abuse of that discretion. *Jackson v. State*, 359 Ark. 297, 197 S.W.3d 468 (2004) (quoting *Brunson v. State*, 349 Ark. 300, 79 S.W.3d 304 (2002)). Rule 702 of the Arkansas Rules of Evidence (2004) provides:

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[3] At trial, the State relied on *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996), and *Neal v. State*, 320 Ark. 489, 898 S.W.2d 440 (1995). In both cases, the State admitted testimony of prior bad acts in light of arguments that the appellant was unaware that the contraband was in their home. In both cases, however, the recent drug activity tended to discredit assertions that the appellants had no knowledge of the presence of drugs in their homes. In the present case, however, we are unable to see how a four-year-old prior conviction for possession of drug paraphernalia and a two-year-old shoplifting arrest tend to show that appellant was manufacturing methamphetamine in 2002.

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

When determining whether to allow expert testimony to be admitted, the trial court must initially determine whether the witness is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. *Farm Bureau Mut. Ins. Co. of Arkansas v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000). If some reasonable basis exists demonstrating that the witness has knowledge of the subject beyond that of ordinary knowledge, the evidence is admissible as expert testimony. *Jackson v. State, supra* (quoting *Brunson v. State, supra*). The trend is not to exclude expert opinion testimony that amounts to an opinion on the ultimate issue as long as such testimony "does not mandate a legal conclusion." *Brunson*, 349 Ark. at 312, 79 S.W.3d at 311 (citing *Davlin v. State*, 320 Ark. 624, 899 S.W.2d 451 (1995); *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984)).

Arkansas appellate courts have allowed police officers to testify regarding their experiences in drug cases. *See Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998) (allowing testimony from two officers concerning how methamphetamine was packaged and sold was proper in light of the State's burden to prove that the appellant had possessed methamphetamine with the intent to deliver it); *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997) (holding that the trial court did not abuse its discretion when it allowed a police officer who was not qualified as an expert witness to testify on redirect examination about variations in drug purity levels within certain quantity of methamphetamine, as such testimony constituted, in the officer's experience, very commonsense explanations for batch of methamphetamine not being mixed thoroughly); *Heritage v. State*, 326 Ark. 839, 936 S.W.2d 499 (1996) (affirming a conviction for possession of methamphetamine with intent to deliver when a police officer was allowed to testify as to normal drug purity level found on streets and as to market value of drugs involved). While appellant claimed that Detective Lee's testimony was unnecessary, appellant argued at trial that the materials in the van could not be used to manufacture metham-

phetamine.[4] Because appellant disputed whether or not the items could have been used to manufacture methamphetamine, the process was relevant in this trial. The trial court did not err in allowing Detective Lee to testify about the manufacturing process.

Reversed and remanded.

GLOVER and ROAF, JJ., agree.

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[4] Appellant said in his opening statement:

> Now, there may or may not have been items necessary for making methamphetamine. That's for you to decide. The State will need to present facts to you to prove to you beyond a reasonable doubt that those items were there, that the necessary items were there to manufacture methamphetamine, all of the necessary items.

He also stated in his closing argument:

> When we take a closer look inside this container, you can see the things that the State alleges that you need for a methamphetamine lab, and we can see that there are some pretty important things missing out of this container. These are things that Officer Lee tells you are vital to the manufacturing process, things that were not present. The biggest thing that is not present in the situation is the heat source. This is the hot method, the red phosphorous method of cooking methamphetamine. Both Detective Lee and the Crime Lab guy explained to you that this is the hot method. There should be a heat source. There should be a hot plate.
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> * * *
>
> Officer Lee told you in his testimony that more than one stage required a heating process. There was nothing like that that was found in the blue container, and it's a critical component if they are going to have a meth lab. There is no evidence that one was found anywhere the day that Mr. Saul was arrested. And according to Officer Lee this is a lengthy process. It's not something you do in a matter of minutes. Vern Saul was only at his place less than an hour. He was pulled over at 6:30. He got off work at 5:30. That's a short amount of time, and there's no heat source found.
>
> There are no pills. There are no clean filters available to filter the finished product. He told us that that was the ending stage, that the product had to be filtered to finish off the process. The absence of those filters indicates that the plan was not to finish off the process. There are no bags to put a finished product in. There is no white powder found in the van. There is not a finished product

SEARCY INDUSTRIAL LAUNDRY, INC.,
and Mid-Century Insurance Company *v.*
Sharon FERREN

CA 05-55 211 S.W.3d 11

Court of Appeals of Arkansas
Opinion delivered June 22, 2005

Huckabay, Munson, Rowlett & Moore, P.A., by: *Carol Lockard Worley* and *Jarrod S. Parrish*, for appellants.

The Zan Davis & McNeely Law Firm PLLC, by: *Steven R. McNeely*, for appellee.

OLLY NEAL, Judge. Appellants, Searcy Industrial Laundry, Incorporated and Mid-Century Insurance Company, appeal from a decision of the Arkansas Workers' Compensation Commission (Commission) awarding appellee Sharon Ferren additional temporary-total-disability benefits. On appeal, appellants argue that appellee's claim for temporary-total-disability benefits was barred by the doctrine of collateral estoppel. They argue, in the alternative, that appellee failed to prove entitlement to temporary-total-disability benefits. We affirm.

On January 13, 2000, appellee sustained an admittedly compensable injury to her back. Four months later, appellee began complaining of a possible cervical-spine injury. Appellants controverted the injury to appellee's cervical spine. The administrative law judge (ALJ) found that appellee had failed to prove by a preponderance of the evidence that she sustained a compensable injury to her cervical spine. The Commission reversed the decision of the ALJ, finding that appellee proved a compensable neck injury by a preponderance of the evidence. Appellants appealed the decision to our court. In *Searcy Industrial Laundry Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003), we affirmed the decision of the Commission.

Thereafter, appellee filed a claim for additional temporary-total- disability benefits for the period of June 7, 2000, to March 19, 2003. Appellants argued that the claim was barred by the doctrine of *res judicata*. The ALJ found that the claim was barred. The Commission reversed, finding that the issue of entitlement to temporary-total-disability benefits had not been litigated during the previous proceedings. From that decision comes this appeal.

Appellants argue that appellee's claim for temporary-total-disability benefits is barred by the doctrine of collateral estoppel. In support of their argument, appellants raise the following subpoints: (1) appellee is impermissibly seeking to relitigate her claim to temporary-total-disability benefits despite the fact that the same issue was presented and decided upon before; (2) appellee's claim for temporary-total-disability benefits was fully litigated during the hearing, the appeal to the Commission, and the appeal to this court; (3) once affirmed by this court, the Commission's decision after conducting *de novo* review became a final ruling and is therefore *res judicata*; (4) no matter what the current position of the Commission is, its original award of benefits to the appellee is final and represents the law of the case for *res judicata* purposes.

Collateral estoppel, also known as issue preclusion, bars relitigation of issues of law or fact previously litigated by a party. *Johnson v. Union Pac. R.R.*, 352 Ark. 534, 104 S.W.3d 745 (2003). The elements of collateral estoppel are: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) the issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; (4) the determination must have been essential to the judgment. *Id.* Collateral estoppel is applicable to decisions of the Workers' Compensation Commission. *See Craven v. Fulton Sanitation Serv., Inc.*, 361 Ark. 390, 206 S.W.3d 842 (2005).

In finding that the appellee's claim was not barred the Commission wrote the following:

> In the present matter, the Full Commission finds that the administrative law judge was correct in finding that the claimant is making the same claim for additional temporary total disability compensation for the exact time frame, based on the same circumstances, as were requested at the hearing in March of 2001. However, we do not find that the claim is barred by the doctrine of *res judicata* because although the prior administrative law judge found in his opinion of March 28, 2001, that the claimant's neck injury was not causally related to her compensable back injury, he did not reach the issue of additional temporary total disability compensation once he found the neck injury not to be a compensable injury. Moreover, we note that once the case was appealed to the Full Commission and the Arkansas Court of Appeals, they did not adjudicate, and nor did they address the issue of temporary total disability compensation. As such, we find that the claimant has not had an opportunity to litigate her entitlement to additional temporary total disability compensation. Therefore, we further find that the doctrine of *res judicata* does not preclude the claimant from claiming entitlement to additional temporary total disability compensation from June 7, 2000, through March 19, 2003.

We agree with the Commission's findings. Therefore, we hold that appellee's claim was not barred by the doctrine of collateral estoppel.

In the alternative, appellants argue that appellee failed to prove entitlement to temporary-total-disability benefits. Temporary-total-disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *K II*

Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary-total-disability. *Id.* The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Id.* The determination of when the healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by substantial evidence. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). These are matters of weight and credibility, and thus lie within the exclusive province of the Commission. *Id.*

We hold that the Commission's finding that appellee's healing period had not ended is supported by substantial evidence. Appellee testified that, following her accident, she went back to work the following Monday and worked the entire week. During that time, due to pain, appellee also saw her doctor. The following week, appellee was only able to work two days and her doctor took her off work. Appellee testified that she was initially paid temporary-total-disability benefits through June 7, 2000. She said that she began receiving benefits again in March 2003. Appellee testified that from June 7, 2000, to March 14, 2003, she was unable to work. She said that she had not worked since the accident.

The medical evidence further established that appellee was in her healing period. In a letter dated April 23, 2001, Dr. John Wilson states that, due to pain, appellee had not been released to work. A letter dated November 11, 2003, further indicates that appellee was still in her healing period. Because appellee has yet to be released to work she remains in her healing period. Accordingly, the Commission did not err when it awarded appellee additional temporary-total-disability benefits.

Affirmed.

BAKER, J., agrees.

GLADWIN, J., concurs.

Candis YOUNG *v.* Maria BARBERA

CA 04-1093 211 S.W.3d 29

Court of Appeals of Arkansas
Opinion delivered June 22, 2005

[redacted]

[redacted]

[redacted]

Oscar Stilley, for appellant.

No response.

LARRY D. VAUGHT, Judge. Candis Young appeals the decision of the trial court — following the entry of a default judgment in her favor — awarding her only $4500 for past medical services after it determined that her medical bills for chiropractic care were excessive. We affirm.

Young filed a complaint alleging that she was physically attacked by Maria Barbera on October 29, 2002. Young asked the court to award her $35,000 in compensatory damages plus $15,000 in punitive damages. Young accused Barbera of assaulting her by punching and scratching her in the face, pulling fistfuls of hair out of her head, and violently jerking her head up and down and side to side while sitting on top of her. Because Barbera was larger in size, it took Young some time to escape. However, once she did, she promptly reported the incident to the police and sought medical attention from Dr. Philip Roberts, a chiropractor, the day after the incident. Young stated that she did not seek emergency-medical attention, nor did she consult a medical doctor. Dr. Roberts treated her for nine months, and his charges totaled $7135. Young testified that when she began seeing Dr. Roberts, she went three times a week. Young stated that after a couple of months, the visits were reduced to twice a week, then once a week, then once every other week, and so on until she was released.

Barbera filed an untimely pro se answer to Young's complaint. The court granted default judgment in favor of Young and held a hearing to determine her damages. Following that hearing,

the court issued a final judgment awarding Young $4500 for medical costs, $2500 for pain and suffering, and $1000 in punitive damages. The court also awarded Young the costs associated with the lawsuit. The court found that the actual medical bills of $7135 were excessive — specifically in light of the fact that no expert witness was called at the hearing to testify regarding Young's medical needs — and declined to award her the full amount that she requested.[1]

In civil cases where the trial judge, rather than a jury, sits as the trier of fact, the correct standard of review on appeal is not whether there is any substantial evidence to support the finding of the court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Schueck v. Burris*, 330 Ark. 780, 957 S.W.2d 702 (1997). The trial judge, as fact-finder, is the sole evaluator of credibility and is free to believe or disbelieve the testimony of any witness. *Id.* at 786, 957 S.W.2d at 705.

The mere fact that a plaintiff has incurred medical expenses and the defendant has admitted liability does not automatically translate into a damage award equivalent to those expenses. *Depew v. Jackson*, 330 Ark. 733, 957 S.W.2d 177 (1997). A party seeking medical damages has the burden of proving the reasonableness and necessity for that party's medical expenses. *Avery v. Ward*, 326 Ark. 829, 934 S.W.2d 516 (1996). Whether the medical expenses were reasonable and necessary is a question of fact for the trier of fact. *Blissett v. Frisby*, 249 Ark. 235, 458 S.W.2d 735 (1970). While not controlling, evidence of expense incurred in good faith is some evidence that the charges were reasonable. *Id.* at 246, 458 S.W.2d at 742. However, evidence of expense incurred alone is not sufficient to show that medical-service charges were causally necessary. "Necessary" means causally related to the tortfeasor's negligence. *Ponder v. Cartmell*, 301 Ark. 409, 784 S.W.2d 758 (1990).

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[1] Young filed a motion to amend the judgment pursuant to Rule 52(b) of the Arkansas Rules of Civil Procedure a few days after the judgment was entered and attached an affidavit from Dr. Roberts regarding the necessity of Young's chiropractic treatment. The trial judge entered an order denying the motion because the court could not consider evidence not submitted at trial.

Expert medical testimony is not essential in every case to prove the reasonableness and necessity of medical expenses. *Bell v. Stafford*, 284 Ark. 196, 680 S.W.2d 700 (1984). The testimony of the injured party alone, in some cases, can provide a sufficient foundation for the introduction of medical expenses incurred. *Id.* at 199, 680 S.W.2d at 702; *see also* Ark. Code Ann. § 16-46-107 (Repl. 1999). In *Bell*, our supreme court gave the following example:

> if a litigant suffered a specific injury in an accident and was immediately taken to a hospital emergency room for treatment of only that specific injury the injured party's testimony would be sufficient to establish the necessity of the medical expense as a result of the accident. However, expert testimony would normally be required to prove the necessity of the expense when, as here, expenses for hospital tests were incurred many months after the accident, none of the physicians in attendance immediately after the accident referred the litigant either to the admitting doctor or to the hospital, and the expenses on their face do not appear to be related to the accident.

Bell, 284 Ark. at 199, 680 S.W.2d at 702–03.

Young relies on a statement in *Ponder v. Cartmell*, 301 Ark. 409, 784 S.W.2d 758 (1990), to support her argument that the trial court should not have been allowed to reduce her damages for medical treatment. In *Ponder*, our supreme court stated that "[i]f a plaintiff proves that her need to seek medical care was precipitated by the tortfeasor's negligence, then the expenses for the care she receives, whether or not the care is medically necessary, are recoverable."[2] 301 Ark. at 412, 784 S.W.2d at 761. However, *Ponder* is clearly distinguishable from the present case. In *Ponder*, the court was ruling on issues of admissibility — whether the

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[2] Taken on its face, such a statement could be interpreted to mean that once a plaintiff shows she was injured by a tortfeasor and sought medical attention, the tortfeasor is responsible for all medical bills regardless of the reasonableness and necessity of those charges.

In our view, although the statement establishes that all such medical costs are recoverable, it does not definitively conclude that the fact-finder is required to award that amount as damages. If it did indeed establish such precedent, then there would be no purpose in holding a hearing on damages once liability had been established. Rather, plaintiffs would be awarded whatever amount of compensatory damages prayed for and there would be no requirement that a jury deliberate on the amount.

defendant in the case should have been allowed to introduce expert testimony that plaintiff's doctor had misdiagnosed the plaintiff and conducted an unnecessary surgery. Both the plaintiff and defendant in *Ponder* presented testimony of expert witnesses at trial, and the definitive issue was not whether the plaintiff had met her burden of proving her medical bills were reasonable and necessary to the trier of fact, but whether the defendant's doctor could second guess the plaintiff's doctor regarding treatment. On appeal, the plaintiff in *Ponder* was not arguing that the amount of damages awarded was insufficient because she had proven she was entitled to more, but rather, that the amount awarded was insufficient because the court had improperly admitted testimony affecting the necessity of a specific course of treatment.

In the present case, the trial court did not deny the admissibility of Young's medical damages — to the contrary, the judge allowed Young to testify regarding her medical treatment and submit her chiropractic bills into evidence. The issue in our case involves the province of the fact-finder to weigh the evidence and ascertain whether Young sustained her burden of proving damages, and we must decide whether the trial judge clearly erred in determining that Young was not entitled to the all the medical damages she sought.

Here, the trial judge was charged with weighing the evidence presented by Young. He was in the best position to observe Young, hear her testimony, and evaluate her credibility. In its order awarding damages, the court specifically found that Young's medical bills were excessive in light of the fact that she presented no expert witness to testify regarding what was medically required to treat her injuries. It was Young's burden to prove that her compensatory damages were reasonable and necessary, and the only evidence she presented was her own self-serving testimony and an invoice from her chiropractor in the amount of $7135. She admitted at trial that she did not seek emergency-medical attention after the assault and, in fact, never sought the care of a medical doctor. Additionally, based on the invoice of Dr. Roberts's charges that Young submitted, she visited the chiropractor at least once every five days for three months after the incident — excluding the week of Christmas, when the time between visits was extended to seven days. In the following months, she saw Dr. Roberts four times in February, four times in March, three times in April, three times in May, twice in June, and a final visit in July.

Based on the evidence presented at trial, the judge's finding that the chiropractor's bill was excessive without some expert testimony that the treatment was medically necessary and reasonable in light of Young's injuries and his subsequent damage award were not clearly erroneous, and we affirm.

Affirmed.

PITTMAN, C.J., GLADWIN, and GLOVER, JJ., agree.

BIRD and BAKER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. This appeal arises from the trial court's award of damages following the entry of a default judgment. The trial court entered a judgment of $4500 in medical expenses although the testimony and verified complaint set the amount at $7135. The defendant was present at neither the default hearing nor the hearing on damages. The majority affirms, holding that it was within the trial court's discretion to enter judgment for the lesser amount. Appellant argues that Arkansas law does not permit the trial court to reduce medical expenditures incurred as a result of the tortfeasor's action for services actually rendered by a competent medical provider. Appellant is correct.

The record contains no evidence upon which the judge could have based a reduction of damages or a finding that the medical expenses incurred were not related to the tortfeasor's negligence. A plaintiff who seeks to recover medical expenses must prove that the expenses were reasonable and necessary, *Ponder v. Cartmell*, 301 Ark. 409, 784 S.W.2d 758 (1990); Howard W. Brill, *Arkansas Law of Damages* § 29-1 (4th ed. 2002), and whether the medical expenses were reasonable and necessary is a question of fact for the trier of fact. *See Davis v. Davis,* 313 Ark. 549, 856 S.W.2d 284 (1993). None-the-less, there is a distinction between proof of reasonableness and proof of necessity. "Necessary" means causally related to the tortfeasor's negligence. *Ponder v. Cartmell, supra.* If a plaintiff proves that her need to seek medical care was precipitated by the tortfeasor's negligence, then the expenses for the care she received, whether or not the care was medically necessary, are recoverable. *Id.* Expert medical testimony is not essential in every case to prove the reasonableness and necessity of medical expenses; in some cases, the testimony of the injured party alone can provide a sufficient foundation for the introduction of medical expenses incurred. *Id.*

In this case, the issue of negligence was decided by default judgment. The defendant, now appellee, did not appear at the trial on damages, and the medical expenses presented were undisputed. There was no evidence that the medical expenses were incurred for a condition other than the tortfeasor's negligence. An award of damages cannot be made on the basis of speculation. *Duncan v. Foster,* 271 Ark. 591, 609 S.W.2d 62 (1980). Because there was no evidence disputing the tortfeasor's negligence, nor the causal relationship of the negligence to the injury, nor the validity of the invoice of services for treatment, the reduction by the trial judge was based purely on speculation. The majority does not attempt to explain how the $4500 amount for medical expenses was derived because no explanation is possible based on the evidence in the case.

The majority attempts to distinguish *Ponder* by saying that *Ponder* was reversed because the trial court Ahad improperly admitted testimony affecting the necessity of a specific course of treatment," but in this case "the judge allowed Young to testify regarding her medical treatment and submit her chiropractic bills into evidence." The majority justifies the trial court's reduction of damages stating that Athe court specifically found that Young's medical bills were excessive in light of the fact that she presented no expert witness to testify regarding what was medically required to treat her injuries."

The majority's reasoning directly contradicts our supreme court's admonition that "[i]f a plaintiff proves that her need to seek medical care was precipitated by the tortfeasor's negligence, then the expenses for the care she receives, whether or not the care is medically necessary, are recoverable." *Ponder,* 301 Ark. at 412, 784 S.W. 2d at 761; (citing *O'Quinn v. Alston,* 213 Ala. 346, 104 So. 653 (1925) (where treating surgeon amputated finger, it was error to ask defense expert whether amputation was necessary); *Whitaker v. Kruse,* 495 N.E.2d 223 (Ind. App. 1986) (plaintiff may recover expenses of unnecessary surgery)).

Given our supreme court's specific directive that it is error to allow testimony challenging the medical necessity of the treatment, I cannot understand the majority's declaration that the reduction is justified because appellant failed to prove that the treatment was medically necessary to treat her injuries. The majority's position is that *Ponder* only prohibits the introduction of evidence to support a reduction in damages, but does not specifi-

cally prevent the judge from reducing damages in the absence of any evidence to support such a reduction.

I am at a similar loss to understand the majority's footnoted explanation that our supreme court's statement that expenses for medical care received, whether or not the care is medically necessary, are recoverable "does not definitively conclude that the fact-finder is required to award that amount as damages once liability has been established." The majority concludes that to accept that premise would do away with a requirement for a hearing on damages and require a court to award "whatever amount of compensatory damages prayed for and there would be no requirement that a jury deliberate on the amount."

Contrary to the majority's conclusion, although liability was established by default, nothing prevented appellee from contesting appellant's proof of damages. In Arkansas, a default judgment establishes liability but not the extent of damages. *Byrd v. Dark,* 322 Ark. 640, 911 S.W.2d 572 (1995); *Divelbliss v. Suchor,* 311 Ark. 8, 841 S.W.2d 600 (1992). Our supreme court has emphasized that in Arkansas, unlike some jurisdictions, a hearing is required after default to establish damages, and the plaintiff must introduce evidence to support damages. *See Volunteer Transp., Inc. v. House,* 357 Ark. 95, 162 S.W.3d 456 (2004) (reversing and remanding default-judgment case, where there was no testimony specifically regarding the medical bills or the summary, no proof that each expense was necessary or related to the accident with Volunteer Transport, and record was silent as to how the trial court arrived at the damage amounts); *see also Henry & Aclin Ford v. Landreth,* 254 Ark. 483, 494 S.W.2d 114 (1973) (holding that trial court erred in permitting appellee to present her medical bills "in a bundle" without proper authentication where she suffered an injury unrelated to the one upon which the claim was made, and it was appellee's burden to show that each of these bills was necessary as a result of the automobile accident rather than from the gunshot wound or any other cause or illness).

Although the appellee could have challenged appellant's proof of damages, she chose not to do so. In this case, there is no evidence of any other wound, cause, or illness present from which the trial court could determine the medical bills were incurred for a cause other than the tortfeasance of appellee. The majority specifically affirms the trial court's reduction based on appellant's failure to present an expert witness to testify that the treatment "was medically required to treat her injuries." That basis for

reduction directly contradicts the law as stated in *Ponder*. The trial court clearly credited appellant's testimony and acknowledged the authenticity of the documentation of medical expenses that it received into evidence. Therefore, the judgment should be reversed.

I respectfully dissent.

BIRD, J., joins.

Darren Keith HELMS *v.* STATE of Arkansas

CA CR 04-1197 211 S.W.3d 53

Court of Appeals of Arkansas
Opinion delivered June 22, 2005

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

Mike Beebe, Att'y Gen., by: *David R. Raupp*, Senior Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Darren Helms was convicted by a jury of felony residential burglary and

misdemeanor theft of property with a value of $500 or less. Helms was sentenced as an habitual offender with more than one but less than four prior felony convictions to twenty-five years' imprisonment in the Arkansas Department of Correction for residential burglary and was fined $1000 and sentenced to one year of incarceration in the county jail for theft of property. On appeal, Helms argues that the trial court erred in admitting a State's document into evidence during the penalty phase and allowing the State to also reference facts showing that Helms committed the offenses at issue while he was released on bond in connection with two unrelated charges. We affirm.

At trial, the State introduced the testimony of two witnesses to prove Helms was guilty of residential burglary and theft of property with a value of $500 or less. One of the State's witnesses was the victim, Steven Hoskinson, and the other witness was Pulaski County Sheriff's Office Investigator Lewis Wig. Hoskinson testified that on July 21, 2003, he discovered that someone had broken into his house and had taken some of his personal property, including a portable television, stereo, weed eater, pellet guns, meat from his freezer, stopwatch, and a box of checks. Investigator Wig testified that he arrested Helms on July 23, 2003, and he took a custodial statement from Helms. Investigator Wig first made contact with Helms while Helms was asleep in his automobile. Investigator Wig arrested Helms, and he found two books of Hoskinson's checks inside Helms's automobile. According to Investigator Wig, Helms admitted that he and an accomplice had broken into Hoskinson's house and had stolen some of Hoskinson's personal property.

The jury found Helms guilty of residential burglary and theft of property. In the penalty phase of the trial, the State proved that Helms had three prior misdemeanor convictions and three prior felony convictions. The State also sought to introduce State's Exhibit No. 6, which was a document establishing that, when Helms had committed the criminal offenses at issue, he was free on bond from the North Little Rock Municipal Court after having been arrested on two counts of forgery. Defense counsel objected to the admissibility of State's Exhibit No. 6, arguing that the exhibit was not relevant and that it stated that Helms was on bond for a charge that the jury knew nothing about and of which Helms had not been convicted of. The trial court admitted State's Exhibit No. 6 over the defense counsel's objection. The prosecutor told the jurors that they should "be aware that [Helms] was out on bond at the time the offense was committed. . . ."

During the penalty phase of the trial, Helms's mother, Ellen Helms, testified for the defense. During cross-examination, the prosecutor approached the bench and asked for permission to ask Ellen Helms about the forgery charges for which Helms was out on bond from, because the State contended that the victim of those forgeries was Ellen Helms. The defense counsel objected to this questioning, arguing that it was not relevant. The trial court allowed the line of questioning. Ellen Helms testified that she had paid Helms's bond for the forgery charges and that she did not know the victim of the forgery charges.

During the State's closing argument of the penalty phase, the prosecutor reminded the jurors that at the time Helms committed the offenses he had been free from pretrial incarceration on bond from unrelated criminal charges. In the State's initial closing argument, the prosecutor stated:

> We are asking you to keep in mind that he is someone who had probation, had been given that chance, also had made a bond and committed this new offense, someone that had been in the county jail and gotten released and committed this new offense. I'm asking that you keep that in mind today as you come up with what you deem to be an appropriate sentence.

In the State's final closing argument, the prosecutor stated:

> Also, please don't forget that when he committed this July 21st burglary, he was out on bond for yet a different case. He has been given his chances. There is no doubt about that. I mean, he acts like he wants to go to prison for a long time. He won't learn his lesson, and he keeps committing these crimes.

The jury sentenced Helms, as an habitual offender, to twenty-five years' imprisonment in the Arkansas Department of Correction for residential burglary and to one year of incarceration in the county jail and a $1000 fine for theft of property. The trial court ran Helms's twenty-five year sentence of imprisonment consecutively to an eighteen-year sentence of imprisonment that he was already serving. Helms now appeals from his sentence.

Helms argues that the trial court erred when it admitted State's Exhibit No. 6 and permitted the prosecutor to cross-examine Ellen Helms concerning Helms's unrelated forgery charges. The State contends in response that Helms's accused status

as shown by State's Exhibit No. 6 was admissible under Ark. Code Ann. § 16-97-103(5) and (6) (Supp. 2003), which permits the introduction of character evidence and aggravated circumstances at sentencing.

In Arkansas, criminal prosecutions in which a jury sits as the trier-of-fact are bifurcated into a guilt-innocence phase and a penalty phase. Ark. Code Ann. § 16-97-101 (Supp. 2003). A trial court's decision to admit evidence in the penalty phase of a trial is reviewed for an abuse of discretion. *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002). The admissibility of proof in the penalty phase of a jury trial is governed by the Arkansas Rules of Evidence; however, pursuant to Ark. Code Ann. § 16-97-103 certain evidence is admissible at sentencing that would not have been admissible at the guilt phase of the trial. *Crawford v. State*, 362 Ark. 301, 208 S.W.3d 146 (2005) (citing *Buckley v. State*, *supra*). Arkansas Code Annotated section 16-97-103 provides in pertinent part:

> Evidence relevant to sentencing by either the court or jury may include, but is not limited to, the following . . .
>
> (5) Relevant character evidence;
>
> (6) Evidence of aggravating and mitigating circumstances. The criteria for departure from the sentencing standards may serve as examples of this type of evidence; . . .

While evidence introduced during the sentencing phase may include evidence described in this section, the list is not exhaustive. *Crawford*, *supra*.

With respect to the admissibility of relevant character evidence under Ark. Code Ann. § 16-97-103(5), we first note that Rule 404 of the Arkansas Rules of Evidence states that character evidence generally is not admissible for the purpose of proving that a person acted in conformity therewith on a particular occasion and that the rule then lists some exceptions to this rule. While it is true that our evidence rules govern the introduction of evidence in the sentencing phase of trials, our supreme court has also held that, pursuant to Ark. Code Ann. § 16-97-103, certain evidence is admissible at sentencing that would not have been admissible at the guilt phase of the trial. *Crawford*, *supra*. Character evidence that might not be admissible at the guilt phase could be admissible at sentencing. *Id.*

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ark. R. Evid. 401. In the present case, although Helms had been accused but not yet convicted of forgery, evidence that Helms was out on bond when he committed residential burglary and theft of property provided proof of his character and was relevant to the jury's determination of an appropriate punishment. Helms argues that the jurors' knowledge that he committed the criminal offenses while he had had been free on bond in connection with forgery charges tells the jury nothing about his character if the jurors were never told that a condition of his bond agreement was that he agreed not to commit any additional crimes while free on bond. In considering evidence, jurors may use their common sense. *Bridges v. State*, 46 Ark. App. 198, 878 S.W.2d 781 (1994). The jury need not have learned of the details of Helms's bond requirements to understand that the fact that Helms was out on bond when he committed the new crimes says something about his character.

Affirmed.

GLOVER, J., agrees.

GRIFFEN, J., concurs.

WENDELL GRIFFEN, Judge, concurring. I concur in the result in this case. I believe the trial court erred in admitting the evidence that appellant was free on bond when he committed the crimes in the instant case. Nonetheless, I agree we should affirm appellant's sentence because the error is harmless, in that appellant cannot show that he was prejudiced by the erroneous admission of the evidence.

The fact that appellant was free on bond in an unrelated case when he committed the offenses in this case was not relevant to prove any matter related to his sentencing for the instant charges of residential burglary and misdemeanor theft of property. To begin, it cannot be said that the fact that he was free on bond that was granted for unrelated, unproven conduct was an aggravation relevant to his sentencing. An aggravation is any circumstance attending the commission of a crime that increases its guilt or enormity or adds to its injurious consequences, but that is above and beyond the essential constituents of the crime itself. *Davis v.*

State, 60 Ark. App. 179, 962 S.W.2d 815 (1998) (affirming the admission of evidence during the sentencing phase that the defendant, who had been convicted of delivery of a controlled substance, had made prior drug sales, even though he was not prosecuted for that conduct); *see also Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994) (affirming the admission of evidence during the sentencing phase that the defendant, who had pled guilty to robbery, had attempted to rob the same victim on a prior occasion). Unlike the related conduct in *Davis v. State*, *supra*, and *Hill v. State*, *supra*, the other conduct in which appellant had allegedly engaged was not related in any way to the convictions for which he was being sentenced. Thus, I do not see how it can be said here that the allegations that appellant had committed forgery constituted an aggravation. Since the forgery allegations were unrelated to the instant charges, they could not increase the guilt or enormity of appellant's convictions for residential burglary and misdemeanor theft of property or add to their injurious consequences.

Nor was that fact indicative of appellant's character or otherwise relevant. The mere fact that someone has been charged with a crime should not blithely be accepted as relevant evidence of his character for sentencing purposes. Even though appellant had been charged with additional crimes, he is presumed to be not guilty of committing those crimes until proven guilty in a court of law. He had not yet been tried for the unrelated forgery charges and thus, still retained the presumption of innocence for those charges at the time he was tried for the instant offenses.

Nonetheless, I agree we should affirm appellant's sentence; he has not demonstrated prejudice from the sentence because his twenty-five-year sentence for the felony was below the maximum sentence allowable and was within the statutory range, and his sentence for the misdemeanor offense was merged with his felony. *See Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002); Ark. Code. Ann. § 5-39-201(a)(1) (Repl. 1997) (defining residential burglary as a Class B felony); § 5-4-501(a)(2)(C) (Supp. 2003) (providing an enhanced sentence of five to thirty years in prison for a Class B felony); Ark. Code Ann. § 5-4-403(c)(2) (Supp. 2003) (requiring that a sentence for a misdemeanor and a felony run concurrently). Therefore, appellant cannot demonstrate that he was prejudiced by the inadmissible evidence.

Emmett JONES and Frances Ann Jones *v.*
Chester SCOTT and Barbara Scott

CA 04-10 211 S.W.3d 46

Court of Appeals of Arkansas
Opinion delivered June 22, 2005

Walker, Shock, Cox & Harp, P.L.L.C., by: *James O. Cox*, for appellants.

Wayland A. Parker, II, for appellees.

ANDREE LAYTON ROAF, Judge. This is a guardianship case. Appellants Emmett and Frances Jones appeal from the Scott County Circuit Court's order granting guardianship of their two minor grandchildren to appellees Chester Scott and Barbara Scott, the paternal grandparents. On appeal, the Joneses argue that the trial court erred in finding that the children should be left in the care of the Scotts because there had been no material change of circum-

stances since the children had been left voluntarily in the Scotts' care by their mother, Sandra Scott. They also argue that the trial court erred in finding that the minor children should be left in the care of the Scotts because that decision was against the preponderance of the evidence and was not in the best interest of the children. The trial court's decision is clearly against the preponderance of the evidence and is not in the children's best interest, and we reverse and remand.

Sandra and Damon Scott are the biological parents of Leanne, now age eight, and Austin, now age six. Sandra and Damon were divorced on September 19, 2002, and Sandra was given custody of the children. After the divorce, she and her children lived in the home of her parents, the Joneses. Sandra admitted that, following her divorce, she began abusing drugs. After finding a syringe in Sandra's pocket, the Joneses confronted Sandra about her suspected drug problem. They advised her that if she had a drug problem that they would put her in a drug-rehabilitation program and care for her children while she was away. In early October 2002, Sandra left her parents' home and, rather than leave her children with her parents, left them in the care of the Scotts, the paternal grandparents. When questioned by the Joneses, Sandra denied that she had left her children with the Scotts. In late December 2002, however, the Joneses discovered that Sandra had left her children with the Scotts, and they contacted Barbara Scott regarding visitation with Austin and Leanne. Initially, they were permitted to visit Leanne and Austin; however, Barbara Scott discontinued the visits in April 2003. Concerned that the Scotts had been interfering with Sandra's parental rights, the Joneses suggested that Sandra try visiting with her children. In May 2003, Sandra attempted to visit her children at the Scotts' home but was refused visitation. Sandra stated that the last time she visited the Scotts' home, her ex-husband, Damon Scott, attacked her in Barbara Scott's presence. Barbara Scott denied this allegation. The Joneses then filed a petition for guardianship.

The following was established at the hearing on the guardianship petition. Barbara Scott is age forty-seven and Chester Scott is sixty-nine. Although Chester and Barbara were divorced in 1996, they continue to reside together. They reside in Scott County in a two-bedroom home, where Austin and Leanne share a bedroom. Barbara Scott has three children, none of whom obtained a high school diploma, and Barbara Scott has only a seventh-grade education. Chester Scott completed the eighth

grade. Barbara Scott does not have a driver's license due to her limited reading ability. She is a homemaker, but Chester Scott is employed outside of the home as a long-haul truck driver. He spends Monday through Friday on the road and returns home on the weekends. Chester Scott has health insurance coverage for himself through his employer but does not have health insurance for Barbara Scott. The insurance provided through Chester Scott's employer would not cover the children; however, he testified that he could provide health insurance for Leanne and Austin. The Scotts admitted that Chester Scott drinks beer and whisky with his son in the presence of the children, and Barbara Scott admitted that she pled guilty to a charge of third-degree battery against her oldest son.

Frances and Emmett Jones also reside in Scott County. Frances Jones is forty-two years old, and Emmett Jones is forty-four years old. They have been married for twenty-six years and have three children. Their two oldest children have obtained high school diplomas, and their youngest daughter is currently a junior in high school, where she participates in cheerleading and softball. Frances Jones is a special education instructor and is certified to teach mildly handicapped children in grades kindergarten through twelfth. She has a bachelor's degree in Education and is certified in Early Childhood Development, which qualifies her to teach kindergarten through sixth grade. In her testimony, Frances Jones stressed the importance of education and proper discipline. The Joneses do not consume alcohol, except for the occasional drink on special occasions, and do not keep alcoholic beverages in their home. They reside in a two-story, four-bedroom home and testified that they are physically and financially able to take on the responsibility of having Leanne and Austin reside in their home. Frances Jones stated that, if placed in her home, the children would sleep in their own separate bedrooms.

While in Chester and Barbara Scott's care, Leanne and Austin attended Waldron Elementary School. Both children had been assigned to Charlene Moudy's kindergarten class, Leanne one year and Austin the following year. While in Ms. Moudy's class, Leanne demonstrated low performance but progressed as the year went on. Ms. Moudy recommended tutoring but was not contacted by the Scotts regarding her suggestion. Ms. Moudy did recall, however, that both Frances Jones and Barbara Scott at-

tended parent-teacher conference day. The Joneses testified that, while in the Scotts' care, Austin began throwing temper tantrums and using profanity.

At the hearing, Sandra admitted that she had abused drugs and alcohol; that she moved from her parent's home in October 2002 because she was on drugs; that her parents offered to get her help, but that she refused it; that after she moved she was not able to care for her children; that she feared that if she took her children to her parents' home, they would have placed her in a rehabilitation facility; and that instead she took them to Barbara and Chester Scott's home. While the children were at the Scotts' home, Sandra was only permitted to visit them on three occasions. She testified that she thought she had given up custody of her children because she had signed a form authorizing Barbara Scott to seek medical treatment for the children. Sandra testified that, although she is no longer abusing drugs, she is not able to properly care for her children. She stated that she wanted her parents to have custody of the children because she was concerned with the drinking and "partying" that occurred at the Scotts' home. During her testimony, the following colloquy occurred between Sandra and the trial court:

> COURT: Now the Scotts apparently were appropriate people to have — to raise your children back in October of last year. What has changed since October of last year, so that they're not the appropriate people to raise your children?
>
> SANDRA: I want my children in my life, sir.
>
> COURT: You can't raise your children. You don't even have a home. What has change about the Scotts between October of 2002, and September 2003, where they were appropriate then, and they are not now?
>
> SANDRA: Nothing, nothing has changed.
>
> COURT: All right. You may stand down.

The trial court entered its order appointing the Scotts co-guardians of the children on September 30, 2003. In the order, the trial court set aside the grant of custody in favor of Sandra Scott as provided in the divorce decree. The trial court also found that

the two children were incapacitated due to their minority; that Sandra Scott testified that there has been no change in circumstances since she left them in the care of the Scotts; that Sandra Scott voluntarily left the children in the Scotts' care; that the children need stability in their lives; and that it is in their best interest to continue in the care of the Scotts. It is from this order that the Joneses appeal.[1]

We review probate proceedings *de novo*, but we will not reverse the trial court's decision unless it is clearly erroneous. *Moore v. Sipes*, 85 Ark. App. 15, 146 S.W.3d 903 (2004). A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Walker v. Torres*, 83 Ark. App. 135, 118 S.W.3d 148 (2003). When reviewing the proceedings, we give due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. *Moore, supra.*

When appointing a guardian, the trial court must be satisfied that (1) the person for whom the guardianship is sought is either a minor or otherwise incapacitated; (2) a guardianship is desirable to protect the interest of that person; and (3) the person to be appointed guardian is qualified and suitable. *Id.* When the incapacitated person is a minor, the key factor in determining guardianship is the best interest of the child. *Id.*; *see also Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000) (stating that the paramount concern in guardianship cases is the best interest of the child). In a guardianship proceeding, there is a preference for the natural parent, unless it is established that the natural parent is unfit. *Id.*

In the instant guardianship proceeding, there was a preference for Sandra Scott as the natural parent. She, however, does not appeal from the trial court's order, which set aside the grant of custody in her favor and effectively determined that she was an unfit parent. We, therefore, need not determine whether the trial

[1] This is the second appeal in this case. In the first appeal, appellants requested four extensions to file their brief, and when the brief was finally tendered, it was rejected due to insufficiencies in the addendum. The brief was submitted on June 15, 2004, and this court ordered rebriefing due to deficiencies in the appellants' addendum in an unpublished opinion delivered January 19, 2005. Thereafter, appellants attempted to tender a brief, which was rejected. Appellants' corrected brief was finally tendered on February 17, 2005.

court's decision granting custody of her minor children to a third party was clearly erroneous with respect to Sandra Scott. The trial court also found that Leanne and Austin were incapacitated due to their minority, and that a guardianship was needed to ensure stability in their lives. The Joneses do not challenge these findings. Therefore, we only consider whether the Joneses are suitable guardians, and whether the trial court's decision was in the best interest of the two minor children.

The Joneses first argue that the trial court applied the incorrect standard by requiring a material change in circumstance before finding that there existed a basis for granting their guardianship petition and awarding them guardianship of the minor children. It is true that, when a trial court modifies an existing custody order, the test is whether there has been a material change in circumstances and whether the modification is in the best interest of the children. *Walker, supra.* In this case, the trial court was considering a petition for guardianship, and the standard is whether the grant of the petition is in the best interest of the children. *Moore, supra.* To the extent that the trial court required a showing of a material change in circumstances, that ruling was clearly erroneous. *See id.* (stating that the standard of review for guardianship cases is the best interest of the child).

The Scotts contend that the trial court did not require a finding of material change in circumstances, but that it merely made a finding of fact that there had been no material change in circumstances in order to stress the fact that Sandra Scott had left the children with them voluntarily, and that the children had continued to live with them at the time of the hearing. We disagree.

During Sandra Scott's testimony, she expressed a desire to have her children placed in the custody of her parents, the Joneses. The trial court then asked Sandra to explain what circumstances had changed since she left her children with the Scotts that would now make them inappropriate people to raise her two children. Sandra responded that no circumstances had changed. It is clear from the colloquy between Sandra and the trial court that the trial court was requiring Frances and Emmett (and Sandra to an extent) to demonstrate a change in circumstances regarding the Scotts that would make them inappropriate guardians for the two minor children—an incorrect standard in guardianship proceedings. *Moore, supra.* The trial court's use of this standard was clearly

erroneous. Moreover, the trial court apparently concluded that, because Sandra Scott voluntarily left her children with the Scotts in the first instance, were appropriate guardians to care for her children. Sandra left her children with the Scotts because she feared facing her parents and her drug addiction. That decision hardly supports a finding that the Scotts were fit and proper guardians for two minor children at the time Sandra left them in their custody. She admitted that, at the time she left her children with the Scotts, she had a drug problem; and that, if she had told her parents, they would have placed her in a drug-rehabilitation facility. Thus, it is clear that, at the time Sandra voluntarily left her children with the Scotts, she was not motivated by the fact that she believed them to be the most fit guardians, but rather by the fact that she could continue her drug use without being held accountable for her actions — conduct that her parents would not allow.

In addition to the colloquy during the guardianship hearing, the trial court reiterated in its written order that there had been no material change in circumstances since the children were placed in the Scotts' care, and the order also makes reference to the children needing stability in their lives. In custody cases, our courts are often concerned with issues related to stability, and this court has stated that, while custody is always modifiable, our court requires a more rigid standard for custody modification than for initial custody determinations in order to promote *stability* and continuity for the children and the discourage repeat litigation of the same issues. *Vo v. Vo*, 78 Ark. App. 134, 79 S.W.3d 388 (2002). This case, however, is not a custody case. The fact that the trial court repeatedly discussed material change in circumstances and the need for stability suggests that it was relying on the standard applicable to custody cases and not the standard used in guardianship cases. The trial court's reliance on the incorrect standard was clearly erroneous.

We now turn to the Joneses' second point on appeal: whether the trial court's grant of guardianship in the Scotts' favor was in the children's best interest. We find that the trial court's decision is clearly erroneous, and that a definite mistake has been committed. Further, it is clearly in the minor children's best interest to be placed in Joneses's care. The Joneses have more living space, and the children would have their own bedrooms if placed with the Joneses. In their current situation, they share a bedroom, which may be appropriate during their youth, but may

not be so as the children become older. The Joneses have a demonstrated interest in the promotion of educational goals and discipline. Frances Jones is a certified special-education instructor and certified to teach grades kindergarten through twelfth grade. She would be instrumental in assisting the children with their educational goals, especially in Leanne's case where she had demonstrated low performance skills in Ms. Moudy's kindergarten class and where Ms. Moudy recommended that she participate in some tutorial program. On the other hand, Barbara Scott has a seventh grade education, and Chester Scott has an eighth grade education; none of her three children have obtained a high school diploma. Barbara Scott is also dependent on another family member, Bonnie Winemiler, to provide tutoring to the children. Barbara Scott stated that Bonnie would "come by from time to time to help Leanne." The Joneses have been married for twenty-six years, while the Scotts are divorced but living together.

Regarding the children's day-to-day activities, because Chester is a long-haul truck driver and works Monday through Friday, Barbara Scott would be the children's primary caregiver. However, Barbara Scott admitted that she has limited reading ability; and that, because of her limited reading ability, she has been unable to obtain a valid driver's license. Without a valid driver's license, Barbara Scott is unable to transport the children, legally, even in the case of an emergency. She also pled guilty to a violent crime, which she committed against one of her own children. The record shows that Barbara Scott struck one of her children with a whiskey bottle. Unlike the Joneses, who very rarely consume alcohol, Chester Scott admitted to drinking whisky and beer with Damon in the children's presence, and Austin has displayed unruly conduct and begun using profanity since being in the Scotts' care. Based on the foregoing facts and all of the testimony presented in this case, we conclude that the trial court's decision is not in the children's best interest and remand. However, we are mindful that two full school years have elapsed since entry of the order that is the subject of this appeal. We reverse and remand to allow the trial court to conduct such further proceedings as may be necessary, *see Walker, supra*, and for entry of an order that is not inconsistent with this opinion.

Reversed and Remanded.

GRIFFEN and GLOVER, JJ., agree.

Rebecca COLLINS and Korey Collins *v.*
Harold MORGAN

CA 04-1071 211 S.W.3d 14

Court of Appeals of Arkansas
Opinion delivered June 22, 2005

Rogers Law Firm, P.A., by: *Edmundo G. Rogers*, for appellants.

Benson & Wood, PLC, by: *Joe Benson*, for appellee.

ANDREE LAYTON ROAF, Judge. This is a summary-judgment case. Appellants Rebecca and Korey Collins appeal from the trial court's grant of summary judgment in favor of appellee Harold Morgan. On appeal, the Collinses argue that the trial court erred in granting Morgan's motion for summary judgment. We agree and reverse and remand for a trial on the merits.

On July 9, 2003, Rebecca Collins filed a complaint in Washington County Circuit Court against Sandra Powell and Harold Morgan alleging causes of action for negligence and negligent entrustment. In her complaint, Rebecca alleged that, on July 11, 2000, she was a pedestrian in the Thrifty Rental Company parking lot in Springdale, Arkansas, when a car driven by Sandra Powell struck her and caused severe injuries; that the vehicle that Sandra was driving was owned by Harold Morgan; that Sandra operated the vehicle in a careless and negligent manner in violation of Ark. Code Ann. § 27-51-104 (Supp. 2003); and that Sandra was legally intoxicated at the time of the accident in violation of Ark. Code Ann. §§ 5-65-101 (Repl. 1997) and 5-65-206 (Supp. 2003). Rebecca also alleged that Harold knew or should have known that Sandra would operate the vehicle in a negligent manner that would endanger other drivers and pedestrians, and that Sandra's negligence and Harold's negligent entrustment were the proximate cause of her severe injuries.

On July 17, 2003, Harold answered Rebecca's complaint. He admitted that he was the owner of the vehicle in question but denied permitting Sandra to operate his vehicle. Harold further alleged that he had sold the vehicle to his brother, Larry Morgan, on installments and had instructed his brother not to allow anyone else to operate the vehicle. Harold also denied that Rebecca had been injured to the extent she alleged in her complaint, and he also denied that his conduct was the proximate cause of her injuries. An amended complaint added Korey Collins as a plaintiff and Larry Morgan as a defendant, sought damages against Larry Morgan for negligent entrustment, and alleged a cause of action for loss of consortium for Korey Collins.

Harold, Larry, and Sandra gave sworn statements on August 7, 2000, at the offices of Nationwide Insurance Company. The following was established during Harold's statement. In June 1999, Harold purchased a 1995 black, Hyundai S-coup that he financed through a bank. Sometime between September and November,

Harold ceased using the car. Larry needed a car, and Harold decided to sell the Hyundai to Larry in September or October of 1999. The sale was conditioned upon Larry making the monthly insurance premium payment and paying Harold $175 per month for the car payment. The title was to remain in Harold's name until the purchase price was paid in full, and Larry was not to allow anyone else to drive the car because other drivers were not insured. Despite this warning, Harold admitted that Larry had let Sandra drive the car on one occasion; and that, when he saw her driving the car, he chased her and instructed her to never drive the car again. During this encounter, Harold inquired whether Sandra had a driver's license, and Sandra said that she did, but that "Springdale's got them." Harold then confronted Larry about having seen Sandra driving the car. On the day of the confrontation, Larry said that he had been drinking, but denied giving Sandra the keys to the car. Harold told Larry that he had seen Sandra in the car, and Larry then stated that he had been sleeping and did not know anything about the situation. Harold instructed him not to allow Sandra to drive the car or he would take it. When asked whether he thought Sandra would drive the car again after he confronted her about driving it the first time, Harold replied, "Everybody deserves their first chance, you know, I mean, if you do something wrong, you know, I mean, I'm game for it, you know. I'm — everybody — you know, you ain't perfect. So I give him a second chance, but the second chance didn't go no more. That was it. There wasn't no third or nothing." Harold described Sandra as a "drifter," "alcoholic," and "fly-by-night" girl.

Harold stated that he did not learn of the accident until two days after it had occurred because Larry and Sandra had attempted to keep it a secret. At first, Harold thought that Sandra had hit another vehicle but later learned that she had hit a pedestrian. Five days later, when Harold spoke to Larry about the accident, Larry said that Sandra had been taken to jail for DWI, for failing to take a sobriety test, and for driving on a suspended driver's license. When asked whether he knew how Sandra ended up with the car on the date of the accident, Harold explained that Sandra took the car while Larry was sleeping and started it with a bobby pin. When asked whether he had spoken to Sandra since the accident, Harold stated, "I don't want to say the words I said, because — it — it hurt me bad, you know, because she knew she wasn't supposed to drive that car." When asked whether he told Sandra she was not supposed to be driving the car, Harold said, "Yes, sir, I sure did.

. . . She knows it. [She said,] 'Oh, I'll never drive it again. I'll never — I thought it was Larry's.' " Harold said that he responded, "No, it's mine and Larry's, but it's more mine than it is Larry's. Until he pays for it, it's mine. . . . You never ever drive this damn car again." Harold went on to say that, when discussing the accident, Larry had told him that he did not give Sandra permission to drive the car. He further stated, "I haven't really talked to her about it. I don't know. All I know is they said they didn't give her permission to drive it, and she knows she didn't have permission to drive it." Apparently frustrated by the vague stories he was receiving regarding the circumstances of the accident, Harold told Larry, "Well, then, you get you'un's asses from Little Rock down here, and all four of us is going down there, and you're going to tell [them] what the hell went on, because I don't know what's going on, neither, because y'all lie to me every time I turn around. I don't know — you go in there and you tell [them] that you didn't give her permission, and she can tell them that she didn't have permission." Harold also stated that every time he saw Larry he would remind him, "Remember, don't let nobody drive that [car]."

Following Harold's statement, Larry testified that he received the Hyundai in November 1999 after the motor in his van quit. He too stated that he was responsible for paying the $175 car payment and the insurance premium. Larry, however, denied that he owned the car. He said, "More or less I was making the payments. It wasn't really mine. It was just that I was using it until I got my van straightened out." Larry stated that, if he got his van working and decided that he no longer wanted the car, he could give it back to Harold, but that, if he kept it until it was paid off, then the car would become his. He admitted that Harold had instructed him not to allow other people to drive the car; that he allowed Sandra to drive the car on one occasion; and that, after Harold confronted him about seeing Sandra driving the car, he did not allow her to drive the car again. On the one occasion that Larry permitted Sandra to drive the car, Larry stated that he had given her the key to the car. At the time that Larry had given Sandra permission to drive the car, he had only known her for approximately one week. The two began living together; Larry had a car, but Sandra did not. Larry was asked how Sandra got around if she did not own a car. Larry said, "Me most of the time. I done most of the driving."

Larry stated that, on the day of the accident, he had been with Sandra at the hospital the night before. Sandra had been hospitalized for three days due to substance abuse. She was released at 8:00 a.m. that morning, and Larry drove her to his sister's house where the two of them were living. The two talked until about 10:30 a.m. when Larry fell asleep. He testified that he was tired because he had been up all night with Sandra at the hospital the night before. When he awoke approximately one hour later, he discovered that Sandra and the vehicle were gone. He said that the keys to the car were in his pocket so, at first, he did not know how she got the car started. He said, "I figured, you know, she — had to be the only one driving it. I mean I had the key in my pocket." Larry began looking for Sandra. He went to the places he thought she might be and the lake. He discovered that she was in custody at the Springdale police station for DWI. Larry bonded Sandra out of jail, and she explained that she had rear-ended a woman. Apparently, Sandra had been attempting to make a turn into a trailer park, but missed her turn and hit Rebecca. Other than that explanation, Larry said that Sandra could not remember the details of the accident. When asked whether he had given Sandra permission to drive the car on the day of the accident, Larry responded that he had not given her permission; that Sandra knew she did not have permission to drive the car; and that she had started the ignition with a pair of eyeglasses. Larry stated that there was only one set of keys to the car, and they were in his pocket when Sandra took the car; but that the tip of his car key is broken off in the ignition, which may explain how she got the car started with a pair of eyeglasses.

Sandra's testimony mirrored Harold and Larry's testimony regarding her impermissive use of the vehicle. She admitted that she drove the car on one occasion with Larry's permission; that Harold instructed her not to drive the car because her driver's license was suspended and because she was not an insured driver; and that on the day of the accident she did not have permission to drive the car. She admitted that she had two prior DWI offenses. She stated that, on the day she was released from the hospital, however, she was heavily medicated. During her statement, she provided documents from the hospital; however, the documents indicated that Sandra had received only insulin, "Hepatitis C viral," and "Peptide." She also testified that she had been released from the hospital at 2:30 p.m.; that she remembered being released in the afternoon because she had had lunch at the hospital that day; and that it was daylight when she left. When told that the incident

report indicated that the accident occurred at 11:55 a.m., Sandra seemed confused and stated, "Well, see that goes to show you. I don't — I don't have any idea."

Sandra said that, after she was released from the hospital, she went to Larry's house. While Larry was asleep, she took the car without his permission to get a pack of cigarettes. She stated that, because the key had been partially broken off in the ignition, she was able to start the vehicle by bending a pair of eyeglasses and inserting them into the ignition. She stated that she then drove the car to the gas station, but that she was unable to remember anything else other than the police putting her in handcuffs. Later on in her statement, Sandra remembered that she missed the turn into the trailer park and ended up in the Thrifty Rental parking lot; that she recalled seeing the woman on the tailgate of a truck and hearing a woman yelling, "call 9-1-1 . . . She's pregnant"; and that she recalled being taken to jail. She admitted that she was at fault for the accident and for taking the car without permission, but denied that she had been drinking on the day of the accident. Sandra also denied that she had ever taken any vehicle without the owner's permission and attributed her conduct to the drugs she had allegedly taken at the hospital.

On November 19, 2003, Harold filed a motion for summary judgment. The motion indicated that, according to sworn statements taken from him, Larry Morgan, and Sandra Powell, Sandra operated the vehicle without permission and without Harold's knowledge. After setting out the law applicable to motions for summary judgment, Harold argued that he was entitled to judgment as a matter of law because there are no genuine issues of material fact to be litigated where sufficient evidence did not show that he knew or had reason to know that Sandra would steal the car without Larry's knowledge or permission that he had sold to Larry.

On December 3, 2003, the Collinses filed a response to Harold's motion for summary judgment, alleging that there were genuine issues of material fact to be decided by a jury. The response challenged the credibility of the statements given by the three defendants and asserted that the facts surrounding how Sandra came into possession of the vehicle on the date in question were "suspect and susceptible to at least one reasonable hypothesis consistent with an entrustment of said vehicle that would render Harold Morgan liable." Accordingly, the Collinses sought denial of Harold's motion for summary judgment.

Attached to their response was a copy of Rebecca Collins's answers to Harold's interrogatories. In her answers to the interrogatories, she identified six persons having knowledge of the facts surrounding the accident. She indicated that Soni Fitzpatrick, a potential witness, was an employee of the Thrifty Car Rental on the day of the accident; that she observed Rebecca being struck by the vehicle; that she observed Sandra turn off the car and put the keys to the car in her pocket; that, when Sandra came over to Rebecca, Soni smelled a strong odor of alcohol; that she asked Sandra if she had been drinking; and that Sandra admitted that she had. These statements also appear in a sworn affidavit attested to by Soni, which was also attached to the response. Soni's affidavit also states that Sandra never stated that she did not have permission to drive the car or that it was stolen. The response also indicates that Rebecca observed Sandra with the keys to the car and would testify that Sandra was belligerent and had been drinking. There is also a sworn affidavit from Rebecca indicating that she saw Sandra with the keys to the car in her hand.

The response also included Rebecca's response to a request for production of documents. Attached to the request is a copy of the police report, which indicates that Sandra was cited for failing to submit to a sobriety test and for DWI. The response also indicated that there was also an oral statement from the tow truck driver that, generally, when he tows cars for the Springdale Police Department, he is given the keys to the vehicle.

The trial court granted Harold's motion for summary judgment on the pleadings and the Collinses appeal.

Our standard of review for summary judgment cases is well-established. *Ginsburg v. Ginsburg*, 353 Ark. 816, 820–21, 120 S.W.3d 567, 569–70 (2003). Summary judgment should only be granted when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *Id.* The purpose of summary judgment is not to try the issues, but to determine whether there are any issues to be tried. *Id.* We no longer refer to summary judgment as a "drastic" remedy and now simply regard it as one of the tools in a trial court's efficiency arsenal. *Id.* Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.*

On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented

by the moving party in support of the motion leave a material fact unanswered. *Id.* We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.* Moreover, "[i]f a moving party fails to offer proof on a controverted issue, summary judgment is not appropriate, regardless of whether the nonmoving party presents the court with any countervailing evidence." *Id.* at 821, 120 S.W.3d 570.

The Collinses raise five points on appeal and present several subarguments. Because their first, fourth, and fifth points on appeal deal with the issue of negligent entrustment, we address those arguments together. In this regard, the Collinses argue that (1) based on the standard of review, the trial court erred in granting the motion for summary judgment on the issue of negligent entrustment; (2) Sandra had implied permission to drive the car; and (3) Harold is liable for his entrustment of the vehicle to Larry. We agree that the Collinses have demonstrated the existence of a genuine issue of material fact regarding the issue of negligent entrustment.

"Negligent entrustment" is established by showing that: (1) the entrustee was incompetent, inexperienced, or reckless; (2) the entrustor knew or had reason to know of the entrustess's conditions or proclivities; (3) there was an entrustment of the chattel; (4) the entrustment created an appreciable risk of harm to the plaintiff and a relational duty on the part of the defendant; and (5) the harm to the plaintiff was proximately or legally caused by the negligence of the defendant. *Mills v. Crone*, 63 Ark. App. 45, 49, 973 S.W.2d 828, 831 (1998).

In *Mills, supra*, we quoted from Section 308 of the Restatement 2d of Torts:

> *It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such a person intends or is likely to use the thing* or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

(Emphasis added.) Permission to use a thing may be expressed on implied. *Norskog v. Pfiel*, 197 Ill.2d 60, 755 N.E.2d (2001) (citing Restatement (2d) of Torts § 308). In *Clark v. Progressive Ins. Co.*, 64

Ark. App. 313, 984 S.W.2d 54 (1998), this court considered whether an insured had given her live-in boyfriend implied permission to drive her car when he hit and killed a pedestrian. The court stated:

> Whether the owner has given another person implied permission to drive his or her automobile depends on the nature of the relationship between the owner and the borrower. The standard treatise on the law of insurance describes 'implied permission to drive an automobile' as follows:
>
> > An implied permission . . . is not confined to affirmative action, but means an inferential permission, in which a presumption is raised from a course of conduct or relationship between the parties in which there is a mutual acquiescence or lack of objection signifying consent.
> >
> > But implied permission is not limited to such situations, and will be evaluated in light of all facts and circumstances surrounding the parties. Implied permission may be proved by circumstantial evidence. Circumstances such as usage, practice, or friendship may be used to show implied permission.
> >
> > *It may be found that the insured has given implied permission where the named insured has knowledge of a violation of instructions and fails to make significant protest. . . .*
>
> • • •
>
> *If the owner of an automobile forbids another person from driving the automobile, but the other person continues to do so with the knowledge of the owner, then the owner has given implied permission to drive the automobile.*

Id. at 318–19, 984 S.W.2d at 58 (citations omitted) (emphasis added). In *Clark*, the court concluded that, because the insured's boyfriend stated that she knew he continued to drive her car even though she had told him not to do so, there existed a genuine issue of material fact regarding whether the insured had impliedly permitted her boyfriend to drive her car.

We find that there are genuine issues of material fact with regard to the issue of negligent entrustment. Harold's motion for summary judgment was based, in large part, on his assertion that there was no genuine issue of material fact regarding his entrustment of the car to Sandra. We disagree. As we stated in *Mills*, *supra*,

a person is negligent if he permits a third party to use a thing and knows or should know that the entrustee intends to use it in a manner that creates a risk of harm to others. Here, the record reveals an issue of fact regarding Harold's implied permission and entrustment of the car to Sandra.

The first issue concerns whether, after Harold discovered a violation of his instructions, he made a significant protest to Sandra's operation of the vehicle. *Clark, supra.* The facts indicate that, when Harold discovered Sandra driving the car the first time, he confronted her and instructed her not to drive the car again. Sandra responded that she believed that the car belonged to Larry, and Harold informed her that it belonged to them both. He also asked whether she had a driver's license, and Sandra said that she did not. When he contacted Larry regarding Sandra's use of the vehicle, Larry initially denied that Sandra drove the car, and later recanted his story when Harold told him that he had seen Sandra in the car. Larry also denied giving Sandra the keys to the car and stated that he did not know anything about Sandra driving the car because he was sleeping, but later stated that he had given her the keys to the car so that she could take some tools to his father's house because he had been drinking and could not drive. Harold stated that he threatened to take the car if Larry permitted Sandra to use the car again, but also stated that he felt everyone deserved a "second chance." When asked whether he thought Sandra would drive the car again after he confronted her about driving it the first time, Harold replied, "Everybody deserves their first chance, you know, I mean, if you do something wrong, you know, I mean, I'm game for it, you know. I'm — everybody — you know, you ain't perfect." Harold also stated that he had told Larry that if he could not adhere to their agreement, then Larry should bring the car back, and that he constantly reminded Larry that he should not permit other people to drive the car. Although Harold took the car after the accident involving Rebecca Collins, he first indicated that he took the car back because Larry had failed to make payments. Later in his statement, he indicated that he took the car because Larry had allowed Sandra to drive the car. Nonetheless, it is clear that Harold did not take the car back until after the accident that is the subject of this case. Given these facts, we conclude that there exists a genuine issue of material fact regarding the sufficiency of Harold's protest after he discovered Sandra driving the car and whether his actions constitute implied permission.

Second, the facts show that there is an issue regarding whether Harold knew that Sandra was operating the car even though he had told her not to. Although there is no statement from Sandra indicating that Harold knew that she continued to operate the car despite his prohibition, as there was in *Clark, supra,* the circumstantial evidence in this case presents a genuine issue of dispute. In *Clark, supra,* we stated that, when another person operates an insured's vehicle even though the insured has forbade him to do so, and the insured knows, then the insured has given implied consent. Implied consent can be shown by circumstantial evidence. *Clark, supra.*

A jury should be allowed to determine whether, under the circumstances, Harold knew that Sandra drove the car despite his instruction. Sandra is Larry's live-in fiancee. She does not have a car of her own and depends on Larry's transportation to get around. After knowing Sandra one week, Larry allowed her to drive the car to his parents' house to deliver tools. At the time of the accident, they had been together for a month. According to Harold's statement, he was not sure whether Larry allowed Sandra to drive the car, and he stated that Larry and Sandra often lied to him. It also appears that Harold was not completely convinced that Larry had adhered to their agreement. He admitted that he had to constantly remind Larry not to allow other people to drive the car, expressed frustration over the inconsistent stories he got from Larry, and admitted that Larry and Sandra often lied to him. In fact, Harold stated that Larry and Sandra attempted to keep the accident a secret, and that he learned of the accident two days after it happened. When he finally discussed the accident with Larry, Larry told Harold that Sandra had taken the keys while he was asleep; that he had not given her the keys; and that he did not give her permission to drive the car. This is the same story that Larry gave Harold when Harold discovered Sandra driving the car the first time. That time, Larry stated that he did not know that Sandra had driven the car, and that he had not given her the keys. Only after Harold informed Larry that he had seen Sandra driving the car did Larry admit that he had given her the keys to drive the car because he was drunk or asleep and could not drive.

Given these facts, we find that a jury should have been allowed to determine whether Harold gave Sandra implied permission to drive the car, whether Harold knew or should have known that Sandra would operate the car even though he had

instructed her not to, and whether Harold's actions were sufficient to constitute a significant protest after he discovered the violation of his instructions.

Additionally, the fact that there are two entrustments is not a bar to recovery. *LeClaire v. Commercial Siding and Maint. Co.*, 308 Ark. 580, 826 S.W.2d 247 (1992). An original entrustor may be liable for negligence in entrusting chattel to one who further entrusts it, resulting in injury to another person. *Id.* (discussing *Garrison v. Williams*, 246 Ark. 1172, 442 S.W.2d 231 (1969) (upholding a jury's verdict that found Garrison liable for injuries suffered by Williams's daughter in a car accident where Garrison had entrusted his vehicle to his fifteen-year-old son, who then entrusted it to his fifteen-year-old friend, who caused the accident the resulted in Williams's daughter's injuries)).

First, it is clear that Harold entrusted the vehicle to Larry. Harold allowed Larry to drive the car conditioned upon payment of the car insurance, payment of the car note, and their agreement that Larry would not take the car out of state or permit others to drive it. There is testimony that, despite his agreement with Harold, Larry permitted Sandra to drive the car to his father's house to deliver some tools because he was too drunk to drive. Harold warned Larry about letting Sandra drive the car, and Larry maintains that he adhered to the warning. He denied allowing Sandra to drive the car on the day of the accident and testified that he had the keys with him at all time. However, the Collinses presented a sworn affidavit from Soni Fitzpatrick that states that she saw Sandra with the keys to the car after the accident. Rebecca Collins also indicated in her response to Harold's interrogatories and in her affidavit that she saw Sandra with the keys after the accident. Thus, the question remains whether Larry did in fact entrust the vehicle to Sandra by giving her the keys to the car on the day of the accident or by otherwise permitting her to use the car. If Larry negligently entrusted the vehicle to Sandra, then Harold may be liable as the original trustor. *LeClaire, supra*; *Garrison, supra.* The fact that there were two entrustments does not bar appellants' recovery. *LeClaire, supra.*

There is also a question regarding whether Sandra was drunk at the time of the accident, and therefore, whether Larry entrusted the vehicle to a person he should have known would drive in a reckless manner. Both Larry and Sandra deny that she had been drinking that day; however, the Collinses provided an affidavit, a police report, and court documents indicating that Sandra was

arrested for DWI on the day of the accident and was subsequently prosecuted. Larry also indicated that Sandra was medicated. So, even if Sandra was not drunk, if Larry gave her the keys to the car, then he entrusted the vehicle to an incompetent person. Larry should have known of Sandra's proclivities for drinking excessively because she did not have a driver's license as the result of previous DWIs and had just been released from the hospital for substance abuse or alcoholism. Harold also indicated that he was aware that Sandra's driver's license had been suspended and that she was an alcoholic.

Accordingly, we find that the Collinses have presented proof of a number of genuine issues of material fact regarding the issue of negligent entrustment, namely: (1) whether Harold gave Sandra implied permission to drive the car, thereby entrusting it to her; (2) whether Harold's conduct constituted a significant protest after he discovered the violation of his instruction to not allow Sandra to operate the car; (3) whether Larry entrusted the vehicle to Sandra by giving her the keys; (4) and whether Harold or Larry entrusted the car to her knowing of her proclivities.

For their second and third points on appeal, the Collinses argue that summary judgment was not appropriate in this case because it was based on the sworn statements of the three defendants — who were all interested parties in this case. The Collinses note that the sworn statements were taken at the insistence of Harold's insurance company; that they were not subject to cross-examination; and that each of the witnesses were parties to the lawsuit. The Collinses also challenge the credibility of all three witnesses and maintain the summary judgment was not appropriate because of the inconsistencies in the witnesses' statements. This argument has merit.

The Collinses cite this court to a line of cases that hold that the trial court is not required to accept the testimony of an interested witness and that the testimony of such witnesses cannot be considered undisputed merely because there was no contradictory evidence presented. *See Motors Ins. Co. v. Tinkle*, 253 Ark. 620, 488 S.W.2d 23 (1972); *Old Republic Ins. Co. v. Alexander*, 245 Ark. 1029, 436 S.W.2d 829 (1969); *Knighton v. Int'l Paper Co.*, 246 Ark. 523, 438 S.W.2d 721 (1969).

In *Motors, supra*, our supreme court stated, "We have said many times that in weighing testimony, courts must consider the interest of a witness in the matter in controversy, and that a trier of

facts is not required to accept any statement as true because merely so testified." *Id.* at 626, 488 S.W.2d at 28. The supreme court noted that the underwriter, an interested party, presented no proof of its underwriting standards or testimony from a disinterested witness. *Id.* Thus, the underwriter's testimony could not be taken as undisputed, and the trial court was not required to accept it even though no contradictory evidence was offered. *Id.*; *see also Old Republic Ins. Co, supra.*

Appellants also cite *Clark, supra,* wherein the court stated:

> A review of the record reveals several circumstances that would cause a reasonable fact-finder to doubt the truthfulness of Moseby's deposition testimony. Although there is little Arkansas authority directly on point addressing whether a motion for summary judgment should be denied because of the lack of credibility of the moving party's supporting evidence, there is ample persuasive authority in federal court decisions interpreting the federal version of our summary-judgment rule, Ark. R. Civ. P. 56, which is Federal Rule of Civil Procedure 56. We consider federal court decision interpreting Fed. R. Civ. P. 56 to be highly persuasive authority.

Id. at 320, 984 S.W.3d at 59. The *Clark* court went on to state that federal court decisions interpreting the Federal Rules of Civil Procedure establish that a trial court may deny a motion for summary judgment based on the lack of credibility of the moving party's affiants or witnesses. *Id.* The court further stated, "Doubts as to the credibility of the movant's affiants or witnesses may lead the court to conclude that a genuine issue [of material fact] exits." *Id.* at 321, 984 S.W.2d at 59. Moreover, the court stated, "Clearly, if the credibility of the movant's witnesses is challenged by the opposing party and specific bases for possible impeachment are shown, summary judgment should be denied." *Id.* at 321, 984 S.W.2d at 59.

In *Clark,* Reginald Moseby hit and killed Otha Jordan while fleeing from the Dermott police. *Id.* At the time of the accident, Moseby was driving his girlfriend, Teresa Moore's, car. Moore was insured by Progressive Insurance Company, who sought declaratory judgment on the issue of whether it was obligated to defend Moseby in a suit brought by the victim's heirs. Progressive then moved for summary judgment arguing that it was not obligated to defend against the action because Moore's policy did not cover non-permissive drivers. The motion was denied, and Progressive

deposed Moseby. Progressive then filed a second motion for summary judgment, attaching Moseby's deposition. The trial court granted the second motion for summary judgment.

In his deposition, Moseby testified that he and Moore had been "together" for twelve years; that the two lived together and had three children; that he never owned a vehicle, but that he helped Moore make the car payments on her car; that, even though Moore had forbidden him to drive the car, he had done so anyway, and that Moore knew that he had done so; and that, on the night he struck and killed Otha Jordan, Moore would not give him permission to drive the car, the two struggled, and he took the keys and left without her permission. When asked whether he considered the car his, Moseby responded, "I been with her twelve years, so she's my wife, so what's hers is mine and what's mine is hers."

On appeal, this court reversed the trial court's grant of summary judgment in favor of Progressive. The *Clark* court found that several statements made during the Moseby's deposition revealed his potential bias. *Clark, supra.* The court also found that his bias established a motive for him to tailor his account of what happened on the night of the accident. *Id.* The court concluded that a reasonable fact-finder could doubt the truthfulness of Moseby's deposition because (1) his bias in favor of Moore would lead him to help her avoid adverse financial consequences, for example to protect her from increased insurance premiums should Progressive have to pay a claim, (2) his bias might lead him to tailor his testimony at Moore's request, especially because he admitted that he had spoken to her about the case (3) his bias might lead him to testify falsely in order to protect Moore from liability in a wrongful death suit brought by Jordan's heirs, and (4) the witness was a convicted felon who was, at the time of his deposition, imprisoned for Otha Jordan's death and may not be deterred by the possibility of a perjury conviction. The court also noted that Progressive only spoke with Moseby after its first motion for summary judgment was denied.

We find *Clark, supra,* persuasive and hold that the adverse parties' testimony in this case reveals potential bias and creates a genuine issue of material fact. First, as the Collinses note, all three of the parties are related. Harold and Larry are brothers, and Larry and Sandra are live-in boyfriend and girlfriend. Therefore, the three have a motive to tailor their testimony or to testify falsely to shield Harold from liability for the Collinses' injuries or from

increased insurance premiums should the insurance company be required to pay the Collinses' claims. Also, Harold's testimony that he prohibited Sandra from using the car was self-serving because, as he admitted, only he and Larry were insured drivers. The facts also show that Harold, Larry, and Sandra had spoken about the case prior to giving their statements which were taken at Harold's insurance company.

All three parties gave inconsistent testimony during their statements, and we have detailed a great number of them in this opinion. For example, Harold stated that he took the car from Larry because he failed to make payments; however, he later stated that he and his wife took the car from Larry because of the accident. Sandra testified that she had not been drinking on the day of the accident, but was heavily medicated. The exhibits attached to appellants' response to the motion for summary judgment show that witnesses stated that they smelled alcohol on Sandra's breath, and that she acted belligerent and "drunk." She was arrested DWI on the day of the accident, and the police report indicates that she was obviously drunk, and her hospital documents did not show that she was medicated upon release. Furthermore, Sandra's credibility is questionable. She testified that she was not released from the hospital until 2:30 p.m., and that she had lunch at the hospital. Larry testified that he picked Sandra up from the hospital at 8:00 a.m., and the accident report shows that the accident occurred at 11:55 a.m. Sandra's testimony was inconsistent and subject to impeachment. The trial court erred in granting Harold's motion for summary judgment because a reasonable trier of fact could conclude that all three witnesses for appellee were biased, and because a reasonable fact finder could have found that the testimony was further inconsistent and not credible, and therefore, could disregard it. *Clark, supra.*

Accordingly, because we find that there exist several genuine issues of material fact, we reverse and remand for trial.

Reversed and remanded.

HART, ROBBINS, and NEAL, JJ., agree.

GLADWIN and GLOVER, JJ., dissent.

ROBERT J. GLADWIN, Judge, dissenting. I dissent because there is no question of material fact to be decided by the jury in this case. We no longer refer to summary judgment as a drastic

remedy and now regard it as one of the tools in a trial court's efficiency arsenal. *Little Rock Elec. Contractors, Inc. v. Entergy Corp.*, 79 Ark. App. 337, 87 S.W.3d 842 (2002). We will only approve the granting of summary judgment when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the nonmoving party is not entitled to its day in court because there are not any genuine issues of material facts remaining. *Id.*; *see also Riverdale Dev. Co., LLC v. Ruffin Bldg. Systems, Inc.*, 356 Ark. 90, 146 S.W.3d 852 (2004). 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. *Riverdale, supra.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. *Id.* This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

The general rule for negligent-entrustment liability states that it is negligence to permit a third person to use a thing or to engage in an activity that is under the control of the actor, if the actor knows or should know that such a person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others. *Mills v. Crone*, 63 Ark. App. 45, 973 S.W.2d 828 (1998). The words "under the control of the actor" are used to indicate that the third person is entitled to possess or use the thing or engage in activity only by the consent of the actor and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing or engaging in the activity. *Id.*

The elements of a claim of negligent entrustment are stated in *Balentine v. Sparkman*, 327 Ark. 180, 937 S.W.2d 647 (1997). There must be proof that: (1) the entrustee was incompetent, inexperienced, or reckless; (2) the entrustor knew or had reason to know of the entrustee's condition or proclivities; (3) there was an entrustment of the chattel; (4) the entrustment created an appreciable risk of harm to the plaintiff and a relational duty on the part of the defendant; (5) the harm to the plaintiff was proximately or legally caused by the negligence of the defendant.

Harold Morgan gave his statement concerning the accident. According to Harold, he was selling the Hyundai to his brother

Larry Morgan but retained the title to the vehicle until such time as the car was paid for in full. Larry was to make the payments on the car, pay the insurance, and not let anyone else drive the car. Harold and Larry were the only named insureds on the vehicle.

Harold described Sandra Powell, Larry's fiance, as "just a drifter, you know. I mean I know her from a lot of people but as far as knowing her I don't . . . I don't know her background or history or anything . . . I don't really talk to her because we don't get along."

On one occasion prior to the accident, in June 2000, Harold learned that Sandra Powell had driven the vehicle. Harold testified that he followed Sandra to where she had driven the car and told her, "Don't never let me see you in this car again driving it, because if I do I'm pulling your ass right out of it." He further testified,

> "[Y]ou know, until the day that I noticed — that I stopped her, you know, and told her to get out of the car, that she wasn't suppose to drive it. She told me she had a driver's license. I said, 'Well, where are they at?' [Sandra responded] 'Springdale's got them.' I said 'You ain't got shit.' I said 'Don't never let me catch you in this car again' . . . . 'Ever.' "

He also testified that he continued to tell Larry that only he could drive the car.

Harold further testified that he did not know of the accident with appellant Rebecca Collins until two days after it occurred, "because they kept saying, 'Don't tell him because it wasn't nothing,' you know, and all this, and I told my brother, 'that's bullshit, I know better than that. Anytime you have an accident they're going to have a police report.' "

Larry Morgan testified that he was purchasing the car from his brother. He was to make the payments while he was driving it, and he explained that "[i]f I kept it until we got it paid off, it would be mine." He further testified that Harold told him that no one else should drive it but him. Larry testified that on one occasion he let Sandra Powell drive the car because he had been drinking and that it was the only time he gave her permission to drive it. He explained that she did not ask to drive the car again and that she did not drive it again prior to the accident.

Larry explained that on the day of the accident Sandra left the hospital after a three-day stay. Larry stated that he had been up with her all night trying to take care of her, and upon her release,

they had gone home for him to take a nap before going to work. He stated that when he woke up after about an hour the car was gone but the only key was in his pocket. He testified that he did not know how Sandra got it started but that the tow-truck driver told him, "She had the sunglasses stuck in the ignition, and it started with them." Larry stated that he had specifically told Sandra not to drive the car, that she knew she was not to drive it, and that she had not been driving it except on the one occasion in June 2000.

Sandra Powell testified that she was told by both Harold and Larry never to drive the car because she was not on the insurance and did not have a current driver's license. She stated that Larry had only given her permission to drive the car on the one previous occasion and that no one gave her permission to drive it the day of the accident. She also explained that she started the car with a pair of eyeglasses by folding them and sticking them into the ignition where a piece of previously broken key remained. In response to this testimony, appellants filed nearly identical affidavits from Rebecca Collins and Soni Fitzpatrick in which they stated that following the accident they saw Sandra Powell exit the vehicle with keys in her hand.

The majority points to no evidence that Harold gave Sandra express permission to use the vehicle, so our analysis must be based upon implied entrustment. It may be found that the insured has given implied permission where the named insured has knowledge of a violation of instructions and fails to make a significant protest. *Clark v. Progressive Ins. Co.*, 64 Ark. App. 313, 984 S.W.2d 54 (1998). If the owner of an automobile forbids another person from driving the automobile, but the other person continues to do so with the knowledge of the owner, then the owner has given implied permission to drive the automobile. *Id.*

The majority first questions whether Harold made a significant protest after he discovered the violation of his instructions. Harold testified that he told Sandra that if he caught her in the car again he would be "pulling her ass right out of it." He further referred to Sandra's assertion that she had a driver's license as "bullshit" and told her not to drive the car. I can think of no more significant protest short of a battery or false imprisonment that would make Harold's point more clear. The majority also makes much of Larry and Sandra lying to Harold about having the car after the accident. The only reasonable inference that can be drawn from this is that they knew that Sandra did not have permission to

drive it, either express or implied, and that they might well be facing Harold's wrath. There is simply no permission shown from the facts presented. Another factor to be considered is the relationship between the parties. The fact that Harold and Sandra did not get along is uncontradicted. Therefore, that circumstantial evidence of implied consent is missing in this case.

The majority next states that there are facts that create an issue as to whether Harold knew that Sandra was operating the vehicle against his instructions, thus creating an implied permission. The majority readily admits that "there is no statement from Sandra indicating that Harold knew that she continued to operate the car despite his prohibition." There is, in fact, no evidence presented that Sandra actually drove the car other than the first time, when Harold protested, and on the day of the accident. The majority states that the following facts constitute circumstantial evidence that Sandra continued to drive the car after Harold protested: (1) Sandra was Larry's fiance; (2) they had been together for some months; (3) she did not have her own car; (4) Larry allowed Sandra to drive the car on one previous occasion. It is sheer speculation to find that those facts prove that Harold knew that Sandra drove the vehicle at other times. Not one shred of evidence presented by the appellants demonstrates that Sandra drove the car other than the two times testified to by Harold, Larry, and Sandra.

I agree that the fact that there may have been two entrustments is not a bar to recovery. *See LeClaire v. Commercial Siding & Maint. Co.*, 308 Ark. 580, 826 S.W.2d 247 (1992). However, there is no evidence that Harold's entrustment to Larry was in any way negligent. None of the elements set forth in *Balentine, supra*, are met other than an initial entrustment from Harold to Larry. Accordingly, the only scenario in which Harold might be liable under a serial-entrustment theory is if he failed to significantly protest to Larry's first entrustment to Sandra. As stated earlier, Harold's protest on that occasion was most certainly significant.

The majority goes on to state that there is a material question of fact as to whether Sandra was drunk at the time of the accident. This is not a material question of fact regarding the trial court's granting of Harold's motion for summary judgment. Viewing the facts in the light most favorable to appellants, Sandra appears to be responsible for appellant Rebecca Collins's injury, whether or not she was drunk at the time. However, Sandra's intoxication is not material as to whether Harold negligently entrusted the car to

Larry or gave permission to Sandra to drive the car. Again, it is uncontradicted that Harold was unaware of the accident for two days afterward.

Federal court decisions interpreting the Federal Rules of Civil Procedure establish that "a trial court *may* deny a motion for summary judgment based on a lack of credibility of the moving party affiants or witnesses." *Clark*, 64 Ark. App. at 320-21, 984 S.W.2d at 59 (emphasis added); *see also* 10A Charles Allan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2726 at 440-47 (1998). The majority holds that, if there is potential bias, then a material question of fact exists. Under this standard, adverse parties in all cases would have potential bias, so summary judgment would never be appropriate. The object of summary-judgment proceedings is not to try the issues but to determine whether there are any issues to be tried. *City of Lowell v. City of Rogers*, 345 Ark. 33, 43 S.W.3d 742 (2001). When a summary judgment motion is put forth with affidavits attached, the motion's opponent cannot rely on a base denial or contrary allegations but must meet proof with proof. *Rankin v. City of Fort Smith,* 337 Ark. 599, 990 S.W.2d 535 (1999). Here, appellants offered no proof as to Harold's knowledge or actions that would support their claim of negligent entrustment. Simply stated, appellants did not meet proof with proof, thus summary judgment is appropriate.

Finally, the majority states that Harold, Larry, and Sandra gave inconsistent statements as to the material facts for the cause of action of negligent entrustment; however, their statements are wholly consistent as to the material facts of this case. Each testified that Harold entrusted the car to Larry and that Harold was adamant that Sandra not drive the car after the one time he found her in it. They each also testified that neither Harold nor Larry gave Sandra permission to drive the car subsequent to that one occasion, including the date of the accident, and that Sandra took the car without permission.

For the reasons stated, I would affirm the trial court. I am authorized to state that Judge Glover joins this dissent.

Imogene H. VOGELGESANG *v.* U.S. BANK, N.A.

CA 04-1179 211 S.W.3d 575

Court of Appeals of Arkansas
Opinion delivered June 29, 2005

Catlett & Stodola, P.L.C., by: *S. Graham Catlett* and *Paul Charton*, for appellant.

Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd., by: *Randy L. Grice, Matthew McCoy,* and *Chris Hart*, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The appellant, Imogene Vogelgesang, was the owner of a checking account at appellee, U.S. Bank. She executed, filed, and recorded a power of attorney in January 1998 to permit her sons to conduct her financial affairs, and delivered a copy of the power of attorney to U.S. Bank. When she discovered in January 2002 that she had no money left in her account, she brought an action against U.S. Bank seeking reimbursement in the sum of $179,304.94 for unauthorized transactions conducted by her son Jerry between April 1999 and December 2001. Asserting that the transactions were authorized by the power of attorney delivered to it by appellant, U.S. Bank moved for summary judgment. The circuit judge agreed and granted summary judgment in favor of U.S. Bank. On appeal, appellant contends that the circuit judge erred in granting summary judgment because the power of attorney did not authorize the transactions. We disagree, and we affirm.

Summary judgment is a remedy that should be granted only when there are no genuine issues of fact to litigate and when the case can be decided as a matter of law. *Johnson v. Encompass Insurance Co.*, 355 Ark. 1, 130 S.W.3d 553 (2003). Our review is limited to a determination as to whether the trial court was correct in finding that no material facts were disputed. *Wright v. Compton, Prewett, Thomas & Hickey, P.A.*, 315 Ark. 213, 866 S.W.2d 387 (1993). In making this determination, we view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Neill v. Nationwide Mutual Fire Insurance Co.*, 355 Ark. 474, 139 S.W.3d 484 (2003). Where the trial court based summary judgment on a written contract, we must ascertain the plain and ordinary meaning of the language in the written instrument, and if there is any doubt about the meaning, there is an issue of fact to be litigated. *Carver v. Allstate Insurance Co.*, 77 Ark. App. 296, 76 S.W.3d 901 (2002). If the contractual language is unambiguous, however, its construction is a question of law for the court, and no question of fact is presented. *See id.*

The relevant facts can be stated briefly. Appellant became ill in 1997 and her sons became responsible for her financial affairs, paying bills, overseeing her accounts, and balancing her checkbook. She executed, filed, and recorded a durable power of

attorney in January 1998 that contained a provision whereby appellant agreed to indemnify and hold harmless any third party against any and all claims that might arise by reason of the third party having relied upon the instrument, and that provided, in pertinent part, as follows:

> TO ALL PERSONS, be it known that I, Imogene Harris Vogelgesang of 4415 Aspen Drive, North Little Rock, Pulaski County, Arkansas 72118 the undersigned Grantor, do hereby make and grant a general power of attorney to William Gerald Vogelgesang — James Edward Vogelgesang of (W.G.) 1909 Pine Valley Rd, Little Rock, AR 72208 & (J.E.) 804 Carywood Lane, Little Rock, AR 72205 and do thereupon constitute and appoint said individual as my attorney-in-fact.
>
> My attorney-in-fact shall act in my name, place and stead in any way which I myself could do, if I were personally present, with respect to the following matters, to the extent that I am permitted by law to act through an agent:
>
> (A) Real estate transactions
>
> (B) Tangible personal property transactions
>
> (C) Bond, share, and commodity transactions
>
> (D) Banking transactions
>
> (E) Business operating transactions
>
> (F) Insurance transactions
>
> (G) Gifts to charities and individuals other than Attorney-in-Fact
>
> (H) Claims and litigation
>
> (I) Personal relationships and affairs
>
> (J) Benefits from military service
>
> (K) Records, reports and statements
>
> (L) Full and unqualified authority to my attorney-in-fact to delegate any or all of the foregoing powers to any person or persons whom my attorney-in-fact may select

(M) Access to safe deposit box(es)

(N) All other matters

(O) [T]his power of attorney shall not be affected by the subsequent disability or incompetence of the Grantor.

Other Terms:

Agents for my affairs will collaborate on all decisions.

The first-listed attorney-in-fact, William Gerald Vogelgesang, had previously been convicted of theft of property for writing checks without authority on the account of Krishna Corporation, a fact known to appellant at the time she executed the instrument granting a general power of attorney to him. William Gerald Vogelgesang proved unworthy of the trust with which he had been invested, making numerous withdrawals and charges for his own benefit upon his mother's account with U.S. Bank, and exhausting it by January 2002.

Appellant, in her deposition, testified that she never intended to authorize either of her sons to execute and endorse checks on her behalf. This, however, is contrary to the express authorization granted by the instrument to conduct banking transactions in any way which she herself could do to the full extent permitted to an agent. Furthermore, the wording of the power of attorney executed by appellant in this case complies substantially with the statutory power of attorney set out in Ark. Code Ann. § 28-68-401 (Repl. 2004). In a statutory power of attorney, the language granting power with respect to banking transactions by definition empowers the agent to withdraw by check money deposited by the principal with a financial institution, and to make and endorse checks payable to the principal's order. Ark. Code. Ann. § 28-68-408(5) and (9) (Repl. 2004). Although appellant may not have subjectively intended to authorize these powers, her subjective intent must yield to the plain meaning of the words employed in the agreement. *See Crain Industries, Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991); *Calvert Fire Insurance Co. v. Francis*, 259 Ark. 291, 532 S.W.2d 429 (1976).

On appeal, appellant argues that the transactions conducted by William Gerald Vogelgesang were unauthorized because the contractual term requiring agents for her affairs to "collaborate on

all decisions" required that all banking activity be conducted by both agents acting in concert, or that this term was at least sufficiently ambiguous to present a fact-question regarding the authority of a single agent to act. We do not agree.

Where an agency is created by contract, the nature and extent of the agent's authority must be ascertained from the contract itself. *American Agricultural Chemical Co. v. Bond*, 177 Ark. 164, 6 S.W.2d 2 (1928). When the terms of a contract are ambiguous and capable of having more than one meaning, extrinsic evidence is permitted to establish intent of the parties, and the meaning of the contract then becomes a question of fact. However, when a contract is free of ambiguity, its construction is a matter of law for the court to determine. *Dodson v. Dodson,* 37 Ark. App. 86, 825 S.W.2d 608 (1992). The initial determination of the existence of an ambiguity rests with the court. *Cranfill v. Union Planters Bank*, 86 Ark. App. 1, 158 S.W.3d 703 (2004). 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. *Id.* It is also established that different clauses of a contract must be read together and construed so that all of its parts harmonize if that is possible. *Dodson v. Dodson, supra.*

We find no ambiguity after reading the different clauses of the power-of-attorney agreement together. The first paragraph of the instrument names the two brothers as appellant's attorney-in-fact. The second paragraph lists the various powers that are granted to each agent and the types of matters in which such agent is authorized to act. The third paragraph deals not with actions but instead with decisions regarding appellant's affairs, and specifies that both agents must collaborate in making these decisions. Reading these paragraphs together, we think that they unambiguously direct the agents to make decisions regarding disbursements from appellant's account jointly, while permitting them to delegate authority or act individually with regard to ministerial actions performed in execution of those decisions, such as writing checks. *See Venhaus v. State*, 285 Ark. 23, 684 S.W.2d 252 (1985).

Finally, appellant stated that, when she delivered the power of attorney to U.S. Bank, she informed the branch manager that her sons were to have "dual power of attorney" and that they would transact all her business for her. To the extent that this

testimony regarding appellant's understanding of the agreement may contradict or vary the terms of the instrument itself, it is precluded by the parol-evidence rule, a substantive rule in the law of contracts requiring the exclusion of prior or contemporaneous agreements of the parties that would vary the express terms of their written agreement. *First National Bank v. Griffin*, 310 Ark. 164, 832 S.W.2d 816 (1992). The effect of this rule is to extinguish all prior and contemporaneous negotiations, understandings, and verbal agreements on the same subject. *Bank of America v. C.D. Smith Motor Co.*, 353 Ark. 228, 106 S.W.3d 425 (2003).

Affirmed.

HART, ROBBINS, BAKER, and ROAF, JJ., agree.

CRABTREE, J., dissents.

TERRY CRABTREE, Judge, dissenting. Appellant maintains that the trial court erred by granting summary judgment as a material issue of fact remains to be decided in this case. I agree with appellant and believe that we should reverse and remand.

I am convinced that the majority turns a blind eye to the limiting language contained in appellant's power of attorney. Powers of attorney are to be construed in accordance with the rules for interpretation of written instruments generally. 3 Am. Jur.2d, *Agency* § 28 (2004). Where, from the face of a written instrument, there is no doubt about the meaning of an instrument, summary judgment is appropriate. *Chlanda v. Estate of Fuller*, 326 Ark. 551, 932 S.W.2d 760 (1996). That is simply not the case here.

In this instance, I see that there is a facial ambiguity on appellant's power of attorney. The *additional* typewritten language under the heading "Other terms" on the power of attorney states, "Agents for my affairs shall collaborate on all decisions." This conditional language could have different interpretations. It may mean that the two sons are required to discuss or confer on all matters before one of them transacts business on appellant's behalf. On the other hand, it may mean that the two sons are *required* to agree and act in unison on all matters and that one may not act without the other. As a result, I think that a genuine issue of material fact exists concerning whether the sons were required to act in concert before transacting banking business pursuant to the power of attorney. I am satisfied that enough doubt and ambiguity

arises with the power of attorney to make this case inappropriate for summary judgment. *See Schnitt v. McKellar*, 244 Ark. 377, 427 S.W.2d 202 (1968); *Reed, Ex'r v. Wright*, 279 Ark. 45, 603 S.W.2d 422 (Ark. App. 1980).

Brenda K. PACHECO *v.* DIRECTOR, Employment Security Department and Community Action Program for Central Arkansas

E 04-357 211 S.W.3d 569

Court of Appeals of Arkansas
Opinion delivered June 29, 2005

Daniel A. Webb, for appellant.

Phyllis Edwards, for appellee.

SAM BIRD, Judge. On June 18, 2004, appellee Community Action Program for Central Arkansas (CAPCA) terminated

appellant Brenda Pacheco from her employment. She subsequently applied for unemployment benefits, and her application was denied by the Arkansas Employment Security Department. Pacheco then appealed to the Arkansas Appeal Tribunal, which reversed the decision of the Department and awarded unemployment benefits to her. CAPCA appealed to the Board of Review, and the Board reversed the decision of the Appeal Tribunal. In the present appeal, Pacheco claims that the Board erred in finding that there was substantial evidence that she was discharged for misconduct under Ark. Code Ann. § 11-10-514. We agree with Pacheco, and for the reasons stated herein, we reverse and remand.

Arkansas Code Annotated section 11-10-514(a)(1) (Repl. 2002) states that a person shall be disqualified from receiving unemployment benefits if the Director of the Employment Security Department finds that the person is discharged from his or her last work for misconduct in connection with the work. "Misconduct," for purposes of unemployment compensation, involves: (1) disregard of the employer's interest, (2) violation of the employer's rules, (3) disregard of the standards of behavior which the employer has a right to expect of his employees, and (4) disregard of the employee's duties and obligations to his employer. *Fulgham v. Director*, 52 Ark. App. 197, 918 S.W.2d 186 (1996). To constitute misconduct, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good-faith errors in judgment or discretion. *Johnson v. Director*, 84 Ark. App. 349, 141 S.W.3d 1 (2004). Instead, there is an element of intent associated with a determination of misconduct. *Id.* There must be an intentional and deliberate violation, a willful and wanton disregard, or carelessness or negligence of such a degree or recurrence as to manifest wrongful intent or evil design. *Id.* Misconduct contemplates a willful or wanton disregard of an employer's interest as is manifested in the deliberate violation or disregard of those standards of behavior which the employer has a right to expect from its employees. *Id.*

The evidence in this case reveals that on June 11, 2004, Pacheco was called into a meeting with her supervisor, Carolyn Mallot, and CAPCA's human resources representative, Pam Hensley. Pacheco was informed that she was being placed on one week's suspension from her employment, with pay, pending an

investigation into co-workers' complaints. Pacheco was apparently told not to discuss "it" with anyone pending completion of the investigation.

Upon her return on June 18, Pacheco was given a letter signed by CAPCA's Executive Director, Phyllis Fry, and Head Start Director, Bill Ballard, informing her that she was dismissed from her position as Family Advocate for CAPCA Head Start for the following reasons:

> Section 1200.00 of the Administrative Manual
>
> #5 Inability to get along with co-workers, so that work is hindered or not up to required standards.
>
> #7 Rudeness in dealing with the public, clients, vendors, or other employees.
>
> #8 Conduct unbecoming of an employee, which adversely reflects upon the agency.
>
> #12 Conduct which undermines the morale of other employees.
>
> #17 Using threatening or abusive language.
>
> #18 Insubordination.

Pacheco pursued a grievance against CAPCA, which was denied. She then filed a claim for unemployment benefits, which has become the subject of this appeal. On July 12, 2004, the Department denied Pacheco's application for unemployment benefits based on its determination that she was discharged from her job because she "willfully" did not perform her work satisfactorily and because her actions were within her control and against CAPCA's best interest. Pacheco then appealed to the Arkansas Appeal Tribunal.

On August 12, 2004, the Appeal Tribunal conducted a hearing by telephone. During the hearing, CAPCA's Head Start Program Director, Bill Ballard, testified that Pacheco worked for CAPCA from February 2000 to June 2004. He said that Pacheco's primary functions were dealing with families, recruiting, and managing children's records, and that the decision to terminate her was based on six items of disciplinary action found in CAPCA's

Administrative Manual. Specifically, he said that "all six items combined led us to make our decision to terminate Mrs. Pacheco's employment with us."

Ballard also said that, prior to Pacheco's termination, she was suspended with pay pending an investigation into certain allegations, including that she was generally rude, that she was "running everybody off," and that she "tried to make [her co-workers] live by her opinion." In addition, Ballard said that Pacheco allegedly "threatened people with their jobs" and that she had, in the past, ignored an order from a center manager to perform a task. Ballard also testified that, at the time Pacheco was suspended, there were "six or eight pages of testimony" from her co-workers to support the allegations against her and that Pacheco "had access to look at these [allegations] and a chance to reply to all of them." However, on cross-examination, Ballard admitted that he did not attend the meeting on June 11, that he did not know why Pacheco was not given a chance to review the file, but that he knew the investigation file was at the meeting if Pacheco had wanted to read it.

Ballard further testified that Pacheco had demonstrated insubordination by discussing the situation with others after CAPCA informed her of the investigation against her, suspended her with pay, and told her "not to discuss it until we completed our investigation." Ballard said that, on the same day that Pacheco was suspended, CAPCA received calls "from outside, from people not even employed with CAPCA that they already knew about all of this, from [Pacheco], or from somebody she talked to."

Carolyn Mallot, CAPCA's Community Development Director, testified that she had supervised Pacheco from February 2004 to June 2004. Mallot said that CAPCA had planned to discuss the allegations with Pacheco after her suspension, but that the discussion never occurred because the center had received phone calls from persons asking questions about the matter.

Pacheco testified that during her employment with CAPCA, she never received any input that things were not going well and that no one warned her that she "was not popular." She said that she did, however, notice "a lot of people resigning from their jobs." She also said that she felt like she was "wrongly done" and that she filed a grievance procedure after being terminated. According to Pacheco, CAPCA responded to her grievance by stating that it had received a phone call after she was suspended, and based on that, the decision to terminate was proper.

Pacheco said that two co-workers contacted her by telephone the day after she was suspended and that she did not initiate the contacts. She said that the first caller called during her lunch break and asked her where she was, and that she replied, "Well, I'm not coming in this week." The caller then asked, "What's wrong?" and Pacheco replied, "I just can't come in." Pacheco said that she responded "no" when questioned by the caller about whether she was fired. Pacheco testified that she started crying during the conversation. According to Pacheco, the second phone call was from co-worker Charla Steiner. Pacheco denied discussing the details of her suspension with Steiner or the first caller, but admitted that she told both callers that she had been suspended.

Pacheco also testified that, on the day she was suspended, she told Mallot, "I don't understand this," and when she asked to further discuss the situation with Mallot, her request was denied. She said that on the day that she returned to work after her suspension, she was terminated. She testified that Ballard and Mallot told her that, based upon their investigation, she was fired. Pacheco stated that she did not "have a clue what they did," but that she was given a letter of termination.

Charla Steiner testified that she resigned from CAPCA "because of what happened to [Pacheco]." She said that she did not know anyone who had quit because of Pacheco, and that she had never known Pacheco to talk to anyone in a rude manner or to have a verbal confrontation with anyone. Steiner also said that she called Pacheco on June 11, 2004, and that Pacheco was "crying" and saying that "she had been suspended and that she did not know why, but they said she was rude to people." She said that Pacheco told her that she was not supposed to have any contact with anyone from work.

The Appeal Tribunal reversed the decision of the Department, concluding that there was not a preponderance of the evidence to support a finding that claimant willfully and intentionally failed to perform her job against the employer's interest, and that she was discharged from her last work for reasons which do not constitute misconduct in connection with the work. CAPCA then appealed to the Board of Review.

The Board of Review reversed the decision of the Appeal Tribunal, stating as follows:

> Based on the evidence, the Board of Review finds that the claimant was discharged from last work for misconduct not con-

> nected with the work. The available evidence does not establish that the claimant's conduct, in regard to the original complaints, rose to the level of misconduct. She may have exceeded her authority to some extent by attempting to correct problems with other co-workers rather than report the problems to the appropriate supervisor for correction. It has not been shown that the claimant was acting against the employer's interests, nor that she was advised to stop attempting to correct her coworkers.
>
> However, the claimant's conduct after her suspension was more serious, and this was the reason the employer discharged her without conducting any further investigation of the complaints. The claimant was told not to discuss *the matter* with any coworkers. The testimony of the claimant's witness was the most damaging evidence against the claimant. The claimant may not have initiated the phone calls to her coworker, but she told her coworkers that she had been suspended, that the reason for the suspension was allegations of rudeness, and that her suspension would last a week. The claimant knew that she was not supposed to discuss *the matter* with her coworkers, and even told them she was not supposed to discuss it when she, in fact, discussed it with them. . . . ? If the claimant had simply told the coworkers that she had been instructed not to discuss her absence, her conduct would probably not rise to a level to constitute misconduct, and the outcome of this case might be different. However, the claimant disclosed information to the callers after she was specifically told not to discuss the matter with her coworkers. Her conduct violated a standard of behavior the employer had a reasonable right to expect. Therefore, the decision of the Appeal Tribunal (Appeal No. 2004-AT-07484), which reversed the Department determination, is reversed on the finding that the claimant was discharged from last work for misconduct connected with the work.

(Emphasis added.)

Whether an employee's actions constitute misconduct in connection with the work sufficient to deny unemployment benefits is a question of fact for the Board. *Thomas v. Director*, 55 Ark. App. 101, 931 S.W.2d 146 (1996). Our standard of review of the Board's findings of fact is well-settled:

> We do not conduct a *de novo* review in appeals from the Board of Review. In appeals of unemployment compensation cases we instead review the evidence and all reasonable inferences deducible

> therefrom in the light most favorable to the Board of Review's findings. The findings of fact made by the Board of Review are conclusive if supported by substantial evidence; even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could have reasonably reached its decision based on the evidence before it. Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion.

Johnson v. Director, supra (citing *Snyder v. Director*, 81 Ark. App. 262, 263, 101 S.W.3d 270, 271 (2003)). Additionally, the credibility of witnesses and the weight to be accorded their testimony are matters to be resolved by the Board of Review. *Johnson, supra.*

Here, there is no evidence that Pacheco manifested the requisite intent to constitute misconduct under Ark. Code Ann. § 11-10-514. The Board of Review found that Pacheco disclosed information about her suspension over the phone after she was specifically told not to discuss the matter with her coworkers, and that her conduct violated a standard of behavior the employer had a reasonable right to expect. Our difficulty with the Board's conclusion, however, is that we are unable to find any evidence in the testimony of CAPCA's witnesses, or anywhere else in the record, that enables us to determine what "the matter" was that Pacheco was not supposed to discuss.

The evidence shows that CAPCA instructed Pacheco not to discuss "it" with anyone pending investigation of the allegations against her. Although CAPCA had planned to discuss these allegations with Pacheco after her suspension, Carolyn Mallot testified that this discussion never occurred. Furthermore, Pacheco testified that, on the day she was suspended, she told Mallot, "I don't understand this," and when she asked to further discuss the situation with Mallot, her request was denied.

After Pacheco was suspended, two co-workers called to inquire why she was not at work. Pacheco clearly did not initiate this contact, and she was emotional and crying when she informed the callers that she had been suspended. Other than telling Charla Steiner that she had been accused of being rude, there is no evidence that Pacheco discussed anything with her about an investigation that was about to be undertaken by CAPCA. If, as the Board suggests, Pacheco should have responded to inquiries by saying that she "was not supposed to discuss her absence," then

that is what CAPCA should have instructed her to do. An admonition not to discuss "it" is not sufficiently specific to put Pacheco on notice of what "it" was that she was not to discuss.

In our view, a reasonable mind could not accept this evidence as adequate to support the conclusion that Pacheco's actions constituted an intentional and deliberate violation of her employer's expectations. We therefore hold that the Board's decision was not supported by substantial evidence, and we reverse and remand the case to the Board for further proceedings to determine the amount and duration of Pacheco's benefits.

Reversed and remanded.

HART and CRABTREE, JJ., agree.

Jane CHITWOOD *v.* Gordon CHITWOOD

CA 04-996 211 S.W.3d 547

Court of Appeals of Arkansas
Opinion delivered June 29, 2005

Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., by: *Curtis E. Hogue*, for appellant.

Matthews, Campbell, Rhoads, McClure, Thompson & Fryauf, P.A., by: *David R. Matthews* and *Sandra L. Waddoups*, for appellee.

DAVID M. GLOVER, Judge. Appellant, Jane Chitwood, and appellee, Gordon Chitwood, were divorced by decree entered on October 21, 1993. They had two children, A.C. and K.C. Appellant subsequently moved with the children to Tulsa, Oklahoma, and visitation problems ensued. In a February 19, 1999 letter to appellant, appellee wrote: "I give up. As per your request, my parental rights are hereby surrendered and child support payments are terminated. You and the children will never see or hear from me again." For the next five years, appellee did not see the children nor pay support after that date until the current proceedings were initiated. On April 21, 2003, appellant filed a motion for contempt and complaint for money damages in which she sought to have appellee held in contempt and ordered to pay back child support. Appellee counter-petitioned to modify the support order. At the hearing, it was stipulated that the amount of accrued arrearage was $189,226 and that the amount of child support to be paid by appellee to appellant, beginning June 1, 2004, was $4,512 a month. Following the hearing on the matter the trial court found that appellant was prohibited by the doctrine of equitable estoppel from seeking to collect child-support arrearages or to enforce any child-support judgment that had accrued through the date of May 25, 2004. For her sole point of appeal, appellant contends that the trial court erred in finding that appellee proved the elements of equitable estoppel and thus erred in barring her from recovering the child-support arrearage on that basis. We disagree and affirm.

At the hearing in this matter, appellant testified that appellee paid his child support in a timely fashion until January 1999. She stated that on or about February 24, 1999, she received a letter

dated February 19, 1999, from appellee, which stated that he was surrendering his parental rights and that child-support payments would be terminated per her request, and further that neither she nor the children would ever see or hear from him again. She explained that she sent the letter to her attorney and that, in return, she received from her attorney "some research regarding Arkansas law as it pertained to voluntary termination of parental rights and release of child-support obligations." She testified that based upon the legal research that she received, she believed at the time that appellee owed a continuing obligation of child support and that he continued to be entitled to visitation, but that she never told him either of these things. She stated that she changed her tax returns to claim both children as dependents after the child-support payments ceased.

Appellant testified that she did not file a contempt action for child support in 1999 because her children were "emotionally drained" and she felt as if she had to choose between money and her children's mental well-being. She stated that she borrowed money from the bank to make ends meet.

Appellant acknowledged that on August 24, 2001, she sent a letter to appellee's parents, and she described her letter as stating that she did not think appellee was serious and that he could show up at any time to visit the children. She told the grandparents that the children could visit with them overnight only if there would be no contact with appellee. She stated that she filed the contempt action in April 2003 primarily for financial reasons to recover child support, but also because the children were older and mature enough to handle a relationship with their father. She stated that she had never refused appellee's visitation.

Appellant testified that there was a contempt action against her in 1997 and that it was settled by her agreeing not to prevent visitation with appellee and to use her best efforts to facilitate visitation. She stated that she allowed appellee overnight visitation with the children until an incident on December 18, 1998, which occurred in Tulsa, Oklahoma. She explained that appellee came to Tulsa to exercise his visitation for Christmas and that she would not allow the children to go with him. She denied that she discussed with appellee at that time "doing away with visitation and child support." She acknowledged, however, that during a prior incident in 1997, when appellee was angry because the children's suitcases were not ready when he came to get them, that she said, "Why don't you just give them up?" She testified that

when she received appellee's February 1999 letter that began, "Per your request," she "did not have any idea what he was talking about." She denied discussing with her attorney, prior to receiving appellee's letter, whether she and appellee could make a deal whereby appellee agreed not to exercise visitation in exchange for not paying child support.

Appellant stated that both children had problems seeing their father. She said that A.C. had panic attacks and that visiting with his dad made his anxiety worse, "although he had anxiety as a little boy and had continued to have anxiety." She explained that she had just bought a new house in 1999 and that she was able to make house payments by borrowing money at first and that she then inherited around $350,000. She stated that once most of the inheritance money was depleted, she initiated the action to recover the outstanding child support from appellee. She stated that by the time the action was filed, she did not have enough money to take care of the children. She acknowledged that when that fact was communicated to appellee, he began paying child support again. She also acknowledged that in the opinion letter that she received in 1999 from her attorney, one of the available options that was noted was for appellee "to pay no child support and in return, exercise no visitation."

With respect to the events of December 1998, appellant testified that around the first of December 1998, she received a letter from appellee in which he stated that he would exercise his Christmas visitation and that he would pick up the children on December 18 for eight days of visitation. She stated that prior to that time, appellee had not exercised overnight visitation with the children for the previous seventeen months and that he had only exercised daytime visitation on limited occasions. She stated that she pleaded with him not to take the children for eight days and nights, but that he told her he would be there to pick them up on Friday for eight days of visitation. She stated that on Friday, December 18, she was driving up to the house with the children in the car when she noticed that appellee was backing out of the driveway. She stated that she continued to drive to a friend's house and that she and the children went into the friend's house. She explained that appellee followed them and came to the front door of the house. She stated that he was not allowed in and that she did deny him visitation. She stated that he filed a contempt action against her the following Monday.

Appellee also testified at the hearing in this matter. He explained that following his divorce from appellant, he was never able to exercise visitation with the children without there being some controversy. He stated that those controversies caused him to return to court on occasions between 1994 and 1999. He explained that there was a period of approximately seventeen months prior to December 1998 when he did not exercise overnight visitation with the children. He testified that many times he would attempt to exercise visitation, but for different reasons would be unsuccessful. He stated that sometimes he would drive to Oklahoma and there would be no one at home, and that at other times, appellant would tell him that the children were not feeling well and did not want to come for a visit. He explained that his son, A.C., was being seen by a psychologist for his anxiety and that the doctor had asked that visitation cease for a period until the doctor completed her sessions with A.C. Appellee stated that he was not informed by appellant until December 1998 that the sessions had ended in May 1998, accounting for the approximate seventeen-month period where he exercised limited visitation.

Appellee testified that appellant called him after she received his letter concerning Christmas 1998 visitation and that she wanted to modify visitation from eight days and nights to one day and one night. He said that he told her such a modified arrangement was not acceptable and that she became angry. He testified that she asked him, "Why don't you give up your visitation, stop paying child support, and leave us alone," and then she hung up.

Appellee explained that he arrived at appellant's house on December 18 at five minutes before six o'clock in the evening. He stated that he sat in his car until 11:00 p.m. when he decided that he would leave to use the bathroom, get something to eat, and then come back. He stated that as he was pulling out of the driveway, he saw appellant and the children drive by the house. He said that he followed her car to a friend's house, which was about three miles away. He explained that he went to the front door and told her that he was there to exercise his visitation, that she told him he was not taking the children, and that there was nothing he could do about it. He stated that he called the police, that they arrived, and that they told him because his papers were from Arkansas, there was nothing they could do. He said that he drove home and had a contempt action filed.

Appellee explained that the contents of the February 17, 1999 order, which was entered by a special judge further hamper-

ing his visitation, "was the straw that broke the camel's back." He stated that he was totally frustrated; that he saw no hope of having a meaningful relationship with his children; and that he wrote the February 1999 letter, beginning "Per your request," in reference to appellant's December 1998 phone call. He testified that he thought the February 1999 letter represented a binding agreement and that he had no contact with appellant or the children after that date until this action for child support was initiated. He said that he did not know that child-support arrearage was accruing. He explained that he believed that he was set up to take a fall; that appellee knew everything that was going on; that she just wanted "to play me out until she ran out of her inheritance and then come and hit me for all this money"; and that there was no way that he could go back and get that time with his children.

Appellee testified that he has another daughter from an earlier marriage and that he has a good relationship with her mother. He stated that he has always exercised visitation with her and that he has paid and continues to pay child support and college expenses, even though it is no longer required. He also explained that he continued to provide insurance coverage for A.C. and K.C. after the February 19, 1999 letter because he did not trust appellant to continue to work. He stated that he was not concerned about appellant's and the children's monetary condition because he knew that appellant had "inherited an extremely large sum of money from her father."

Appellant's former attorney testified by deposition, after appellant waived the attorney-client privilege, that he received a letter from appellee's attorney dated March 22, 1999, which indicated that appellee and appellant had agreed that appellant would no longer have visitation and would no longer pay child support. He stated that he forwarded the letter to appellant and had conversations with her about the substance of the letter. He explained that an attorney, who worked for him at the time, prepared a research memo concerning whether appellee could relinquish his parental rights and obligations in that fashion and that the attorney drafted an opinion letter to appellant on the same subject. The research memorandum was dated May 21, 1999, and he explained that it was his belief that the opinion letter that was sent to appellant would have followed preparation of the memorandum. He further testified, however, that he recalled discussing with appellant the notion of swapping visitation for money before appellee's February 19, 1999 letter was received by appellant.

The opinion letter that the attorney wrote to appellant was introduced as an exhibit. It provided in pertinent part:

> As we discussed during our telephone conference on Friday, it is my opinion, after reviewing Arkansas law, that an agreement to terminate parental rights in exchange for a waiver of child support would not be enforced by an Arkansas court if the agreement was challenged at a later time. In fact, it is my opinion the agreement would be voided, i.e., held never to have existed. If the agreement is not enforced, your attorney would certainly assert that a judgment for past-due child support should be entered against Dr. Chitwood. However, there is no guarantee that a court would award you the past-due support as I suspect Dr. Chitwood would raise equitable defenses in hopes the court would not enter a judgment against him.
>
> . . . .
>
> The other option, as you noted, is that you can do nothing. If Dr. Chitwood is not exercising his visitation, that is his problem so long as you are not denying it. Child support payments that he does not make become individual judgments once he does not make the payments. Therefore, you can collect them by garnishment or by obtaining an income withholding order.

A trial court's ruling on child-support issues is reviewed *de novo* by this court, and the trial court's findings are not disturbed unless they are clearly against the preponderance of the evidence. *State v. Burger*, 80 Ark. App. 119, 92 S.W.3d 64 (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. *Rigsby v. Rigsby*, 356 Ark. 311, 149 S.W.3d 318 (2004). We give due deference to the superior position of the trial court to view and judge the credibility of the witnesses. *Id.*

Once a child-support payment falls due, it becomes vested and a debt due the payee. *Office of Child Support Enforcement v. King*, 81 Ark. App. 190, 100 S.W.3d 95 (2003). However, enforcement of child-support judgments are treated the same as enforcement of other judgments, and a child-support judgment is subject to the equitable defenses that apply to all other judgments. *Id.* If the obligor presents to the court or administrative authority a basis for laches or an equitable-estoppel defense, there may be

circumstances under which the court or administrative authority will decline to permit enforcement of the child-support judgment. *Id.*

The elements of equitable estoppel are (1) the party to be estopped must know the facts; (2) the party must intend that its conduct shall be acted on or must so act that the party asserting estoppel had a right to believe the other party so intended; (3) the party asserting estoppel must be ignorant of the facts; and (4) the party asserting estoppel must rely on the other party's conduct to his detriment. *Burger, supra.*

The trial court specifically noted in its order that the credibility of the witnesses was the crucial factor in deciding this case. The court made the following pertinent findings: 1) that appellant initiated the conversations concerning the agreement that appellee would surrender his parental rights and terminate his child-support payments; 2) that appellant was aware that such an agreement was unenforceable and void as against public policy in Arkansas, but that she intentionally, by her words and especially by her actions, induced appellee to give up his visitation privileges in exchange for her agreement not to seek child support; 3) that appellant had received legal advice on the consequences of her actions; 4) that she intended that her conduct be acted upon and that appellee believed that she so intended; 5) that appellee was ignorant of the facts; 6) that appellee relied upon appellant's conduct to his detriment. In announcing her decision from the bench, the trial judge further explained that appellee's detrimental reliance was not monetary, but rather that appellee "let go of five years [of visitation] that never gets made up, five years of time that is just gone, five years of time that nobody gets to recapture."

We find no clear error with respect to any of the trial court's findings. First, as noted by the trial court, credibility was a crucial factor in this case, and we give due deference to the trial court's credibility determinations. Second, we hold that the elements of estoppel were established.

(1) Appellant knew the facts

Appellant knew that the "agreement" by which appellee gave up his parental rights and stopped making support payments was not enforceable and that the child-support obligations would continue to accrue. The deposition of appellant's attorney

disclosed that he believed he discussed with appellant the notion of swapping visitation for money *before* the February 19, 1999 letter from appellee, and that he distinctly remembered discussing the February 19, 1999 letter with appellant concerning its validity. Moreover, the opinion letter that was subsequently prepared for appellant explained that under Arkansas law, an agreement to terminate parental rights in exchange for a waiver of child support would not be enforced by the courts and that a judgment for past-due child support would presumably be entered, but cautioned that her ex-husband might raise equitable defenses.

(2) The party must intend that its conduct shall be acted on or must so act that the party asserting estoppel had a right to believe the other party so intended

The trial court clearly believed appellee's testimony that appellant initiated the conversations by asking appellee to give up his visitation, to stop paying child support, and to leave them alone. The trial court also recognized that after receiving the February 19, 1999 letter from appellee and the opinion letter from her attorneys, appellant did not contact appellee about paying child support or about visitation, and, in fact, wrote to the paternal grandparents two years later, requiring assurances that appellee would not be allowed to visit the children if they went to visit the grandparents. Appellee had every right to believe that appellant intended for her conduct to have the result that it did.

(3) The party asserting estoppel must be ignorant of the facts

Appellee testified that it was his belief that the agreement relinquishing his parental rights and stopping child-support payments was enforceable. His conduct supported that testimony in that he did not see his children nor pay support after the date of the letter until these proceedings began. Moreover, the trial court clearly credited appellee's testimony that he was not informed by his attorney about the invalidity of the agreement. Consequently, appellee was not factually aware that child support was legally accruing, and he was obviously not aware that appellant had specifically sought legal opinions regarding the validity of the agreement.

(4) The party asserting estoppel must rely on the other party's conduct to his detriment

Finally, as noted by the trial court, the detriment in this case is not monetary. Rather, it is the amount of time that appellee went without seeing his children, which is time that can never be regained.

In *Arkansas Department of Human Services v. Cameron*, 36 Ark. App. 105, 818 S.W.2d 591 (1991), which has been overruled to a limited extent under circumstances not applicable in this case,[1] the appellee ex-husband, Richard Cameron, signed a consent to adoption, giving his consent for appellant's new husband to adopt appellee's child. Cameron testified that he stopped paying child support when he signed the adoption papers because he believed that signing the consent for adoption had the effect of terminating his parental rights and obligations. He also stopped visitation with his child. However, the adoption was never completed, and he was never informed of that fact. The trial court found that the mother was "'estopped because of her actions into leading this man into thinking there was or was going to be an adoption . . . from collecting the arrearages and support.'" 36 Ark. App. at 107, 818 S.W.2d at 593. Our court affirmed:

> Appellee testified that [the mother] contacted him concerning the adoption and wanted him to sign the consent. He said it was his understanding that when he signed he did away with his legal rights and his obligation to pay child support, and because of this belief, he no longer sought to exercise his visitation rights. We believe these circumstances are sufficient to establish the elements of estoppel, and we cannot say that the chancellor's finding is clearly erroneous.

36 Ark. App. at 109, 818 S.W.2d at 593. The situation presented in *Cameron, supra*, is similar to that presented here.

In short, the trial court's findings of fact in the instant case are not clearly erroneous. Those facts satisfy the elements of equitable estoppel. The case law of this state holds that

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[1] *See Arkansas Dep't of Human Servs. v. Robinson*, 311 Ark. 133, 842 S.W.2d 47 (1992) (*Robinson* explains that a court may not do indirectly that which it is directly prohibited from doing, and that under RURESA, the Arkansas court could not directly determine visitation nor could it be raised as a defense; therefore, supreme court held that the trial court could not indirectly determine visitation by making payment of child support dependent upon visitation).

the enforcement of child-support judgments are treated the same as enforcement of other judgments, and that a child-support judgment is subject to the equitable defenses that apply to all other judgments, including equitable estoppel. Our supreme court has defined equitable estoppel as "a judicial remedy by which a party may be precluded by its own act or omission from asserting a right to which it otherwise would have been entitled, or pleading or proving an otherwise important fact." *R.N. v. J.M.*, 347 Ark. 203, 216, 61 S.W.3d 149, 157 (2001). Appellant had a large source of money available to her during the period that she was not receiving child support from appellee, so the children did not suffer under these circumstances. Moreover, when these proceedings began and appellee learned that the money had dissipated, he immediately began paying child support again. The trial court, which was in the best position to evaluate this situation, invoked the judicial remedy of equitable estoppel, and we find no error in its having done so under the circumstances of this case.

Affirmed.

PITTMAN, C.J., ROBBINS, VAUGHT, and CRABTREE, JJ., agree.

BIRD, GRIFFEN, NEAL, and BAKER, JJ., dissent.

OLLY NEAL, Judge, dissenting. Because I am of the opinion that appellee failed to satisfy the third and fourth elements necessary to avail himself of the equitable estoppel defense, I respectfully dissent. Specifically, appellee has proven neither that he was ignorant of the facts nor that he relied on appellant's conduct to his detriment.

The majority has determined that the following made appellee ignorant of the fact that child support was legally accruing: (1) his conduct of neither seeing his children nor paying support after the date of the letter, (2) his testimony that it was his belief that the agreement relinquishing his parental rights and stopping child-support payments was enforceable, and (3) the trial court's credence to appellee's testimony that he was not informed by his attorney about the invalidity of the agreement. I do not agree.

A parent has a legal and moral duty to support his minor children, regardless of the existence of a support order. *See Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002); *Fonken v. Fonken*, 334 Ark. 637, 976 S.W.2d 952 (1998). Neither the dissolution of the

marriage tie, nor awarding custody of the children, either permanently or temporarily, to the mother, relieves the father of his obligation to support them. *Id.* Here, appellant's actions in telling appellee to "just give [the kids] up," and appellee's reliance thereupon, are insufficient to relieve him of his legal and moral obligation to his minor children. Even when the support obligation may be affected by contract, the duty cannot be bartered away permanently to the detriment of the child. *See Fonken v. Fonken, supra.*

Appellee knew that the court had ordered him to pay $6095.92 in support each month for his two children. Thus, he was not ignorant of the facts in this instance. *See State v. Burger*, 80 Ark. App. 119, 92 S.W.3d 64 (2002) (equitable estoppel was not applicable in part because appellee was not ignorant of the fact that he had not paid court-ordered child support). Furthermore, notwithstanding the existence of an "agreement" between him and appellant, appellee continued to have a moral duty to provide support for his children. It is clear from the facts of this case that appellee recognized that duty. Appellee continues to provide child support for his older daughter from a previous marriage, "as well as college living expenses and all other expenses," regardless of the fact that she has reached the age of majority and there no longer exists an order. His recognition is further evidenced by the continued insurance coverage he provides for A.C. and K.C. and by appellant's testimony that appellee sent a child-support payment in January of 2004 in the amount of $2950. The submission of this payment was, notably, after appellee wrote the February 1999 letter in which he agreed to "surrender" his parental rights and "terminate" his child support payments.

Appellee has also failed to show that he relied on appellant's conduct to his detriment. The trial court and this court recognize that the detriment in this case is not monetary but is the amount of time that appellee has lost with his children, which is time that can never be regained. I can agree with this notion to some extent; however, I cannot find where appellee regularly exercised his visitation prior to the February 1999 "agreement." Appellee acknowledged that, for a period of approximately seventeen months prior to December of 1998, before writing the letter, he did not regularly exercise his visitation with the children. Many times, he explained, he would drive the four-hour round trip to

Tulsa, only to be denied visitation for one reason or another.[1] Notwithstanding this, however, appellee obviously knew that he could seek court intervention because he had previously filed a contempt proceeding against appellant for her refusal to allow him proper visitation with the children for Christmas in 1998. Regardless, payment of appellee's child support was not dependent upon his visitation with the children. *See State v. Robinson*, 311 Ark. 133, 842 S.W.2d 47 (1992). Appellee could have availed himself of all the judicial processes to enforce his visitation rights.

Additionally, as a matter of public policy, it is my contention that equitable estoppel should not apply with the same force in matters such as these where you have a third party (the minor child) involved and for whose benefit the child support payments inure. An order of support is for the benefit of children, even though it is directed to be paid to the mother or other custodian. *Office of Child Support Enforcement v. Harris*, 87 Ark. App. 59, 185 S.W.3d 120 (2004) (citing *Miller v. Miller*, 929 S.W.2d 202 (Ky. Ct. App. 1996)). The courts have said that once a child-support payment falls due, it becomes vested and a debt due to the payee. *State v. Burger, supra*. It has long been the law in Arkansas that the interests of a minor cannot be compromised by a guardian without approval by the court. *Davis v. Office of Child Support Enforcement*, 322 Ark. 352, 908 S.W.2d 649 (1995). Our supreme court has further provided that:

> It is not sufficient that a court be made aware of a compromise agreement and that it is agreeable to the guardian; rather, the court must make a judicial act of investigation into the merits of the compromise and into its benefits to the minor. Any judgment by a court that compromises a minor's interest without the requisite investigation is void on its face.

Id. at 355-56, 908 S.W.2d at 651-52. Although equitable estoppel has been used in other instances such as this where the parties reach an

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[1] In determining that appellee has not proven the elements of equitable estoppel, I in no way mean to endorse the tactics used by the appellant. She obviously thwarted appellee's visitation on many occasions, and she was not entirely innocent in this situation. She knew that the "agreement" was unenforceable; nevertheless, she chose to forego seeking child support until such time that she felt the children were ready to exercise visitation with their father. I do not condone such conduct. Regardless of this, appellee did not meet his burden of proving the third and fourth elements of equitable estoppel.

agreement to cease support, *see Truman v. Truman*, 256 Neb. 628, 591 N.W.2d 81 (1999) (custodial parent agreed that neither she nor the non-custodial parent would be obligated to pay child support to each other because both had custody of one child); *In re Marriage of Harms v. Harms*, 174 Wis. 2d 780, 498 N.W.2d 229 (1993) (where custodial parent removed the children in her custody from the state where the father resided, advised him in writing that she no longer expected him to pay child support, and took no legal action to enforce the original child-support obligation for a period of seven years, she was estopped from collecting accrued child support), such extrajudicial agreements of the parties regarding termination of child-support obligations are enforceable under the doctrine of equitable estoppel where the children are not adversely affected. *See State v. Stephen Leo S.*, 198 W. Va. 234, 479 S.E.2d 895 (1996) (holding that extrajudicial agreement of parties regarding termination of child support obligations was enforceable under doctrine of equitable estoppel where welfare of children not adversely affected); *McNattin v. McNattin*, 450 N.W.2d 169 (Minn. App. 1990) (holding that mother's extrajudicial agreement not to seek child support in exchange for father's agreement to relinquish custody of child to her not binding upon the court but was enforceable under doctrine of equitable estoppel).

Here, the evidence indicates that the children may have been adversely affected. Unlike the situation in *State v. Stephen Leo S.*, *supra*, where the children received financial support from their step-father, Thomas Crouse, who contracted under an express agreement that such support was provided on behalf of the non-custodial father,[2] and where the record did not disclose that the children were ever deprived of their financial needs due to any default by Thomas Crouse in meeting such obligation, the appellant in this case underwent some financial difficulties. Appellant testified that:

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[2] In *State v. Stephen Leo S.*, *supra*, the custodial parent decided to marry Thomas Crouse while that same year her ex-husband and the non-custodial parent decided to marry Crouse's ex-wife, Sharon Crouse. Thomas and Sharon Crouse had three children from their marriage. Prior to the remarriage of the four individuals, they each executed an agreement that purported to absolve the non-custodial father of child support payments to the custodial parent. Under the agreement, Thomas Crouse was obligated to provide for the support of the non-custodial father's two children. In turn, the non-custodial father agreed to provide for the support of Thomas's three children.

> Once a majority of the inheritance money was depleted, I initiated the action to recover the outstanding child support. By the time the action was filed, I did not have enough money to take care of the children.

I further note that the children have not been named as parties in this matter. To the extent that the two children of the parties wish to assert any right they may have to past child support obligations by the appellee, they are presumptively capable of bringing an independent action against their father. Our law provides that, once a child turns eighteen, he or she may file a petition to collect unpaid support from the non-supporting parent. *See* Ark. Code Ann. § 9-14-105(c) (Repl. 2002).

I am authorized to state that Judges Bird, Griffen, and Baker join in this dissent.

Mark TURBYFILL *v.* STATE of Arkansas

CA CR 04-958 211 S.W.3d 557

Court of Appeals of Arkansas
Opinion delivered June 29, 2005

William C. McArthur, for appellant.

Mike Beebe, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. Mark Turbyfill appeals his conviction of rape. He received a sixty-year sentence after a jury found him guilty of raping an eight-month-old girl. On appeal he argues that the evidence was insufficient to support the verdict and that the trial court erred in allowing medical witnesses to testify regarding the cause of the child's injury. We find no error and affirm.

Because of double-jeopardy concerns, we first consider Turbyfill's sufficiency-of-the-evidence argument — that the trial court erred in its denial of his motion for directed verdict. *King v. State*, 338 Ark. 591, 999 S.W.2d 183 (1999). We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Id.* In our review of the evidence, we seek to determine whether the verdict is supported by substantial evidence. *Ashe v. State*, 57 Ark. App. 99, 942 S.W.2d 267 (1997). However, we consider only the evidence that supports the conviction without weighing it against other evidence that is favorable to the accused. *Id.* If the evidence is of sufficient certainty and precision to compel a conclusion and pass beyond mere suspicion and conjecture, the evidence is substantial. *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001). Further, we do not weigh the credibility of the witnesses on appeal; such matters are left to the factfinder. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002). A jury is not required to believe the defendant's version of events because he is the person most interested in the outcome of the trial. *Springston v. State*, 61 Ark. App. 34, 962 S.W.2d 836 (1998). Also, because of the difficulty in ascertaining intent, it is presumed that a person intends the natural and probable consequences of his acts, and the factfinder may draw upon common knowledge and experience to

infer the defendant's intent from the circumstances. *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000).

We begin our analysis of this case with an examination of the applicable statute. A person commits rape if he engages in sexual intercourse or deviate sexual activity with someone who is less than fourteen years old. Ark. Code Ann. § 5-14-103(a)(1)(C)(i) (Supp. 2001).[1] "Sexual intercourse" is penetration, however slight, of the labia majora by a penis; "deviate sexual activity" is an act of sexual gratification involving penetration, however slight, of the labia majora of one person by any body member or foreign instrument manipulated by another person. Ark. Code Ann. § 5-14-101(1)(B), (10) (Supp. 2001). "In a rape case, penetration can be shown by circumstantial evidence, and if that evidence gives rise to more than a mere suspicion, and the inference that might reasonably have been deduced from it would leave little room for doubt, that is sufficient." *Clem*, 351 Ark. at 117 – 18, 90 S.W.3d at 430. Circumstantial evidence can support a finding of guilt in a criminal case if it excludes every other reasonable hypothesis consistent with innocence, and the question of whether the evidence excludes every other reasonable hypothesis is for the factfinder to determine. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001). "Overwhelming evidence of guilt is not required in cases based on circumstantial evidence; the test is one of substantiality." *Id.* at 230, 57 S.W.3d at 156.

Next, we must determine — based on the statutory requirements and the precedential framework — whether the evidence established at trial meets the requisite "substantial" threshold. According to the testimony, the genesis of this case was July 22, 2002, when S.R. was presented to the emergency room at Children's Hospital in Little Rock, Arkansas. She was accompanied by her mother and her mother's fiancé, Mark Turbyfill. One of S.R.'s attending emergency-room physicians, Dr. Valerie Borum Smith, testified that the infant had a life-threatening injury — she had a high heart rate and a low blood pressure. The child was pale and in shock due to the fact she had lost twenty-five percent of her blood supply. The infant had blood in her diaper, dried blood all over her genital area, and a large tear with a clot in her vaginal area.

[1] Arkansas Code Annotated § 5-14-103 was amended by Act 1469 of 2003. The crime that is the subject of this appeal took place prior to the effective date of Act 1469.

The tear was a third-degree tear, extending through the muscle all the way down to the rectal sphincter; a tear equivalent to the kind a woman would have from child birth. Dr. Smith testified that in order to have a vaginal tear of that degree, there would have to be penetration of the labia majora of the vagina. Dr. Smith further testified that S.R.'s was the worst tear she had ever seen — the child's vaginal opening had been torn to twice its normal size, and she was in danger of bleeding to death without surgical intervention. Dr. Smith also testified that the child's condition was so grave that they were unable to perform a rape kit on her for fear it would dislodge the clot and restart the bleeding.

Dr. Smith also noted that the child would have begun to bleed immediately and that the blood would have been immediately evident. She also testified that — based on the rate of blood loss — the injury occurred the same day that the child presented to the emergency room. Dr. Smith stated that she called in the attending physician, Dr. Steven Wade Shirm, to help treat the child. Dr. Smith also called Dr. Karen Kozlowski, the state's only pediatric gynecologist, to perform the complicated and painful surgical repair on the child. A social worker was also called in, based on the doctors' belief that the child had been abused. The emergency-room doctors also searched the child's body for ejaculate fluids with a fluorescent lamp but found none. Dr. Smith testified that this was possibly due to the excessive amount of blood that could have washed the fluid away. Dr. Smith stated that it was rare to find ejaculates and that penetration by a penis can occur without ejaculate being present.

Dr. Smith concluded by stating within a reasonable degree of medical certainty that the child's vaginal tear was consistent with an intentional injury, stating, "It's consistent with penetration by an object of some sort that caused this tear." She based this opinion on the fact that accidental tears (straddle injuries) are much more likely to be interior tears and they usually tear upward toward the clitoris — here the victim's tear went down, suggesting a significant amount of force penetrating her labia. Further, Dr. Smith also noted that the child was not yet walking, thus there was a low possibility for an accidental, recreation injury.

Dr. Shirm also testified at trial, and his account of events was essentially the same as Dr. Smith's. He noted that the infant's vaginal tear was by far the worst he had ever seen and stated that the injury was not consistent with an accidental injury. He further stated that the only time he had observed a tear in similar severity

was while serving on obstetric service where he saw such a tear after a woman had given childbirth without an episiotomy being performed. Dr. Shirm concluded that this injury could not have occurred without penetration to the labia majora. He stated that a blunt force caused the injury — a penis, a broom handle, or some other object.

Initially, the infant's mother reported to the physicians that she had been alone with the child all day. When Dr. Shirm told the mother and Turbyfill that the child's injury did not appear to be accidental and that the child had been intentionally assaulted, Turbyfill did not react or interact with the doctors. He merely stood in a corner. Dr. Smith testified that Turbyfill's reaction seemed odd because typically when a patient is injured to that degree, the caretakers are concerned about the child's physical state and how the injury occurred. Dr. Shirm testified that most parents in such a situation are aghast, have a terrible reaction, and are very angry. However, in this case, witnesses observed that neither Turbyfill nor the child's mother had much of a reaction to the news.

T.G. Stone of the Crimes Against Children Division of the Arkansas State Police also testified. His testimony concerned his investigation of the child's injury. Both the child's mother and Turbyfill were interviewed the same day that S.R. was taken to the hospital. In Turbyfill's first recorded statement, he claimed that the child's mother had gone to the store and left him with the child that afternoon. He admitted that the baby was crying, and he went to check on her. Finding that she had a wet diaper, he took off her diaper, picked her up out of the baby bed, and laid her on her sister's bed in the same room. He noticed blood on the baby's bottom. He wiped it up, but could not ascertain where it was coming from. He then returned to the living room to wait for the child's mother to arrive home. When asked what he thought was the cause of the blood, he guessed that he had accidentally cut the child with his fingernail when he picked her up. However, a photo was taken of Turbyfill's hands that showed his nails were short and that there was no blood under his nails. Turbyfill testified that he had to move the child from the baby bed to her sister's bed because it was too deep for him to reach her. Two days later, Trooper Stone visited the child's home. He testified that he could have changed the infant in her bed, without having to move her.

Four days later, Turbyfill gave a second statement to the authorities. Investigator Michael Connell explained that he falsely

told Turbyfill during the interview that he had conducted a rape kit on the child in hopes of prompting a confession. Turbyfill denied intentionally hurting the child. He stated that when he picked her up she was struggling and squirming, so he had to "pinch or do something of that nature" because "she was squirming real hard." As the interview progressed, Turbyfill continued to deny intentionally hurting the child. Once he said, "I did not start out to molest that child." He also stated that the mother and the three-year-old sibling were alone with the child during the two hours prior to the time he was alone with the child and that the three-year-old could have put something in the infant's diaper. At the conclusion of the interview, he admitted to only accidentally hurting the child.

When asked about Turbyfill's explanations of S.R.'s injury, the doctors stated that none of the scenarios could explain the level of damage the infant sustained. Turbyfill's hands were examined and Dr. Shirm noted that Turbyfill's nails were not unlike his own — short without blood underneath. Dr. Shirm noted that he had examined many children and never caused an injury from a fingernail. The doctors that testified agreed that the child could not have sustained an injury of this magnitude from a pinch, a fingernail scratch, or a three-year-old's actions. The evidence at trial established that, while in Turbyfill's exclusive care, the victim's labia majora was intentionally penetrated by blunt force — a penis, a broom handle, or some other object. This evidence, coupled with Turbyfill's improbable and inconsistent statements regarding how the infant sustained the injury, is more than sufficient to support the charge of rape. Therefore, we affirm the trial court's denial of Turbyfill's motion for directed verdict.

Turbyfill also contends that the two doctors who testified at trial were not qualified to opine that S.R.'s injury was intentionally inflicted. Arkansas Rules of Evidence 702 and 703 govern the admission of testimony of expert witnesses. Rule 702 states:

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

Rule 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Whether a witness qualifies as an expert in a particular field is a matter within the trial court's discretion, and we will not reverse such a decision absent an abuse of that discretion. *Jackson v. State*, 359 Ark. 297, 197 S.W.3d 468 (2004). If some reasonable basis exists demonstrating that the witness has knowledge of the subject beyond that of ordinary knowledge, the evidence is admissible as expert testimony. *Id.* The general test of admissibility of expert testimony is whether it will assist the trier of fact in understanding the evidence presented or determining a fact in issue. Ark. R. Evid. 702; *Arrow Int'l v. Sparks*, 81 Ark. App. 42, 98 S.W.3d 48 (2003).

Dr. Valerie Borum Smith, who was two months shy of completing her training as a pediatric specialist, was established as an expert witness based on her specialized training in detecting sexual abuse, which included attending lectures by a child-abuse expert regarding physical and sexual abuse, working with patients in the hospital's child-abuse clinic, reading on the subject, and reviewing a series of pictures and slides of children who had been injured intentionally and accidentally in order to discern the difference between accidental and intentional injuries. At the time of trial, Dr. Smith had examined between fifty and sixty children who were victims of sexual abuse, mostly females, and had observed approximately ten vaginal tears, which she described as a relatively rare injury. At the time she treated S.R., she had worked at Children's Hospital for thirteen months and had examined about 300 to 500 children (with forty indicating abuse) during her tenure at the hospital. Based on her knowledge and experience in the area of sexual abuse, Dr. Smith was willing to assert that S.R.'s injury was not sustained in an accidental fashion. Indeed, Dr. Smith's testimony supported only one finding — that the infant's injury was due to a blunt-force intentional injury.

Dr. Shirm, a pediatrician who was serving as the attending physician in the emergency room at Children's Hospital as part of his duties as a University of Arkansas for Medical Science (UAMS) faculty member also testified at trial. Dr. Shirm had served on the UAMS faculty since 1988. He was board certified in General

Pediatrics and Pediatric Emergency Medicine. He estimated that he had examined between 400 and 500 children at the hospital where the complaint was sexual abuse. Dr. Shirm also testified that he attended lectures and kept current with all literature in the area of child abuse as part of his specialty in emergency medicine. In the course of his work, Dr. Shirm had observed fifty to 100 vaginal tears. He further testified that, based on his observation and published accounts on the subject, he was able to observe distinct patterns that allow him to differentiate accidental and intentional tears. Dr. Shirm also concluded that S.R.'s injury was not consistent with an accidental injury — that there was a blunt force (a penis, broom handle, or some other object) from the outside of the infant's vagina inward that caused injury to the interior portion of the vaginal area.

Although Turbyfill does not dispute that both Dr. Smith and Dr. Shirm were qualified medical experts, he argues that their conclusions regarding the intentional nature of S.R.'s injury did not meet the *Daubert* test[2] because the conclusions were not based on testing or other scientific method.

In *Farm Bureau Mutual Insurance Co. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000), the Arkansas Supreme Court adopted the holding of the United States Supreme Court in *Daubert* and the inquiry to be conducted by a trial court. Therefore, after *Foote*, the trial judge, when presented with a proffer of expert scientific evidence, must initially perform a gatekeeping function in order to determine if the reasoning behind the evidence is scientifically valid and can be applied to the facts of the case. The supreme court set forth criteria to be used by the judge in making that decision — whether the theory can be tested, whether the theory has been subjected to peer review and publication, whether there were standards maintained controlling the tests or operation, and whether the theories have been generally accepted in the scientific community. The court later observed that the requirements of Rule 702 apply equally to all types of expert testimony and not simply to scientific expert testimony. *Coca-Cola Bottling Co. v. Gill,* 352 Ark. 240, 100 S.W.3d 715 (2003) (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137

[2] Named for the case in which it was adopted, *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

(1999)). The supreme court added that in assessing reliability, the trial court may, at its discretion, consider the *Daubert* factors to the extent relevant. *Id.*

However, the *Daubert* and *Kumho Tire* opinions recognize that not all expert testimony is subject to the *Daubert* analysis. The inquiry to be made by the trial court is a flexible one, not a rigid one. *Daubert*, 509 U.S. at 594–95. Further, the *Daubert* factors neither necessarily nor exclusively apply to all experts or in every case. *Kumho Tire*, 526 U.S. at 141. The law grants a trial court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination. *Id.* at 142. Moreover, the factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. *Id.* at 150.

In the instant case, we conclude that it was not necessary for the circuit court to engage in a *Daubert* or *Kumho Tire* analysis of the particular questions relating to reliability of the doctors' conclusions regarding causation. The *Daubert* factors are simply inapplicable to this kind of testimony that is based on the experiences and the knowledge garnered by the expert. *Jackson*, 359 Ark. at 303, 197 S.W.3d at 473. The *Daubert* inquiry, which seeks to determine the dependability of an expert's methods, is of little value in the present case. As our supreme court has noted, the *Daubert* factors are applicable to "novel" scientific evidence, theory, or methodology. *Id.* at 303, 197 S.W.3d at 473. The testimony of these doctors was not novel in any respect. Instead, the testimony in this case was based on experience and observations rather than methodology. Accordingly, we are satisfied that the trial court did not abuse its discretion or fail in its gatekeeping function by allowing Dr. Smith and Dr. Shirm to opine as to the causal nature of S.R.'s injury based on their experience, knowledge, and training, which is specifically permitted under Rule 702.

Finally, Turbyfill claims that the court abused its discretion and violated *United States v. Whitted*, 11 F.3d 782 (8th Cir. 1993), by allowing the doctors to testify that sexual abuse had in fact occurred, testimony that has been classified by the courts as neither useful to the jury nor admissible. However, here, the doctors merely testified that S.R.'s injury was consistent with intentional penetration causing injury to the child as well as sexual

abuse. Existing Arkansas law allows such testimony, because although it embraces the ultimate issue, it does not mandate a legal conclusion. *Johnson v. State*, 292 Ark. 632, 732 S.W.2d 817 (1987). In sum, we find no meritorious argument in Turbyfill's appeal, and we affirm the trial court in all respects.

Affirmed.

BIRD and GRIFFEN, JJ., agree.

Jose Manuel MERAZ-LOPEZ *v.* STATE of Arkansas

CA CR 04-888 211 S.W.3d 564

Court of Appeals of Arkansas
Opinion delivered June 29, 2005

[Rehearing denied October 5, 2005.]

David L. Dunagin, for appellant.

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

KAREN R. BAKER, Judge. Appellant, Manuel Meraz-Lopez, appeals a jury verdict convicting him of possession of marijuana with intent to deliver and possession of drug paraphernalia and sentencing him to a total of 240 months' imprisonment. His sole challenge to this conviction is that the trial court erred by denying his motion to suppress evidence seized from the trunk of his car at the scene of a traffic stop. We agree.

At 10:04 p.m. on January 30, 2004, Arkansas State Trooper Jason Aaron activated his lights to pull over a 2004 Crown Victoria that was following the vehicle in front of it too closely. The trooper testified that the car took longer than most cars to pull over in response to his lights. When the car stopped, Aaron approached the passenger side of the vehicle and explained to the appellant, who was the driver, that he had been following the car in front of him too closely. Appellant explained that the car in front of him slowed down as it crossed the state line, causing him to follow it too closely. While speaking to appellant, Aaron noticed that appellant had a brand new cellular telephone, new atlases, fast food wrappers, and energy drinks scattered in the front. Aaron considered the presence of these items as indicators of possible criminal activity.

Aaron explained that "we've encountered [possession of new cell phones] in almost every single one of our drug arrests" because drug couriers were provided telephones so that the drug suppliers could track the couriers. While the new phone was not suspicious on its own, the appellant's hands were shaking when he handed the trooper his paperwork, consisting of the car's rental agreement and his driver's license. In addition, the rental agreement indicated that the car had been rented on January 28 in Palmdale, California, and was due back there on February 4, while appellant's driver's license indicated that he lived in Phoenix, Arizona. Appellant's reason for the discrepancy was that he was driving to Little Rock to visit family for two days before returning to Palmdale and moving to California. The trooper viewed this information as suspicious in that appellant was driving more than 3,400 miles for a two-day visit, and that in his experience, drug couriers take such atypical trips.

After checking appellant's paperwork, the trooper asked appellant to come to the back of the car so he could issue him a warning. The trooper described appellant at this point as "extremely nervous" as though he were "going to pass out." The

trooper viewed appellant's nervousness as excessive when compared with the nervousness he normally encounters during traffic stops. In response to the trooper's question inquiring whether appellant felt well, however, appellant explained that he was shaking and starting to feel sick due to going suddenly from the warm car to the cold, night air.

Trooper Aaron issued appellant a warning at approximately 10:10 p.m., six minutes after the stop, and then asked whether he could search appellant's car. As this was occurring, Olen Craig, also of the Arkansas State Police, arrived at the scene. Although Aaron and appellant had been conversing in English during the entire stop, when the trooper asked for consent to search, appellant seemed suddenly to not understand English. Other testimony indicated that Trooper Craig and an officer who later interviewed appellant, Special Agent Doug McAllister, agreed with Trooper Aaron's assessment that appellant appeared to be fluent in English. Trooper Aaron nevertheless retrieved a consent form in Spanish, and appellant began to review it. The trooper asked appellant whether he felt okay, and appellant responded that he felt like he was going to be sick, going from hot to cold without a jacket. The trooper explained that because he was concerned that appellant was going to fall, he asked appellant whether he wanted to sit in his patrol car, and appellant said, "yes."

Although appellant eventually signed the consent form, it is unclear whether he did so before Trooper Eric Schrock arrived at the scene with his drug dog and ran it around the car from 10:24 to 10:26 p.m.[1] The dog alerted on the trunk of the car, resulting in the discovery of three boxes containing approximately ninety-five pounds of marijuana.

Appellant does not challenge Trooper Aaron's initial stop of the car, but argues that the trial court erred in failing to suppress the evidence seized from the traffic stop because a reasonable suspicion did not exist to continue to detain the appellant after the warning ticket was issued. In his argument, appellant alleges constitutional violations as well as violation of Rule 3.1 of the Arkansas Rules of Criminal Procedure. The State argues that the

[1] The State has a heavy burden to prove by clear and positive testimony that consent was freely and voluntarily given. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002); *Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999). The testimony in this case fell short of the burden to prove that the consent was given prior to the search.

constitutional argument is not preserved for appellate review because appellant relied exclusively upon Rule 3.1 at the suppression hearing. However, we need not decide the waiver issue in that appellant's reliance upon Rule 3.1 is well taken, and we reverse on that basis.

When we review the denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of 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 circuit court. *Simmons v. State,* 83 Ark. App. 87, 118 S.W.3d 136 (2003). In order for a police officer to make a traffic stop, he must have probable cause to believe that the vehicle has violated a traffic law. *Sims v. State,* 356 Ark. 507, 157 S.W.3d 530 (2004). Whether a police officer has probable cause to make a traffic stop does not depend on whether the driver was actually guilty of the violation that the officer believed to have occurred. *Id.* at 512, 157 S.W.3d at 533. As part of a valid traffic stop, a police officer may detain the party while the officer completes certain routine tasks — such as computerized checks of the vehicle's registration, the driver's license, and the driver's criminal history — and writes the driver a citation or warning. *Id.* at 514, 157 S.W.3d at 535. During this process, the officer may ask the party routine questions such as the party's destination, the purpose of the trip, and whether the officer may search the vehicle; the officer may act on whatever information is volunteered. *Laime v. State,* 347 Ark. 142, 60 S.W.3d 464 (2001).

Under Ark. R. Crim. P. 3.1, a detention without arrest may transpire under certain circumstances:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

Pursuant to Ark. R. Crim. P. 2.1, "reasonable suspicion" is defined as "a suspicion based on facts or circumstances[,] which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion . . . a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion." Our supreme court has held that the determination of whether an officer has reasonable suspicion depends on whether, under the totality of the circumstances, the officer has specific, particularized, and articulable reasons indicating that the person may be involved in criminal activity. *Laime,* 347 Ark. at 155, 60 S.W.3d at 473. In the absence of reasonable suspicion, it is unlawful for law enforcement to detain a party once the legitimate purpose of the traffic stop is concluded. *Sims,* 356 Ark. at 515, 157 S.W.3d at 536.

This case is similar to *Sims, supra.* In *Sims,* during a valid traffic stop made midday, the police noticed that the driver was nervous and sweating and thought it was strange that he volunteered an odd comment about having just been to Wal-Mart to buy a swing set. After telling Sims that the traffic stop was over, the police then decided to run a drug dog around the car. Our supreme court held that reasonable suspicion to detain did not exist, primarily because nervousness alone does not give rise to reasonable suspicion. *Id.*

The recent case of *Lilley v. State,* 362 Ark. 436, 208 S.W.3d 785 (2005) is also instructive.[2] In *Lilley,* our supreme court focused on when the traffic stop was over and held that reasonable suspicion did not exist based on the fact that Lilley was nervous, he was drinking energy drinks, his car smelled like air freshener, the rental agreement was for one-way travel, and the car was rented in another person's name, although Lilley was listed as an additional driver. As our supreme court explained, taken as a whole, these facts are seemingly innocent. But *cf. Burks v. State,* 362 Ark. 558, 210 S.W.3d 62 (2005) (distinguishing *Lilley* and finding that the facts at the time the traffic stop was over suggested that the rental car had been stolen).

Likewise, under the totality of the circumstances in this case, we hold that the facts do not establish "specific, particularized, and

[2] We attempted to certify this case to the supreme court; however, the supreme court declined to accept certification upon handing down its decision in *Lilley v. State.*

articulable reasons" that criminal activity was afoot. The presence of a brand new cellular telephone, new atlases, fast food, and energy drinks scattered in the front are seemingly innocent. Even if appellant's shaking was due to nervousness, rather than the cold air of the January night, nervousness alone is not a sufficient basis to detain an individual. *See Laime, supra.* Consequently, the trial court erred in failing to suppress the evidence obtained as a result of the search of the car.

While a consent to search was eventually signed, the uncertainty of when it was signed cannot remedy the unwarranted detention which resulted in the officer's securing the consent.

Accordingly, we reverse and remand.

CRABTREE, J., agrees.

PITTMAN, C.J., concurs.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING OCTOBER 5, 2005

PER CURIAM. Petition for rehearing is denied.

HART, GLADWIN, BAKER, and ROAF, JJ., agree.

PITTMAN, C.J., and CRABTREE, J., dissent.

JOHN MAUZY PITTMAN, Chief Judge, dissenting. In a published opinion delivered on June 29, 2005, we reversed appellant's convictions for possession of marijuana with intent to deliver and possession of drug paraphernalia because we concluded that the arresting officer lacked a reasonable suspicion to further detain appellant after issuing him a warning ticket. Although I joined in that opinion, I must agree with the State's assertion that our decision was incorrect because we failed to properly consider the totality of the circumstances involved in the decision to extend the detention. Instead, I believe that we fell into the error, discussed by the United States Supreme Court in *United States v. Arvizu*, 534 U.S. 266 (2002), of evaluating and rejecting individual factors in isolation from one another rather than considering how each factor contributed to the totality of the circumstances with which the police officer was confronted.

The error is evident in our statement on page six of our opinion that "nervousness alone is not a sufficient basis to detain an individual." Quite clearly, we did not properly consider appellant's extreme nervous agitation in light of other circumstances, particularly those concerning appellant's statement to the officer that he was driving from Palmdale, California, to Little Rock — a distance of over 3,400 miles — for a two-day family visit. Although either appellant's travel plans or his extreme nervousness might be viewed as innocuous in isolation, in combination they are telling. I believe that we were mistaken in holding otherwise, and I would grant the State's petition for rehearing.

CRABTREE, J., joins in this dissent.

Jack H. GUNTER and Priscilla Gunter *v.*
LIBERTY BANK of Arkansas and Roger Wilkinson

CA 04-1344 211 S.W.3d 579

Court of Appeals of Arkansas
Opinion delivered August 31, 2005

Lyons, Emerson & Cone, P.L.C., by: *Scott Emerson*, for appellant Priscilla Gunter.

Collier & Jennings, by: *Larry R. Jennings*, for appellee Liberty Bank of Arkansas.

Daggett, Donovan, Perry & Flowers, P.L.L.C., by: *Robert J. Donovan*, for appellee Roger Wilkinson.

JOHN MAUZY PITTMAN, Chief Judge. Jack and Priscilla Gunter[1] were among several defendants to a foreclosure suit filed by the appellee bank's predecessor. Other defendants filed timely answers but the Gunters failed to do so and instead filed their answer after the expiration of the time allowed. Priscilla Gunter now appeals from an adverse judgment entered after the trial court granted a motion to strike as untimely those portions of their answer that were not common to those raised by the other defendants who had filed timely answers, arguing that the trial court erred in failing to correctly apply the common-defense doctrine. We affirm.

Midsouth Bank (the predecessor of appellee Liberty Bank) filed a complaint naming numerous defendants, including Gunter Elevator, Inc., Jack and Priscilla Gunter, and Wilkinson Farms. In its complaint the bank sought foreclosure of a mortgage given by Gunter Elevator, Inc., and Jay Gunter to secure payment of a note.

[1] Jack Gunter is now deceased.

The bank alleged that the note was in default, that demand had been made, and that the note had not been paid. Noting that Jack and Priscilla Gunter might claim some interest in the property by virtue of a mortgage executed to them by Gunter Elevator, Inc., on April 4, 2000, the bank stated that its mortgage lien should be declared a first mortgage lien on the lands described in the mortgage, and that any lien of Jack and Priscilla Gunter was inferior and subordinate to its own mortgage. Similarly, the bank noted the existence of a judgment against Gunter Elevator, Inc., filed September 24, 2001, in favor of Wilkinson Farms and related individuals, and asserted that this judgment lien was inferior and subordinate to its mortgage.

Wilkinson Farms filed a timely answer, denying most of the allegations in the complaint for lack of knowledge, but asserting that a writ of execution on its judgment lien had been issued, and that its judgment lien was a first lien on the rent proceeds of the property. Jack and Priscilla Gunter filed an admittedly untimely answer in which they argued that, pursuant to the "common defense doctrine," they should be allowed to argue that Midsouth's mortgage and Wilkinson Farm's judgment lien were inferior to their own mortgage. The trial court disagreed. Although it did not strike the answer in its entirety and ruled that the Gunters could raise any defenses they had in common with the other defendants who filed a timely answer, it did not permit them to argue the superiority of their own lien. This appeal followed.

Arkansas recognizes the "common-defense doctrine." This principle first appears in Arkansas law in *Bruton v. Gregory*, 8 Ark. 177 (1847), where Chief Justice Johnson wrote that:

> It is perfectly manifest that the interlocutory judgment, which is authorized to be taken against such as make default, is required to stand and to abide the result of any defense to the merits, that those, who appear in the action, may see fit to interpose. If two are sued jointly, one of whom makes default, and the other appears and interposes a successful defense to the action, there can be no doubt but that the plea of the one appearing, will enure to the benefit of the other, and that he will also be entitled to his discharge, notwithstanding the interlocutory judgment by default.

Id. at 180. In modern practice, the test for determining if an answer will inure to a co-defendant's benefit is whether the answer of the non-defaulting defendant states a defense that is common to both

defendants, because then "a successful plea . . . operates as a discharge to all the defendants, but it is otherwise where the plea goes to the personal discharge of the party interposing it." *Richardson v. Rodgers*, 334 Ark. 606, 612, 976 S.W.2d 941, 944-45 (1998) (quoting *Southland Mobile Home Corp. v. Winders*, 262 Ark. 693, 694, 561 S.W.2d 280, 280-81 (1978)).

Under this test, Wilkinson Farms' answer does not inure to appellant's benefit because, unlike the defense offered by the co-defendant in *Southland Mobile Home Corp. v. Winders, supra*, it did not go to the existence of appellee's cause of action nor assert a defense common to both defendants. The cause of action in this case was foreclosure of a mortgage based on a default on a debt secured by that mortgage. Wilkinson Farms offered no defense that would preclude foreclosure in this case, such as inequitable conduct (*Tucker v. Pulaski Federal Savings & Loan*, 252 Ark. 849, 481 S.W.2d 725 (1972)), statute of limitations (*Davidson v. Hartsfield*, 250 Ark. 1072, 468 S.W.2d 774 (1971)), misrepresentation (*Williams v. Brown*, 240 Ark. 974, 403 S.W.2d 89 (1966)), or payment (*Houston v. Carson*, 219 Ark. 665, 244 S.W.2d 151 (1951)). Furthermore, Wilkinson Farms disputed the priority of appellee's mortgage on the grounds that its own judgment lien was superior. Quite clearly, this defense was not common to both Wilkinson Farms and appellant. Finally, to the extent that Wilkinson Farms denied the paragraph of the complaint asserting the superiority of appellee's mortgage to that of appellant, it did so in general terms on the basis of lack of knowledge. A general denial covers defenses which go to destroy the plaintiff's cause of action, but not those defenses which are grounded on new matters or matters in avoidance, or other defenses. These must be specially pleaded. *Chiles v. Mann & Mann*, 240 Ark. 527, 400 S.W.2d 667 (1966). Here, appellant's claim of the priority of her own lien is a new matter in the nature of a plea in avoidance, operating not as a discharge to all the defendants but instead to the personal discharge of the appellant, and we cannot say that the trial judge erred in refusing to allow this matter to be raised for the first time in her untimely answer.

Affirmed.

ROBBINS and VAUGHT, JJ., agree.

Michael WRENN *v.* STATE of Arkansas

CA CR 03-1146 211 S.W.3d 582

Court of Appeals of Arkansas
Opinion delivered August 31, 2005
[Rehearing denied September 28, 2005.]

Daniel C. Becker, for appellant.

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

JOSEPHINE LINKER HART, Judge. Michael Wrenn was convicted in a Jefferson County jury trial of first-degree domestic battery, kidnapping, and first-degree terroristic threatening for which he received concurrent sentences of 240 months, 180 months, and 72 months, respectively, in the Arkansas Department of Correction. Previously, Wrenn's appellate counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals. However, based upon our review of the record and the law concerning the offense of first-degree domestic battery, we concluded that an argument addressing whether Wrenn was a "family or household member," as contemplated by the sections of our criminal code dealing with domestic battery and assault, *see* Ark. Code Ann. § 5-26-301 *et*

seq. (Supp. 2003), would not be wholly frivolous. Wrenn now raises that argument on appeal, asserting that the trial court erred in failing to direct a verdict on the charge of domestic battery in that the State failed to prove that he was a household or family member. Wrenn does not contest his conviction on the other charges, and we affirm those convictions. However, we find merit in his argument concerning the domestic-battery conviction and reverse and dismiss.

Wrenn's convictions stem from the events of January 30, 2003, when a social encounter with the victim, Goldie Diane Whitaker, devolved into a physical altercation. In the course of the evening, after visiting a night club, Wrenn allegedly wrapped a belt around Ms. Whitaker's neck and forced her into the van that she had previously been driving with Wrenn as the passenger. She eventually escaped by leaping from the moving vehicle.

Because this appeal only concerns the issue of whether Wrenn was properly convicted under our domestic-battery statute, we will focus on that part of the testimony that relates to Wrenn's and Whitaker's status as "family or household members" under our domestic- battery statute. Under Arkansas Code Annotated section 5-26-302 (Supp. 2003), "family or household members" are defined as

> (1) Spouses;
>
> (2) Former spouses;
>
> (3) Parents;
>
> (4) Children, including any minors residing in the household;
>
> (5)(A) Persons related by blood within the fourth degree of consanguinity.
>
> (B) Degrees of consanguinity shall be computed pursuant to § 28-9-212;
>
> (6) Persons who presently or in the past have resided or cohabited together; and
>
> (7) Persons who have or have had a child in common.

At Wrenn's trial, Anita Stennis testified that Wrenn and the victim Goldie Diane Whitaker had dated for four or five months, but she thought that they had "split up." In her testimony,

Whitaker confirmed that her relationship with Wrenn had ended. She stated that they met in July 2002 and would "see each other three or four times a week." When asked if there were occasions when the two would spend the weekend together, Whitaker denied that they would spend "the whole weekend" but noted that Wrenn would drive to her residence on Sunday morning and attend church services with her and her family. According to Whitaker, in September, Wrenn asked her to marry him, but she told him that she was not ready. However, she claimed that the relationship ended in November 2002, when Wrenn moved to North Carolina.

Whitaker further testified that on or about January 15, 2003, Wrenn called her suggesting that they get back together. He claimed he had an interview at the Pine Bluff Arsenal and would arrive on January 24. Whittaker stated that when she picked him up at the bus terminal on Friday, Wrenn told her that he did not have money for a hotel. She took him to her home, and her mother agreed to "put him up till Monday." According to Whitaker, Wrenn did not go to the arsenal on Monday or any other day that week. Nonetheless, Wrenn told her that he would leave on Friday. The events in question occurred on Thursday evening.

Whitaker stated that she invited Wrenn to accompany her to the "Y-Not Jazz and Blues" club because "since he was at my house it would be nice to invite him to go." She testified that on Tuesday, "we had talked that we would just be friends" and that they would not try to go on with their relationship. Whitaker concluded her testimony by confirming that, in the course of her relationship with Wrenn, they had "physical relations together."

Wrenn moved for a directed verdict, arguing that the State failed to prove cohabitation or that he resided with the victim sufficiently to qualify as a household or family member. The motion was denied, and Wrenn testified on his own behalf. Wrenn confirmed that he and Whitaker had a relationship that lasted from July until he moved to North Carolina in early December and that he intended to return to North Carolina on Friday. Wrenn timely renewed his directed-verdict motion at the close of all the evidence.

On appeal, Wrenn argues the trial court erred in finding that he fit the description of "family or household member" as defined by Arkansas Code Annotated section 5-26-302. He contends that

the testimony proved only that he was a short-term guest and that the purpose of his visit was to seek employment. Wrenn argues further that there was no "intent" by him or the victim that he become a family or household member, and therefore his conviction on this count should be reversed and dismissed. We agree.

The record indicates that Wrenn's relationship with the victim had ended. While it is true that he was staying in the victim's home, it was uncontroverted that at the time he assaulted the victim, he had already decided to return to his home in North Carolina the next day. Furthermore, while it was true that Wrenn and Whitaker had a sexual relationship in the past, Whitaker made it very clear in her testimony that they had not cohabited. Under these facts, we hold that the State failed to prove that Wrenn was a household member, and therefore, we reverse and dismiss his conviction for first-degree domestic battery.

Affirmed in part; reversed and dismissed in part.

BIRD and CRABTREE, JJ., agree.

Samuel EVANS *v.* Benita EVANS

CA 04-884 211 S.W.3d 584

Court of Appeals of Arkansas
Opinion delivered August 31, 2005

[Rehearing denied September 28, 2005.]

Dodds, Kidd & Ryan, by: *Judson C. Kidd* and *David W. Kamps*, for appellant.

Worsham Law Firm, by: *Richard E. Worsham*, for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Samuel Evans, argues that, by refusing to lower his alimony payments, the circuit court erroneously modified the terms of a property-settlement agreement between him and appellee, Benita Evans, that provided for reduction of his alimony payments while he worked outside of the United States as a medical missionary. We affirm, concluding that the court's refusal to lower his alimony payments was a proper exercise of its contempt powers.

On December 18, 2000, a decree was entered granting appellee a divorce from appellant. Incorporated into the decree was the parties' property-settlement agreement, which provided in part as follows:

> [Appellant] will pay to [appellee] the sum of $5,000.00 per month, as alimony, on the first day of each month. . . . [Appellee] acknowledges that [appellant] plans to become a medical missionary and agrees that, despite any economic hardship it may cause her, [appellant's] alimony payments should be reduced to $1,000.00 during each month he lives outside the United States while pursu-

> ing this lifelong ambition. Upon [appellant's] return to the United States alimony payments of $5,000.00 per month shall immediately resume.

The agreement further provided that appellant would pay appellee $100,000 following the sale of the marital residence.

Following the sale of the residence, the court, in an order filed August 13, 2001, found appellant "in willful contempt of the Decree of Divorce entered herein for failure to pay alimony and for failure to meet other financial obligations" and ordered him to pay, along with other sums, $100,000 plus interest relating to the disposition of the parties' marital home. The court also instructed appellant to "surrender his passport" to the court and ordered that his "passport shall not be returned to him, nor shall [appellant] apply for a duplicate passport," until appellant had made the required payments, including payment of the $100,000 plus interest.

On January 11, 2002, appellee filed a petition asking that appellant be held in contempt. The matter was not heard, however, until May 13, 2004. At the hearing, appellant's counsel argued that, in accordance with the property-settlement agreement, appellant's monthly alimony payment decreased to $1000 beginning in January 2002 when he left the United States and became a medical missionary. During his testimony, appellant admitted that he had obtained a duplicate passport and left the United States on December 30, 2001, for the Philippines, where he practices as a medical missionary. He also admitted that he filed for bankruptcy in Missouri in August 2002, that he had not paid $100,000 to appellant, and that this payment was still within the jurisdiction of the bankruptcy court. Also introduced into evidence was an order from the bankruptcy court that awarded appellee a judgment for any unpaid alimony.

In its June 1, 2004, order, the court found appellant in contempt of court for "applying for a duplicate passport and blatantly leaving the United States against the Court's Order and for not paying alimony payments as ordered." In calculating appellant's alimony arrearages, the court stated that appellant "is not entitled to receive a reduction of the $5,000.00 per month obligation from January 2002 through July 2002, since [appellant's] departure from the United States during this time period was in violation of the Court's Order." The court further ordered that the "monthly alimony obligation of [appellant] shall be

reduced to $1,000.00 per month effective from August 2002, to present, provided that the United States Bankruptcy Court in Missouri discharges [appellant] from his obligation . . . to pay [appellee] $100,000.00." The order further provided that if appellant was "not allowed a discharge of this obligation, then additional alimony arrearages shall be calculated from August 2002 through the date of this hearing at the rate of $5,000.00 per month, with a supplemental order being issued from this Court awarding [appellee] judgment against [appellant] for this additional sum."

On appeal, appellant argues that the court erred by modifying the parties' property-settlement agreement and ordering him to pay $5000 a month in alimony even though the agreement reduced his alimony obligation to $1000 a month while he was working as a medical missionary outside of the United States. We note the well-established Arkansas jurisprudence that when parties enter voluntarily into an independent property-settlement agreement that is incorporated into a decree of divorce, the agreement cannot subsequently be modified by the court. *See, e.g., Gentry v. Gentry*, 327 Ark. 266, 938 S.W.2d 231 (1997). Appellant, however, acknowledged in his brief to this court that he was properly found in contempt of the circuit court's order for leaving the United States and for violating the parties' agreement. And if appellant had abided by the court's order, then he would have remained in the United States and continued to pay alimony at the rate of $5000 a month.

The Arkansas Supreme Court has stated that if "an act interferes with the order of the court's business or proceedings, or reflects upon the court's integrity, that act is deemed contemptuous" and that a "court's contempt power may be wielded to preserve the court's power and dignity, to punish disobedience of the court's orders, and to preserve and enforce the parties' rights." *Hart v. McChristian*, 344 Ark. 656, 670, 42 S.W.3d 552, 562 (2001). In *Hart*, although the parties' limited-partnership agreement required each party to pay one-half of any costs associated with arbitration, the Arkansas Supreme Court concluded that the trial court properly assessed one party the other half of the costs as punishment for violating the court's orders. The court concluded that "the contempt award was not a modification of the parties' limited-partnership agreement but a valid exercise of the court's inherent contempt power." *Id.* at 671, 42 S.W.3d at 562. In the case at bar, the circuit court's decision to order appellant to pay alimony at the rate of $5000, despite appellant's presence in the

Philippines as a medical missionary, was likewise not a modification of the terms of the agreement. Rather, it was a valid exercise of the court's inherent contempt power for appellant's violation of the court's order restricting his travel outside of the United States until he satisfied his obligation under the agreement to make the $100,000 payment to appellee. Thus, we affirm.[1]

Affirmed.

BIRD and CRABTREE, JJ., agree.

Franklin DAVIS *v.* LITTLE ROCK SCHOOL DISTRICT

CA 04-987 211 S.W.3d 587

Court of Appeals of Arkansas
Opinion delivered August 31, 2005

[Rehearing denied November 2, 2005.]

[1] While appellant further argues that the doctrine of unclean hands is inapplicable, we do not address this argument because the court, in its order, did not rely on the doctrine. Instead, the court relied on its contempt powers and fashioned a remedy designed to enforce its prior order.

Kearney Law Office, by: *Jack R. Kearney*, for appellant.

Friday, Eldredge & Clark, LLP, by: *Christopher Heller*, for appellee.

DAVID M. GLOVER, Judge. Appellant Franklin Davis appeals from a summary judgment in favor of his former employer, appellee Little Rock School District. We affirm.

The pertinent facts are as follows. Davis was an elementary-school principal in the Little Rock School District. In mid-1997, the District began investigating complaints by several teachers and parents that Davis had sexually harassed them. Davis was confronted with the accusations and denied them. Following another similar complaint in November 1997, the District was prepared to terminate Davis's employment. Instead, Davis was transferred to an associate-principal position at Central High School. Thereafter, in March 1998, yet another sexual-harassment complaint was made against Davis, this time by a Central High School teacher.

In an April 2, 1998 letter to Davis, District Superintendent Leslie Carnine stated that he would recommend termination of Davis's contract "because the District has received numerous complaints of sexual harassment and inappropriate conduct by you directed at both teachers and patrons of the District." Carnine further stated that Davis was entitled to a hearing before the District board. On May 4, 1998, Davis, who was represented by counsel, responded as follows:

> Please be advised that, in lieu of the proceeding required by the Teacher Fair Dismissal Act, including the right to a school board hearing, I will agree to the submission of the recommended termination of my contract to binding arbitration through the American Arbitration Association. The offer to utilize this alternate dispute resolution process is based on the premise that formal judicial processes can be time consuming, costly and frustrating for both parties. The authority for a school district to submit a nonrenewal/termination recommendation to binding arbitration is recognized by the Attorney General of the State of Arkansas in Opinion No. 95-136.

On May 12, 1998, the District accepted Davis's offer to arbitrate and referred him to its attorney to coordinate selection of the arbitrator and to schedule the hearing.

For reasons that are unclear from the record, the arbitration hearing did not take place until June 1999. At the hearing, several women who were either teachers, school-district employees, or mothers of children in the district testified that Davis had either conducted himself in a sexually inappropriate manner in their presence or made lewd and suggestive comments to them. Davis denied the allegations. On July 12, 1999, the arbitrator issued an award in which she found that "the recommendation not to renew [Davis's] contract was not arbitrary, capricious or discriminatory and should be upheld. [Davis's] contract is not renewed for the 1999-2000 school year." However, in Davis's favor, she found that the District should have paid Davis for the entire 1998-99 school year,[1] and she ruled that he was entitled to all salary and benefits that he had not received for that period. On July 23, 1999, Davis received $24,561.94 "in full and complete satisfaction of the arbitration award dated July 12, 1999."

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[1] Several months before the hearing, the District had ceased paying Davis for the 1998-99 school year.

On or about July 26, 1999, Davis asked the arbitrator to reconsider the award. His request is not contained in the record, but Davis states in his reply brief that he was giving the arbitrator "notice that the award did not comport with the requirements" of the Arkansas Teacher Fair Dismissal Act (TFDA), a statutory scheme comprised of various procedures that a school district must follow when nonrenewing or terminating a teacher's contract. *See* Ark. Code Ann. §§ 6-17-1501 to -1510 (Repl. 1999 and Supp. 2003). The arbitrator, citing Rule 33 of the National Rules for the Resolution of Employment Disputes, declined to reconsider the award, stating that, while a party may request correction of "clerical, typographical, technical, or computational errors," an arbitrator is not empowered to "redetermine the merits of any claim already decided." Further, she stated, Arkansas law permits an arbitrator to modify or correct an award only where there is an "evident miscalculation of figures or mistake in the description of a person, thing, or property" or where the award was "imperfect in a matter or form not affecting the merits of the controversy." *See* Ark. Code Ann. §§ 16-108-209 and -213(a) (1987). Additionally, she said, Arkansas's arbitration statutes provide for the "vacation" of an arbitration award only by the courts and not by the arbitrator. *See* Ark. Code Ann. § 16-108-212 (Supp. 2003). Following the arbitrator's denial of reconsideration, Davis did not appeal the award to circuit court or ask the court to vacate or modify the award.[2]

On July 1, 2002, almost three years after the arbitrator entered her award, Davis filed the present complaint against the District in Pulaski County Circuit Court. The thrust of his complaint was that he was entitled to back pay, reinstatement, damages, and attorney fees because the arbitrator and the District did not comply with the TFDA in various respects, including but not limited to 1) failing to make specific written conclusions regarding the truth of each reason given in support of the termination recommendation, 2) failing to bring any problems to Davis's attention prior to the termination recommendation and failing to document efforts to assist him with the problems, and 3)

[2] The record before us contains a complaint filed by Davis in Pulaski County Circuit Court in October 1999 against the District, several of its employees, and several of his accusers seeking damages for tortious interference, defamation, racial and gender discrimination, and violation of due-process rights. However, the action is not designated as an appeal, and the record does not indicate what became of this lawsuit.

terminating his salary before the hearing occurred. The District answered and, in the course of the litigation, filed two motions for summary judgment, the first of which was denied and the second of which was granted. The grant of summary judgment was made on the basis that Davis's suit was barred by *res judicata* and that, by asking for arbitration, he waived strict compliance with the TFDA.

Davis now appeals from the above ruling. We review his arguments under the appropriate standard for issues of law, *i.e.*, if the law has been erroneously applied and the appellant has suffered prejudice, the erroneous ruling will be reversed. *See generally Sheets v. Dollarway Sch. Dist.*, 82 Ark. App. 539, 120 S.W.3d 119 (2003) (holding that whether a school district has complied with the TFDA is a question of law); *Office of Child Support Enforcement v. King*, 81 Ark. App. 190, 100 S.W.3d 95 (2003) (treating review of a trial judge's conclusion that a suit was barred by the application of *res judicata* as a question of law). We also note that, where parties file cross-motions for summary judgment, as they did in this case, they essentially agree that there are no material facts remaining, and summary judgment is an appropriate means of resolving the case. *See Clarendon Nat'l Ins. Co. v. Roberts*, 82 Ark. App. 515, 120 S.W.3d 141 (2003).

■ In his first assignment of error, Davis argues that summary judgment was improper because 1) the District failed to comply with Ark. R. Civ. P. 56(c), and 2) the doctrine of *res judicata* was not applicable under the facts of this case.[3] On the first point, Davis claims that the District's motion should have been denied because it did not meet Rule 56(c)'s mandate to "set for[th] the undisputed facts upon which a finding for summary judgment may be based." However, Rule 56(c) contains no requirement that a statement of undisputed facts accompany a motion for summary judgment; it simply provides that a motion for summary judgment "shall specify the issue or issues on which summary judgment is sought and may be supported by pleadings, deposi-

[3] The heading to Davis's first point also indicates that he will challenge the timeliness of the District's second motion. However, this point is not developed in the text of Davis's argument. Therefore, we will not consider it on appeal. *See generally Dougan v. State*, 330 Ark. 827, 957 S.W.2d 182 (1997) (declining to consider an argument that is mentioned only in a subheading of the appellant's brief); *Brockwell v. State*, 260 Ark. 807, 545 S.W.2d 60 (1976) (holding that the mere statement of a point is not a sufficient argument for reversal).

tions, answers to interrogatories and admissions on file, and affidavits." Davis has therefore shown no basis for reversal on this point.

As for Davis's *res judicata* argument, that doctrine provides that a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim or cause of action. *Cox v. Keahey*, 84 Ark. App. 121, 133 S.W.3d 430 (2003). Except in certain limited situations, a valid and final award by an arbitrator has the same effect under the rules of *res judicata* as the judgment of a court. *See Riverdale Dev. Co., LLC v. Ruffin Bldg. Sys., Inc.*, 356 Ark. 90, 146 S.W.3d 852 (2004); *Restatement (Second) of Judgments* § 84 (1982). When a case is based on the same events as the subject matter of a previous lawsuit, *res judicata* will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *Cox, supra.* The key question regarding the application of *res judicata* is whether the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. *Id.*

We believe that Davis had a full and fair opportunity in the arbitration proceeding to litigate the matters he now raises in this lawsuit. Although he contends that his present issues were not determined in arbitration, we find nothing in his brief argument on this point to support that contention. To the contrary, Davis argued in arbitration, just as he does in this lawsuit, that the school board should not have terminated his employment before the hearing was held. He prevailed on that issue in arbitration and collected an award of back pay. Davis also contended at the arbitration hearing, just as he does in this lawsuit, that the TFDA's procedures should have been applied in his case. A review of the arbitrator's award shows that she did apply the TFDA in some respects, determining, for instance, that the superintendent's recommendation was not "arbitrary, capricious, or discriminatory" and "should be upheld." *See* Ark. Code Ann. §§ 6-17-1503 and 1510(b) (Repl. 1999).[4] However, Davis requested reconsideration on the basis that the award did not fully comport with the TFDA. The arbitrator denied reconsideration, and Davis neither appealed

[4] In 2001, the legislature amended the TFDA in several respects, but those amendments were not in effect at the time of Davis's disciplinary actions in 1998 and 1999 and thus were not applicable. *See Olsen v. East End Sch. Dist.*, 84 Ark. App. 439, 143 S.W.3d 576 (2004).

from that ruling nor requested that the circuit court vacate or modify the award. *See McLeroy v. Waller*, 21 Ark. App. 292, 731 S.W.2d 789 (1987) (holding that a decision by an arbitrator on all questions of fact and law is conclusive unless grounds are established to vacate or modify the award). In light of these circumstances, we believe that Davis has already had a full opportunity to challenge the propriety of his dismissal and the procedures employed in connection therewith. The trial court correctly ruled, therefore, that Davis's lawsuit was barred by *res judicata*.

Our holding on the above point makes it unnecessary to reach Davis's second argument that the trial court erred in ruling that he waived strict compliance with the TFDA by submitting to arbitration.

For his final argument, Davis claims that his due-process rights were violated because the arbitrator did not address the veracity of each allegation lodged against him or "vote on the truth of each allegation and vote to terminate his employment" as required by the TFDA. Our reading of the trial court's order does not reflect a clear ruling with regard to Davis's due-process claims. Failure to obtain a ruling is a procedural bar to our consideration of an issue on appeal; this is true even of constitutional arguments and even where the arguments were raised at trial. *See Scamardo v. Jaggers*, 356 Ark. 236, 149 S.W.3d 311 (2004).

In any event, in litigation filed by Davis against the District in federal court in 2000, the United States Court of Appeals for the Eighth Circuit agreed with the United States District Court that "the pre-termination and post-termination process Davis received was constitutionally sufficient." *Davis v. Little Rock Sch. Dist.*, No. 01-3007 (8th Cir. 2002) (unpublished). The District Court also ruled that Davis had waived his due-process claims and his rights under the TFDA when he requested and participated in a binding arbitration proceeding. Although Davis argues in his reply brief that the federal courts did not dismiss his "state due process claims" that are "based upon the TFDA" with prejudice, he fails to explain to our satisfaction how the due-process and TFDA claims he now asserts differ in any meaningful way from the claims ruled upon by the federal courts.

Affirmed.

GRIFFEN and ROAF, JJ., agree.

Jennifer FRITZ, as Special Administratrix of the Estate of Georgia Fritz a/k/a Georgia Collins, Deceased *v.* BAPTIST MEMORIAL HEALTH CARE CORP., d/b/a Baptist Memorial Nursing Center, *et al.*

CA 04-1099 211 S.W.3d 593

Court of Appeals of Arkansas
Opinion delivered August 31, 2005

[Rehearing denied October 5, 2005.]

Wilkes & McHugh, P.A., by: *Brian G. Brooks*, for appellant.

Butler, Hickey, Long & Harris, by: *Andrea W. Brock*, for appellee.

LARRY D. VAUGHT, Judge. This appeal arises from the sexual assault of one nursing-home resident by another resident. Appellant Jennifer Fritz, as special administratrix of the estate of Georgia Fritz Collins, appeals from the jury's verdict finding appellee Baptist Memorial Health Care Corporation negligent for allowing the assault to occur but not awarding any damages for the assault. Fritz seeks a new trial on damages or, in the alternative, a new trial on all issues. Baptist conditionally cross-appeals from two of the trial court's evidentiary rulings, as well as from decisions denying motions to dismiss and for a directed verdict. We affirm on direct appeal; consequently, we do not address the cross-appeal.

Georgia Collins was admitted to Baptist's Blytheville nursing home in 1999. At the time, Collins was alleged to be suffering from dementia. On February 28, 2001, Collins was sexually assaulted by another resident, Theodore Weaver, who was arrested for the crime. On April 1, 2001, Collins left the nursing home. On November 1, 2001, Fritz, as special administratrix of Collins's estate, filed suit, alleging that Baptist was negligent in allowing the assault to take place and that Baptist violated Ark. Code Ann.

§§ 20-10-1201 through 1209 (Repl. 2000 & Supp. 2003), which provide protection and rights for residents of long-term-care facilities. The allegations of the complaint were generally denied.

The jury returned a verdict on interrogatories. In the first interrogatory, the jury found that Baptist was negligent. This interrogatory was signed by the jury foreperson. The second interrogatory found that the plaintiff was not entitled to punitive damages and was signed by eleven jurors. The third interrogatory asked the jury to assess compensatory damages. The jury answered: "Plaintiff court costs and plaintiff attorney's fees." A blank was left for an amount to be inserted. Ten jurors signed this interrogatory. When the verdict was returned, the trial court inquired of the jurors concerning interrogatory number three. The court asked whether the jury found any monetary damages, and the jury responded "no." The court then asked if it was their intention that plaintiff recover court costs and attorney's fees and not monetary damages and the jury responded "yes." Fritz then orally moved for a mistrial based on the jury's failure to properly complete the interrogatories. The court denied the motion for a mistrial but asked the parties to brief the effect of the jury's answer to the third interrogatory. Judgment was entered on the jury's verdict. By an "Addendum to Judgment on Jury Verdict," the trial court denied Fritz's motion for a mistrial or a new trial on damages. This appeal and cross-appeal followed.

Fritz argues one point on appeal, that a new trial is required because of the jury's failure to award damages. She subdivides her point into two parts: that the nature of the offense requires an award of damages and that the jury's answers to the interrogatories are inconsistent because of the jury's finding of proximate cause.

■ Rule 59 of the Arkansas Rules of Civil Procedure provides that a new trial may be granted on the ground of error in the assessment of the amount of recovery, whether too large or too small. Ark. R. Civ. P. 59(a)(5). When the primary issue is the alleged inadequacy of the damage award, we will affirm the denial of a motion for new trial absent a clear and manifest abuse of discretion. *Depew v. Jackson*, 330 Ark. 733, 957 S.W.2d 177 (1997); *Fields v. Stovall*, 297 Ark. 402, 762 S.W.2d 783 (1989). An important consideration is whether a fair-minded jury might reasonably have fixed the award at the challenged amount. *See Depew*, *supra*; *Fields*, *supra*. The trial court is not to substitute its view of the evidence for that of the jury. *Clayton v. Wagnon*, 276 Ark. 124, 633 S.W.2d 19 (1982).

Fritz asks this court to award a new trial on damages only. This cannot be done. Even though the alleged error in this case pertains 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); *Waste Mgmt. of Ark., Inc. v. Roll Off Serv., Inc.*, 88 Ark. App. 343, 199 S.W.3d 91 (2004).[1]

Citing such cases as *Cathey v. Arkansas Power & Light Co.*, 193 Ark. 92, 97 S.W.2d 624 (1936); *Davis v. Richardson*, 76 Ark. 348, 89 S.W. 318 (1905); and *Western Union Telegraph Co. v. Glenn*, 68 S.E. 881 (Ga. App. 1910), Fritz argues that the assault on Collins requires that some damages be presumed and, therefore, it was error for the trial court not to order a new trial.

Nominal damages may be awarded where a legal right, such as an assault, is vindicated but where an infringement produces no actual present loss, or where some compensable injury is shown but the amount of the injury not proved. *Baker v. Armstrong*, 271 Ark. 878, 611 S.W.2d 743 (1981). Some damages are presumed to flow from the violation of a legal right. The law in such cases will at least award nominal damages. *Baker, supra*; *Adams v. Adams*, 228 Ark. 741, 310 S.W.2d 813 (1958); *Barlow v. Lowder*, 35 Ark. 492 (1880). To warrant recovery of nominal damages, there must be an unlawful infringement of a property right. *Thigpen v. Polite*, 289 Ark. 514, 712 S.W.2d 910 (1986).

Here, Fritz did not allege an assault case. She pled and tried this case as a negligence case against Baptist, alleging that, because of its negligence, the attack on Collins was allowed to occur. In negligence cases, the supreme court appears to have adopted a different rule: that the failure to award nominal damages is not reversible error. *See Webb v. Thomas*, 310 Ark. 553, 837 S.W.2d 875 (1992); *Thigpen v. Polite*, 289 Ark. 514, 712 S.W.2d 910 (1986); *Harlan v. Curbo*, 250 Ark. 610, 466 S.W.2d 459 (1971); *Wells v. Adams*, 232 Ark. 873, 340 S.W.2d 572 (1960).

We conclude that there was testimony from which the jury could have reasonably concluded that Collins did not suffer any injury as a result of the incident with Weaver. When ques-

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[1] *See also Avery v. Ward*, 326 Ark. 829, 934 S.W.2d 516 (1996); *Johnson v. Gilliland*, 320 Ark. 1, 896 S.W.2d 856 (1995); *Jacuzzi Bros., Inc. v. Todd*, 316 Ark. 785, 875 S.W.2d 67 (1994); *McVay v. Cowger*, 276 Ark. 385, 635 S.W.2d 249 (1982) (collecting cases dating to 1900).

tioned by Detective Tim Bentley of the Blytheville Police Department, Collins said she was okay. Collins's treating physician, Dr. Richard Hester, testified that he examined Collins on March 12, 2001, some twelve days after the incident and that she showed no change in her condition from before the incident. There was also a great deal of testimony from Collins's caregivers, Betty Hartsfield, R.N.; Doris Johnson, a former C.N.A.; and Carolyn Johnson, C.N.A., that Collins did not complain of any pain when she was examined following the incident. Jean Shook, Baptist's expert and a registered nurse, testified that it was her opinion that Collins was not harmed by the incident because Collins denied having any pain and because Collins, noted in the medical records as being easily agitated, would have complained had she been in pain. Shook also based her opinion on Carolyn Johnson's testimony that Collins was upset when the nurses entered her room and stopped the encounter.

Fritz also argues that the invasive nature of the rape exam performed on Collins justifies an award of damages. We disagree. First, there was no testimony that the exam was invasive. Second, there was likewise no testimony as to how the exam affected Collins. Fritz had the burden of showing entitlement to compensatory damages, and the jury's answer to the third interrogatory indicated that she did not meet that burden. We cannot say that the trial court abused its discretion in refusing to order a new trial. In its consideration of the oral motion, the trial court considered the appropriate factors concerning the elements of damage to Collins.

For the second part of her point on appeal, Fritz contends that the jury's answers to the interrogatories were inconsistent because the jury found Baptist negligent yet failed to award any damages. We disagree. It is the duty of the trial judge to harmonize apparent inconsistencies in arriving at a judgment, if possible to do so. *Russell v. Pryor*, 264 Ark. 45, 568 S.W.2d 918 (1978). The verdicts should not be set aside if the jury's intentions were capable of ascertainment with certainty. *Id.* Here, the trial court recognized the possible inconsistency in the jury's answers to the interrogatories and appropriately asked the jury if it was the wish of the jury that plaintiff recover court costs and attorney's fees and not monetary damages, and the jury responded in the affirmative. The trial court then entered a verdict consistent with the

jury's stated intention. Fritz argues that the jury's answer to the third interrogatory leaving the blank for the amount of damages unfilled and writing in attorney's fees and costs indicates that the jury intended that she recover. However, the jury had no authority to award attorney's fees and costs, and the trial court properly entered judgment based on the jury's answers to the interrogatories as clarified by the trial court's questioning. *Bowen v. Saxton*, 255 Ark. 298, 499 S.W.2d 867 (1973).

Fritz also argues that the trial court's questioning of the jury foreperson was not a proper poll of the jury. The short answer to this is that she did not object to the questioning of the jury.

Finally, Fritz argues that the jury found that Baptist was negligent, thereby justifying an award of damages. However, although a defendant may be shown to have been negligent in some manner, the plaintiff must also prove that he or she suffered damages as a result of that negligence. *See Lovell v. Brock*, 330 Ark. 206, 952 S.W.2d 161 (1997); *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 148 S.W.3d 754 (2004). Further, the amount of an award of damages rests largely within the discretion of the jury. *Coca-Cola Bottling Co. v. Adcox*, 189 Ark. 610, 74 S.W.2d 771 (1934).

As noted, the cross-appeal is conditional and needs to be addressed only in the event that the court decides to reverse on the direct appeal. Our decision on direct appeal renders the cross-appeal moot.

Affirmed on direct appeal; cross-appeal moot.

PITTMAN, C.J., and ROBBINS, J., agree.

Charles MARSHALL *v.* STATE of Arkansas

CA CR 04-1259 211 S.W.3d 597

Court of Appeals of Arkansas
Opinion delivered August 31, 2005

[redacted]

[redacted]

John H. Bradley, Mississippi County Managing Public Defender, for appellant.

Mike Beebe, Att'y Gen., by: *Suzanne Antley*, Ass't Att'y Gen., for appellee.

KAREN R. BAKER, Judge. A jury in Mississippi County Circuit Court found appellant, Charles Marshall, guilty of murder in the first degree and sentenced him to twenty-five years' imprisonment in the Arkansas Department of Correction. On appeal, appellant challenges only the denial of his "motion to suppress his custodial statement that is against his interest." We find no error and affirm.

On August 10, 2003, appellant was involved in an altercation that resulted in the shooting death of Harold Walker. Appellant and three others were riding around in an automobile when they were involved in an altercation with a friend of Mr. Walker's. After leaving the scene of the altercation, the driver proceeded to an unknown person's house to obtain a gun. Later, while again riding in the vehicle, appellant and the others again encountered Mr. Walker's friend, Mr. Walker, and other individuals. At this time, another altercation ensued, shots were fired, and Mr. Walker was hit. He later died from his injuries.

Appellant was arrested in Indiana and returned to Mississippi County on September 3, 2003, the date on which appellant was to be arraigned. However, before he was taken to court, Detective Timothy Bentley advised appellant that he was going to speak to him in reference to the murder case and took him to an interview room. Appellant informed Detective Bentley that he did not have to say anything and that he wanted to talk with his lawyer. Detective Bentley responded that he did not really want to speak with appellant and stated, "I don't need anything from you. There's plenty of witnesses and I personally don't care if I speak with you." At that point, Detective Bentley proceeded to obtain from appellant basic information for a criminal investigation divi-

sion (CID) information form. Upon completion of the CID form, appellant was informed that it was time for his arraignment, at which time appellant asked Detective Bentley, "What do you want to know? I will speak with you." Appellant was then advised of his *Miranda* rights, he signed the Blytheville Police Department Interrogation Advise of Rights form, and he gave a tape-recorded statement admitting that he had pointed a gun and shot three times in the direction of Mr. Walker and the other individuals.

On October 2, 2003, appellant filed a motion to suppress his statement. Following testimony and arguments by counsel, the court denied appellant's motion to suppress and admitted his statement into evidence.

Our review of a denial of a motion to suppress evidence is *de novo*, and we make an independent determination based on the totality of the circumstances, giving due deference to the trial court's ability to assess the credibility of the witnesses. *Davis v. State*, 351 Ark. 406, 94 S.W. 3d 892 (2003). In *Davis,* our supreme court clarified the standard of review by replacing a view of the evidence "in the light most favorable to the State" with a "proper deference to the findings of the trial court," which was held to be more consistent with the standard announced by the United States Supreme Court. *State v. Harmon*, 353 Ark. 568, 113 S.W.3d 74 (2003) (quoting *Ornelas v United States*, 517 U.S. 690 (1996)).

Appellant's sole point on appeal is that the trial court erred in denying the motion to suppress his statement. Appellant asserts that his Fifth and Fourteenth Amendment Rights of the United States Constitution were violated and once that right is invoked "all interrogation must cease until an attorney is present." The trial court denied the motion, reasoning that the appellant voluntarily reinitiated the questioning by indicating that he wanted to give a statement.

Appellant correctly asserts that once an individual in custody invokes his right to counsel the interrogation must cease. The term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Rhode Island v. Innis*, 446 U.S. 291 (1980). However, what occurred in this case was not the continuation of an interrogation relating to the charges, rather it was an informational procedure normally attendant to arrest and

custody. In fact, there is no indication in the record that appellant was initially questioned regarding the charges against him.

Furthermore, the statements that Detective Bentley made in response to appellant's decision to remain silent and his request for an attorney were not statements that were reasonably likely to elicit an incriminating response from appellant. Detective Bentley simply responded that he had witnesses to speak with and that he did not need to speak with appellant regarding the charges. The crux of the inquiry is whether Detective Bentley should have known that due to his statements appellant would be moved to make a self-incriminating admission. *See Innis, supra.* Given the fact that Detective Bentley's statements appear to have consisted of no more than a few off-hand remarks, we cannot say that Detective Bentley should have known it was reasonably likely that appellant would respond. Nor does the record indicate that Detective Bentley's comments were particularly evocative. Therefore, Detective Bentley did not subject appellant to words or actions that he should have known were reasonably likely to elicit an incriminating response from appellant.

Our supreme court recently clarified the standard of review for cases involving a trial court's ruling on the voluntariness of a confession holding that we must make an independent determination based upon the totality of the circumstances. *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004) (citing *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003)). 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 order to determine whether a waiver of *Miranda* rights is voluntary, this court looks to see if the confession was the product of free and deliberate choice rather than intimidation, coercion, or deception. *Id.*

Here, Detective Bentley spoke with appellant in an interview room and said he would like to speak with appellant regarding the case. Appellant invoked his right to remain silent and his right to counsel. Detective Bentley then proceeded to question appellant only regarding the CID form. When informed that it was time for the arraignment to begin, appellant spontaneously asked Detective Bentley what he wanted to know and indicated that he wanted to talk with him about the charges. Detective Bentley testified that at that point he advised appellant of his rights,

appellant signed the Advise of Rights form, and Detective Bentley asked appellant to note specifically that he would be speaking to him without an attorney. Furthermore, appellant's tape-recorded statement evidenced his understanding of his waiver of rights. There is no evidence of coercion, and it is clear that appellant was aware of the consequences of abandoning his right to remain silent and to have counsel present during questioning.

Given the totality of the circumstances in this case, we hold that the trial court did not err in denying appellant's motion to suppress his custodial statement.

Affirmed.

GLADWIN and NEAL, JJ., agree.

Roger ISRAEL *v.*
Christopher D. OSKEY and Lisa Oskey

CA 05-8 212 S.W.3d 45

Court of Appeals of Arkansas
Opinion delivered September 7, 2005

Taylor Law Firm, by: *Timothy J. Myers*; and *Roy, Lambert & Lovelace*, by: *James M. Roy, Jr.* and *James H. Bingaman*, for appellant.

The Nixon Law Firm, by: *Theresa L. Pockrus*, for appellees.

JOHN B. ROBBINS, Judge. Appellant Roger Israel appeals the entry of default judgment against him in a negligence action filed by appellees Christopher and Lisa Oskey in Washington County Circuit Court. In the complaint filed on April 7, 2004, Christopher alleged that he suffered personal injuries after he fell from a ladder while performing construction work on appellant's personal residence. A process server provided the summons and complaint to appellant at his residence on April 19, 2004. Though the circumstances of delivery were in dispute, both the process server and appellant agreed that hand-delivery of documents took place that day. The process server testified that she went to the door, appellant answered and affirmed his identity to her, she informed him that she was serving him with a summons and complaint, he said, "okay," and he shut the door. Appellant recalled the process server driving to his residence, he saw her car and ran to it, and he accepted what he thought was mail from her through the window of her car. Appellant did not know what happened to the documents after he accepted them, though he thought he put them in his back pocket, that he never looked at them, and that they were somehow lost. The process server filed proof of service with the circuit court on the following day, April 20, 2004, by filling in the return form on the summons that

was for use when service was made by the sheriff or sheriff's deputy. The process server did not complete an affidavit of service.

After the time for filing an answer elapsed, appellees filed a motion for a default judgment on May 25, 2004. Appellant filed an answer on August 18, 2004. On August 20, 2004, appellant moved to enlarge the time within which to answer, responded to the motion for default, and moved to dismiss appellees' complaint. Appellees responded by filing a motion to strike appellant's answer on September 20, 2004. Appellant followed this with a motion to strike appellees' motion to strike his answer on October 1, 2004. The hearing on the respective requests was conducted on October 1, 2004. The trial court entered the order on appeal on November 4, 2004.

The order granted appellees' motions for a default judgment and to strike appellant's answer. In this same order, the trial court denied appellant's motion to dismiss the complaint and appellant's motion to strike the request to strike his answer. The order did not dispose of the motion to enlarge the time within which to answer the complaint. The letter opinion, incorporated into the order, stated that default judgment was granted on the issue of liability, but that appellant was entitled to a trial on the remaining issue of damages. The trial court found that there was valid service by a duly-qualified process server on April 19; that the process server erroneously used the sheriff's return instead of providing an affidavit of service on April 20; that this error did not invalidate service; that appellant admitted receipt of the documents; that there was neglect in failing to answer the complaint, but not excusable neglect; that the trial court sent two letters to appellant, dated July 9 and August 4, setting the matter for trial on October 1; and that appellant's filing of an answer on August 18 demonstrated his failure to take any of the documents seriously. Appellant filed a timely notice of appeal from the trial court's order.

On appeal, appellant argues that the trial court erred in entering a default judgment because (1) the service requirements were not strictly followed, (2) the proof of service was defective, (3) appellant demonstrated excusable neglect in failing to file a timely answer, and (4) appellant was entitled to an extension of time. Appellant also argues that the trial court erred in granting appellees' motion to strike his answer. After our appellate review of all issues, we affirm the trial court's decision in all respects.

[redacted] We first note that as to the default judgment, appellees contend that we do not have a final order for purposes of appeal.

The issue of jurisdiction is one that we are duty-bound to raise, even if it is not raised by the parties. *See, e.g., Hyatt v. City of Bentonville*, 275 Ark. 210, 628 S.W.2d 326 (1982). Appellees correctly state the general rule that a judgment or order is not final and appealable if the issue of damages remains to be decided. *See U.S. Bank, N.A. v. Milburn*, 352 Ark. 144, 100 S.W.3d 674 (2003); *String v. Kazi*, 312 Ark. 6, 846 S.W.2d 649 (1993); *John Cheeseman Trucking, Inc. v. Dougan*, 305 Ark. 49, 805 S.W.2d 69 (1991); *Sevenprop Assoc. v. Harrison*, 295 Ark. 35, 746 S.W.2d 51 (1988). In *Sevenprop*, our supreme court held that, in an appeal from a default judgment on liability, where there was failure to file a timely answer and the issue of damages was not yet resolved, the appeal had to be dismissed.

Nevertheless, we conclude that we have appellate jurisdiction of the present appeal because there is a single distinguishing factor — appellant's answer was struck. Under those circumstances, the Arkansas Supreme Court has held that the appeal is proper. *See Arnold Fireworks Display, Inc. v. Schmidt*, 307 Ark. 316, 820 S.W.2d 444 (1991). In *Arnold Fireworks*, the supreme court held that Arkansas Rule of Appellate Procedure–Civil 2(a)(4) provides that an appeal may be taken from an order that strikes all or part of an answer. Our supreme court declared that this specific provision in Ark. R. App. P.–Civ. 2(a)(4) controlled over the more general rule of Ark. R. App. P.–Civ. 2(a)(1), which requires a "final judgment." The supreme court held that appellate rule 2(a)(4) permitted a "piecemeal approach." *Id.* at 319. Therefore, we have appellate jurisdiction over the striking of the answer, which permits review of the entry of default judgment.[1]

We now address appellant's arguments on appeal in the order presented by him. The thrust of his appeal is directed toward whether the trial court erred in entering default judgment. When a party against whom a judgment for affirmative relief is sought fails to plead or otherwise defend as provided by the Rules of Civil Procedure, a default judgment may be entered against

[1] Although appellate Rule 2(a)(4) speaks only to an appeal from "an order which strikes out an answer, or any part of an answer, or any pleading in an action," the supreme court has relied on this jurisdictional base to review the related default judgment. *See Southern Transit Co., Inc. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998); *Arnold Fireworks Display v. Schmidt, supra.*

him. *See* Ark. R. Civ. P. 55(a). Default judgments are not favorites of the law and should be avoided when possible. *B & F Engineering v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992). A default judgment may be a harsh and drastic result affecting the substantial rights of the parties. *CMS Jonesboro Rehabilitation, Inc. v. Lamb*, 306 Ark. 216, 812 S.W.2d 472 (1991); *Burns v. Madden*, 271 Ark. 572, 609 S.W.2d 55 (1980). Pursuant to Rule 55(c) of the Arkansas Rules of Civil Procedure, a default judgment may be set aside for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the judgment is void; (3) fraud, misrepresentation, or other misconduct of an adverse party; or (4) any other reason justifying relief from the operation of the judgment. In cases where the appellant claims that the default judgment is void, we review a trial court's decision using a de novo standard. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004). In cases where an issue arises under sections (c)(1), (3), or (4) of Rule 55, we review the trial court's decision for abuse of discretion. *Id.*

Appellant first contends that default judgment was improper because he was not properly served with the summons and complaint. Arkansas law is long settled that service of valid process is necessary to give a court jurisdiction over a defendant. *Raymond v. Raymond*, 343 Ark. 480, 36 S.W.3d 733 (2001) (citing *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982)). Statutory service requirements, being in derogation of common-law rights, must be strictly construed and compliance with them must be exact. *Id.*; *Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 921 S.W.2d 944 (1996) (citing *Wilburn v. Keenan Companies, Inc.*, 298 Ark. 461, 768 S.W.2d 531 (1989) and *Edmonson v. Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978)). The same reasoning applies to service requirements imposed by court rules. *Carruth v. Design Interiors, Inc., supra*; *Wilburn v. Keenan Companies, Inc., supra.*

We hold that the trial court did not err in finding that there was valid service in this instance. Appellant agreed that he was handed some documents from a female who had driven to his residence that day. Appellant disagreed that he accepted them at the door; instead, he said he met her at the window of her car, thinking she was a mail carrier delivering regular mail. There was no dispute that the summons and complaint specifically and correctly notified appellant of all he was required to be provided under Arkansas law, and in particular Arkansas Rule of Civil Procedure 4. Appellant contends that his belief that the process

server was actually a mail carrier and that she did not inform him what she was handing him invalidates the completed service. We disagree that appellant was not properly served.

By both appellant's and the process server's testimony, appellant received documents from the process server at his residence on April 19. He simply neglected to read the documents. The summons is a process used to apprise a defendant that a suit is pending against him and afford him an opportunity to be heard. *See Nucor, supra.* Appellant's contention that he was mistaken in his belief that he was being handed regular mail does nothing to erode the admitted fact that appellant received hand-delivery of service. *See Miller v. Transamerica Commercial Finance Corp.*, 74 Ark. App. 237, 47 S.W.3d 288 (2001) (holding that evidence was sufficient to prove service of summons and complaint despite appellant not recalling being served at all, where deputy's unequivocal testimony was that he recalled serving the pleadings at a specific time and date, even though he stated on cross-examination that he had served so many times that he could not identify each and every instance). We affirm this point.

Appellant also contends that service was defective because the process server provided her proof of service by incorrectly filling in the form printed on the summons, which is provided for use by the sheriff or his deputies when serving summons and complaints. The form read as follows, with the handwritten insertions of the process server set out in italics:

> On this *19* day of April 2004 I have duly served the within writ, by delivering a copy and stating the substance thereof to the within named *Roger Israel in person at 5857 New Hope Rd. Springdale, AR.*
>
> Sheriff's costs $_____ _____
>
> Sheriff
>
> _____
>
> D.S. [deputy sheriff]
> *Sheri R. Brooks*
> *WPS 00-7*

Appellant directs us to Ark. R. Civ. P. 4(g), which states in pertinent part that:

> If service is made by a sheriff or his deputy, proof may be made by executing a certificate of service or return contained in the same

> document as the summons. If service is made by a person other than a sheriff or his deputy, the person shall make affidavit thereof[.]

The trial court found that the process server had not complied with Rule 4(g) by her failure to provide an affidavit to prove her service of summons. Notwithstanding that mistake, the trial court found that this omission did not affect the validity of service. The trial court was correct.

There is a distinction between service and proof of service. *See Adams v. Nationsbank*, 74 Ark. App. 384, 49 S.W.3d 164 (2001). Failure to make proof of service does not affect the validity of service, because proof of service may be made by means other than demonstration on the return of the serving official. *Lyons v. Forrest City Machine Works, Inc.*, 301 Ark. 559, 785 S.W.2d 220 (1990). We affirm this point and hold that valid service was provided to appellant to notify him of the summons and complaint, and that the erroneous manner of proving service did not invalidate service.

Appellant's next argument concerns whether the trial court abused its discretion in granting a default judgment. Appellant's argument has essentially two facets: (1) that he was unfairly allowed to harbor the false notion that the documents handed to him were regular mail and that this constitutes misconduct on the serving party excusing his failure to answer in a timely fashion, and (2) that his failure to answer on time was excusable neglect for his failure to understand the gravity of what had been handed him. We disagree with both of those arguments.

We have already disposed of the service-of-process argument. Furthermore, appellant presents no compelling argument or any legal authority requiring a verbal warning of what is being served. Assignments of error that are unsupported by convincing argument or authority will not be considered on appeal unless it is apparent without further research that they are well taken. *Webb v. Bouton*, 350 Ark. 254, 85 S.W.3d 885 (2002).

We also disagree that failure to answer within the time allotted under the Rules of Civil Procedure was a product of excusable neglect. Indeed, the trial court found that appellant had failed to answer due to neglect, but not "excusable" neglect. We cannot say that this finding is clearly erroneous or that the trial court abused its discretion in entering a default judgment under

these circumstances. Failure to attend to business is not excusable neglect. *Maple Leaf Canvas, Inc. v. Rogers*, 311 Ark. 171, 842 S.W.2d 22 (1992); *CMS Jonesboro Rehabilitation, Inc. v. Lamb, supra.*

Appellant adds to this argument by stating that no prejudice resulted to the appellees and that he has a meritorious defense. It must be remembered, however, that appellant must first satisfy the court that a threshold reason exists for denying default judgment. *See Maple Leaf, supra.* Like in *Maple Leaf* and in *CMS, supra*, the failure to answer the complaint was due more to carelessness or not attending to business.

The case of *Nucor, supra*, is instructive. In that case, a high-level employee of Nucor received a summons and complaint. Though the employee was undoubtedly extremely busy at the time he received the suit papers, he did nothing, and the trial court found that his being "too busy" was not excusable neglect. The justices in the *Nucor* appeal affirmed that discretionary decision. The *Nucor* decision referred back to *Layman v. Bone*, 333 Ark. 121, 967 S.W.2d 561 (1998), where it was held that:

> Presumably, any failure to file an answer on time could be referred to as a "mistake" in the sense that an error of some sort caused the failure to file on time. To hold, however, that any error whatsoever should excuse compliance with Rule 12(a) would deprive the trial courts of the discretion to which the rule refers. That is not the intent behind the rule.

Layman, 333 Ark. at 125, 967 S.W.2d at 563-564.

In the present appeal, appellant testified that he was a business man who was familiar with court processes. Despite his experience and intellect, appellant failed to tend to this business and did nothing until after being informed by letter that a trial on damages was pending. We cannot say that the trial court's conclusion, that this did not rise to excusable neglect, was clearly erroneous. As a result, we hold that its discretion was not abused in entering a default judgment. *Compare to Hubbard v. The Shores Group, Inc.*, 313 Ark. 498, 855 S.W.2d 924 (1993) (upholding trial court's discretionary decision setting aside default judgment under compelling facts supporting a finding of excusable neglect).

Appellant next contends that the trial court erred in granting a default judgment because he was entitled to an extension of time within which to file an answer pursuant to Ark. R. Civ. P. 6.

Arkansas Rule of Civil Procedure 6(b) provides that upon motion made after the expiration of the specified period, a trial court has discretion to permit the act to be done where the failure to act was the result of mistake, inadvertence, surprise, excusable neglect, or other just cause. Appellant contends that the trial court abused its discretion in denying his motion to enlarge the time within which to file his answer.

We do not address this issue on appeal because appellant bore the burden to obtain a ruling on the Rule 6 argument. His failure to do so is a procedural bar to our consideration of the issue on appeal. *See Kangas v. Neely*, 346 Ark. 334, 57 S.W.3d 694 (2001); *Barker v. Clark*, 343 Ark. 8, 33 S.W.3d 476 (2000); *St. Paul Fire & Marine Ins. Co. v. First Bank of Ark.*, 341 Ark. 851, 20 S.W.3d 372 (2000).

Even had we reached the merits, we would not hold that the trial court abused its discretion in not extending the time to answer because, like the entry of default judgment, there was no finding of excusable neglect. Rule 6(b)(2) was amended in 1990 to make it compatible with the move to liberalize Rule 55 and the standards for granting default judgments. *See Layman v. Bone, supra.* It allows a trial court, "in its discretion," to enlarge the time to answer, even after the initial period has passed. *See id.* However, the revision of the rule did not require the trial courts to permit such answers in any circumstance. *See id.*

Appellant's final contention on appeal is that the trial court erred in striking his answer filed on August 18, 2004. He notes that the trial court specifically stated that he had made a prima facie showing of a meritorious defense to the complaint, and furthermore, the issue of damages was remaining for trial. Thus, he asserts that striking his belated answer prevents him from maintaining his defenses raised in the answer. We disagree.

A trial court's decision regarding the striking of a pleading will not be reversed in the absence of an abuse of discretion. *See Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002). Arkansas Rule of Civil Procedure 12(f) provides that a trial court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. *See also* Newbern, *Arkansas Civil Practice and Procedure* § 11-12. Clearly, the belated answer was untimely to rebut the factual allegations in the complaint upon default regarding liability,

and therefore the factual responses were immaterial under Rule 12(f). Appellant correctly states that the issue of damages remains outstanding for trial. The harm levied against appellant in striking his answer was the entry of default judgment. The defenses raised in his answer related primarily to the issue of service of process, which has heretofore been resolved in the propriety of entering default judgment. Appellant remains free to counter any proof of damages, which must be proved by appellees at trial. Thus, we cannot say that the trial court abused its discretion in striking the untimely answer filed by appellant.

We affirm.

PITTMAN, C.J., and VAUGHT, J., agree.

Patricia STULTZ *v.* STATE of Arkansas

CA CR 04-1297 212 S.W.3d 42

Court of Appeals of Arkansas
Opinion delivered September 7, 2005

David L. Dunagin, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Patricia Stultz pleaded guilty to possession of methamphetamine and possession of drug paraphernalia and was given a four-year suspended imposition of sentence on March 14, 2003. On March 31, 2004, the trial court entered a judgment and commitment order sentencing Ms. Stultz to three years in prison with an additional seven-year suspended imposition of sentence, which was pursuant to Ms. Stultz's plea of guilty to conspiracy to deliver methamphetamine, which she entered on March 24, 2004. On April 6, 2004, the State filed a petition to revoke all of the suspended sentences on the grounds that Ms. Stultz violated her conditions on March 31, 2004, by committing several criminal offenses. After a hearing, the trial court announced that it was revoking the suspended sentences, and on August 13, 2004, an order

was entered sentencing Ms. Stultz to a ten-year suspended imposition of sentence for possession of methamphetamine and for possession of drug paraphernalia, as well as a twenty-year prison term for conspiracy to deliver methamphetamine. Ms. Stultz now appeals from the order revoking her suspended sentences, arguing that there was insufficient evidence that she violated her conditions. We affirm in part and reverse in part.

In a hearing to revoke, the burden is on the State to prove a violation of a condition of the suspended sentence by a preponderance of the evidence. *Hyde v. State*, 59 Ark. App. 131, 953 S.W.2d 911 (1997). On appellate review, the trial court's findings are upheld unless they are clearly against the preponderance of the evidence. *Id.* Because a determination of the preponderance of the evidence turns on questions of credibility and weight to be given testimony, we defer to the trial court's superior position in this regard. *Id.*

At the revocation hearing, Stan Ames testified that Ms. Stultz came to his residence at around noon on March 31, 2004. Donnie and James Kramer were already there when she arrived. According to Mr. Ames, he was in his garage when he heard his truck windows being busted out, and Donnie and James contained him in the garage. Mr. Ames stated that "Donnie busted me in the mouth," and that Ms. Stultz started beating him with a steel pipe while accusing him of burning her house down and stealing from her. Mr. Ames indicated that Ms. Stultz hit him multiple times with the pipe, first hitting his leg and then hitting him in the face when he fell to the floor. Ms. Stultz then threw gasoline on Mr. Ames, and he managed to run into his house and call the police before "they followed and tackled me again and went to beating me again."

By the time Officer Roger Green arrived at the scene, Donnie and James had fled, but Ms. Stultz was still there attempting to leave the driveway in a pickup truck. Officer Green stopped her, and noticed she had blood on her hands. Mr. Ames emerged from the garage and was bleeding from his mouth and nose. Officer Green observed a puddle of blood in the garage, and upon inspecting the interior of the house he found it to be "total destruction." Mr. Ames advised Officer Green that Ms. Stultz had taken some items from his residence, including some knives that were found in Ms. Stultz's purse.

Mr. Ames testified that he was afraid he was going to be killed that day and that Ms. Stultz threatened him the entire time she was beating him. After the episode ended, Mr. Ames went to the hospital to make sure that no bones were broken, and he was examined but not admitted. However, he testified that his face and nose were "pretty busted up."

At the conclusion of the revocation hearing, the trial court found that Ms. Stultz violated her conditions by committing second-degree battery, attempted first-degree battery, and burglary. Ms. Stultz argues on appeal that these findings were clearly against the preponderance of the evidence. She contends that the evidence presented by the State was circumstantial and did not support the trial court's decision to revoke.

We hold that the trial court's finding that Ms. Stultz violated a condition of her suspended sentences was not clearly against the preponderance of the evidence. In order to revoke a suspended sentence, the State need only prove one violation. *Ramsey v. State*, 60 Ark. App. 206, 959 S.W.2d 765 (1998). Contrary to Ms. Stultz's argument, there was direct evidence that she violated a condition by committing second-degree battery.

Pursuant to Ark. Code Ann. § 5-13-202(a)(2) (Supp. 2003), a person commits battery in the second degree if, with the purpose of causing physical injury to another person, he or she causes physical injury to any person by means of a deadly weapon other than a firearm. A steel pipe is considered a deadly weapon. *See Releford v. State*, 59 Ark. App. 136, 954 S.W.2d 295 (1997). The victim testified that Ms. Stultz beat him repeatedly with a steel pipe, resulting in his face and nose being "busted up" as well as considerable facial bleeding. "Physical injury" is defined as "infliction of substantial pain," *see* Ark. Code Ann. § 5-1-102(14)(B) (Supp. 2003), and in deciding whether this has been proved the trier of fact may consider the sensitivity of the area of the body to which the injury is inflicted and the severity of the attack. *See Holmes v. State*, 15 Ark. App. 163, 690 S.W.2d 738 (1985). We conclude that the trial court committed no error in finding that Ms. Stultz's purpose was to inflict substantial pain with the pipe and that this was accomplished.

While we disagree with the only issue raised in Ms. Stultz's brief, we nonetheless reverse the revocation and twenty-year prison sentence related to the March 31, 2004, conviction for

conspiracy to deliver methamphetamine. In *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003), the supreme court held that a trial court does not have the authority to revoke a suspended sentence before the commencement of the period of suspension, and that in such instances the resulting sentence is void. That is exactly what happened in the present case. As in *Harness v. State*, *supra*, Ms. Stultz was sentenced to prison and a suspended imposition of sentence for an additional term, but the violation of her condition occurred before she served any of her prison sentence. Because Ms. Stultz had not been lawfully set at liberty from the imprisonment, her period of suspension had not yet commenced to run. *See* Ark. Code Ann. § 5-4-307(c) (Repl. 1997); *Harness v. State*, *supra*. Although Ms. Stultz does not challenge the legality of her sentence on appeal, we review problems involving void or illegal sentences even if not raised on appeal and not objected to in the trial court. *See Harness v. State*, *supra*.

However, we affirm the trial court's revocation of Ms. Stultz's suspended sentences, and resulting ten-year impositions of suspended sentences, as relates to her guilty pleas for possession of methamphetamine and possession of drug paraphernalia as reflected on the March 14, 2003, judgment. This is because she committed a violation during the period of those suspensions.

The State notes in its brief that the trial court pronounced ten years' imprisonment from the bench, but the judgment being appealed from reflects a ten-year suspended imposition of sentence for each offense. This discrepancy is resolved by *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003), where our supreme court held that judgment and commitment orders are effective upon entry of record, and that the trial court is within its authority to modify the sentence pronounced in open court prior to entry of judgment so long as it complies with other pertinent criminal rules.

The August 13, 2004, order being appealed from reflects ten-year suspended impositions of sentences, which were authorized by law and are hereby affirmed. However, that portion of the order that imposed the unauthorized twenty-year prison term is reversed and dismissed.

Affirmed in part; reversed and dismissed in part.

PITTMAN, C.J., and VAUGHT, J., agree.

GRAND SLAM STORES, L.L.C. *v.* L&P BUILDERS, INC.

CA 05-94 212 S.W.3d 6

Court of Appeals of Arkansas
Opinion delivered September 7, 2005

Richard C. Downing, for appellant.

Herby Branscum Jr., for appellee.

SAM BIRD, Judge. On August 27, 2003, the Perry County Circuit Court entered a default judgment against appellant Grand Slam Stores, LLC, after Grand Slam failed to file an answer to a third-party complaint filed against it by appellee L&P Builders, Inc. Grand Slam later filed a motion to set aside the default judgment on the ground that it was void due to defective service of process. The trial court denied Grand Slam's motion and this appeal followed. We hold that service of the third-party complaint on Grand Slam was not properly effected, and we reverse and remand.

On January 21, 2003, Blaylock Heating and Air Conditioning, Inc., filed suit against L&P Builders for breach of contract. On February 28, 2003, L&P Builders filed a third-party complaint against Grand Slam seeking $33,262.53. In an affidavit filed on April 4, 2003, counsel for L&P Builders stated that Grand Slam was served with a certified letter dated February 28, 2003. Attached to the affidavit was a copy of a letter addressed to "Grand Slam Stores LLC," which stated that a third-party complaint and summons were enclosed. The return receipt was signed by "Missy Johns"

and showed a delivery date of March 3, 2003. A check-marked box on the receipt indicated that Missy Johns was the "agent" for Grand Slam.

Grand Slam did not file an answer to the third-party complaint, and the court entered a default judgment against it on August 27, 2003. On July 20, 2004, Grand Slam filed a motion to set aside the default judgment, claiming that it had not been served in the manner required by Rule 4(d)(5) of the Arkansas Rules of Civil Procedure. Specifically, Grand Slam contended that Missy Johns "was not and has never been an officer, partner, member, manager, [or] director" for Grand Slam, and that she "has never been an agent authorized by appointment or by law" to receive service of summons on behalf of Grand Slam.

At the hearing on the motion to set aside the judgment, Ronald Calhoun testified that he owned fifty percent of Grand Slam and that he never had an employee named "Missy Johns." He also said that he had an employee named "Missy Johnson," who was the receptionist for Ron Calhoun and Associates, a real estate company. Calhoun said that Johnson answered the phone, but that she was not an officer of Calhoun and Associates and that she had "no connection" with Grand Slam. According to Calhoun, Missy Johnson was twenty-three years old at the time she worked for his company and was there for approximately eight months. Furthermore, Calhoun said that Johnson was not the registered agent for service of process for Grand Slam.

The trial court denied the motion to set aside the default judgment and ordered Grand Slam to pay $27,329.37 to L&P Builders. On October 5, 2004, Grand Slam filed a motion for reconsideration, again claiming that the default judgment was void because service of process had not been properly effected in accordance with Ark. R. Civ. P. 4(d). The trial court also denied this motion.

On appeal, Grand Slam contends that the court erred in denying its motion to set aside the default judgment and its motion for reconsideration because L&P Builders failed to comply with service of process requirements under Rule 4(d) of the Arkansas Rules of Civil Procedure. Rule 4(d) states, in relevant part:

> (d) *Personal Service Inside the State.* A copy of the summons and complaint shall be served together. The plaintiff shall furnish the

person making service with such copies as are necessary. Service shall be made upon any person designated by statute to receive service or as follows:

. . . .

(5) Upon a domestic or foreign corporation or upon a partnership, limited liability company, or any unincorporated association subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, partner other than a limited partner, managing or general agent, or any agent authorized by appointment or by law to receive service of summons.

. . . .

(8)(A)(i) Service of a summons and complaint upon a defendant of any class referred to in paragraphs (1) through (5), and (7) of this subdivision (d) may be made by the plaintiff or an attorney of record for the plaintiff by any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee. *The addressee must be a natural person specified by name*, and the agent of the addressee must be authorized in accordance with U.S. Postal Service regulations. However, service on the registered agent of a corporation or other organization may be made by certified mail with a return receipt requested.

(ii) Service pursuant to this paragraph (A) shall not be the basis for the entry of a default or judgment by default unless the record contains a return receipt signed by the addressee or the agent of the addressee or a returned envelope, postal document or affidavit by a postal employee reciting or showing refusal of the process by the addressee. If delivery of mailed process is refused, the plaintiff or attorney making such service, promptly upon receipt of such notice of such refusal, shall mail to the defendant by first class mail a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default may be rendered against him unless he appears to defend the suit. Any such default or judgment by default may be set aside pursuant to Rule 55(c) if the addressee demonstrates to the court that the return receipt was signed or delivery was refused by someone other than the addressee or the agent of the addressee.

(Emphasis added.)

The standard of review for denial of a motion to set aside a default judgment is whether the trial court abused its discretion. *B&F Eng'g, Inc. v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992). It has long been recognized in Arkansas that service of process requirements, being in derogation of common law rights, must be strictly construed and compliance with them must be exact. *See Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 921 S.W.2d 944 (1996). Furthermore, Arkansas courts have recognized that judgments by default rendered without valid service are judgments rendered without jurisdiction and are therefore void. *See Lawson v. Edmondson*, 302 Ark. 46, 786 S.W.2d 823 (1990).

In this case, L&P Builders clearly failed to comply with Ark. R. Civ. P. 4(d)(8). Here, counsel for L&P Builders stated that Grand Slam was served by certified letter dated February 28, 2003, and the letter was addressed to "Grand Slam Stores LLC." We hold that this does not comply with our service of process requirements under Ark. R. Civ. P. 4(d)(8), which requires that an addressee be a "natural person specified by name." A "natural person" is a "human being." *See Black's Law Dictionary* 1178 (8th ed. 2004). A limited liability company is clearly not a "natural person" within the meaning of Ark. R. Civ. P. 4(d)(8), and the letter did not name any human being as an addressee. Thus, Grand Slam was not properly served under our rules of civil procedure, and the trial court abused its discretion by failing to grant Grand Slam's motion to set aside the default judgment and its motion for reconsideration. We therefore reverse and remand for further proceedings.

Reversed and remanded.

HART and CRABTREE, JJ., agree.

Hardy LITTLE and Loretta Little *v.*
JONESBORO COUNTRY CLUB

CA 05-179 212 S.W.3d 57

Court of Appeals of Arkansas
Opinion delivered September 7, 2005

The Rees Law Firm, by: *David Rees*, for appellants.

Womack, Landis, Phelps, McNeill, McDaniel, by: *David Landis*, *Mark Mayfield*, and *Jared Woodard*, for appellee.

SAM BIRD, Judge. Appellants Hardy and Loretta Little brought a negligence action against appellee Jonesboro Country Club after Mrs. Little was injured while playing golf at the club. The Littles' sole point on appeal is that the trial court erred by

granting the club's motion for summary judgment. Because we find that the evidence in this case presents a genuine issue of material fact, we reverse and remand.

In a complaint filed on May 23, 2003, the Littles claimed that they had participated in a Memorial Day golf tournament at the club on the afternoon of May 29, 2000, and that during this time, Mrs. Little had fallen into an "uncovered and hidden valve hole" located off the sixteenth-hole fairway. According to the complaint, the club maintained and operated an underground irrigation system with valves housed in metal casings. The casings were approximately twenty-three inches deep and eight to ten inches in diameter. The Littles claimed that the valve causing Mrs. Little's injury was not covered at the time she was injured, and that grass had grown over the surface area of the valve hole to the extent that it was completely obstructed from view. The complaint specifically alleged that the club had breached its duty of ordinary care in maintaining the premises by "failing to conduct regular inspections, and thereby failing to discover, secure, and maintain the valve that created this dangerous condition."

On September 24, 2004, the club filed a motion for summary judgment. Mark Huffer, superintendent of the club's golf course, stated in a supporting affidavit that the club had maintained the underground irrigation system since 1983 and that there were approximately 120 valves and 120 valve covers associated with the sprinkler system throughout the golf course. Furthermore, Huffer stated that of the 120 valve covers, no more than fifteen had been replaced or repaired since 1983. He said that during the months preceding Mrs. Little's fall, he never observed or received information regarding a cracked valve cover anywhere on the golf course, including the sixteenth hole. Huffer's affidavit also stated that the club's employees had mowed the rough on the sixteenth hole during the months of April and May 2000; that Huffer would inspect the entire golf course at least twice a week to look for potential hazards; and that Huffer had inspected most of the course on the morning of May 29, 2000. To the best of Huffer's knowledge, the rough along the sixteenth hole was mowed four days before Ms. Little's fall occurred. In addition, two members of the club, Dr. Grover Poole and Les Abernathy, each stated by affidavit that he frequently played golf at the club and had never observed a broken valve cover on the course.

The Littles filed a response to the club's motion for summary judgment, including supporting affidavits and deposition testi-

mony. In his affidavit, Mr. Little stated that, while playing in the tournament on May 29, 2000, he noticed that Mrs. Little had fallen into a hole on the course that was "approximately two feet deep" and was "covered by grass so that it could not be seen by an unsuspecting golfer." He also said that he had played golf at the club for more than twenty years and that he was very familiar with the course; thus, he knew that the valves were supposed to be capped, but "this one was not capped." Frankie Gray, Dick Gray, and Steve Mitchell, who were playing golf with Mrs. Little at the time of her injury, each stated in an affidavit that the hole into which Mrs. Little fell was not visible and that it was covered with grass. Dick Gray also stated that the hole was not capped. In her deposition testimony, Mrs. Little testified that at the time she fell, "the hole was covered and the grass was thick at that time, and it was completely covered." After reviewing the matter, the court granted summary judgment in favor of the club.

On appeal, the Littles argue that the trial court erred in granting summary judgment to the club. Our supreme court has previously set forth the standard of review for cases in which summary judgment has been granted:

> Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Jackson v. City of Blytheville Civ. Serv. Comm'n*, 345 Ark. 56, 43 S.W.3d 748 (2001). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *George v. Jefferson Hosp. Ass'n, Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999); *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. *Id.* This court views evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998). Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998); *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997). After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable persons might reach different conclusions from those undisputed facts. *George*,

> *supra. MedMarc Cas. Ins. Co. v. Forest Healthcare*, Inc., 359 Ark. 495, 499, 199 S.W.3d 58, 61 (2004) (quoting *Allen v. Allison*, 356 Ark. 403, 412-13, 155 S.W.3d 682, 689 (2004)).

Rice v. Tanner, 363 Ark. 79, 82, 210 S.W.3d 860, 863 (2005).

Here, the club had a duty to use ordinary care to protect the Littles because they were invitees. *See Gann v. Parker*, 315 Ark. 107, 865 S.W.2d 282 (1993) (citing *Kay v. Kay*, 306 Ark. 322, 812 S.W.2d 685 (1991)). In *Autozone v. Horton*, 87 Ark. App. 349, 353, 192 S.W.3d 291, 295 (2004), this court specifically explained the duty of care that a premises owner owes to invitees:

> [A]s follows in *Restatement (Second) of Torts*, § 343 (1965):
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.
>
> The basis for a premises owner's liability under this rule is the superior knowledge of an unreasonable risk of harm of which the invitee, in the exercise of ordinary care, does not or should not know. *Jenkins v. Hestand's Grocery, Inc.*, 320 Ark. 485, 898 S.W.2d 30 (1995).

The initial question is therefore whether the defect is so apparent that, through the use of ordinary care, the possessors should have discovered and corrected it. *Gann, supra.* Ordinary care means that the possessor must protect an invitee from dangers that could have been, or reasonably should have been, foreseen. *Id.*

In the case at bar, there is a genuine issue of material fact as to whether the club, through the use of ordinary care, should have discovered that the valve cover was defective or missing. The

Littles offered evidence to show that the valve hole into which Mrs. Little fell was not visible at the time of her injury, that it was covered by thick grass, and that it was supposed to be capped but was not. On the other hand, the club's golf course superintendent stated that the area was mowed approximately four days before the incident; that the entire course was frequently inspected for potential hazards; that prior to Mrs. Little's fall, he had never received information concerning a cracked valve cover or observed one anywhere on the course; and that he had inspected most of the course on the morning of May 29, 2000. It is also clear from the evidence, however, that the irrigation system had been in place since 1983 and that the valve covers required periodic maintenance and attention. Whether the club's inspection and maintenance procedures were adequate in this case presents an issue of material fact for the trier-of-fact.

The cases cited by the club to support its position are clearly distinguishable from this case. In *Gann, supra*, the court stated that there was no genuine issue of material fact regarding the appellees' lack of negligence in failing to cure a defect inside an appliance or in failing to warn the invitee, a repairman, of the defect. In affirming the trial court's grant of summary judgment to the appellees (possessors of the premises), the court noted that the defect inside the appliance was simply not apparent to them, and that there was no showing that by the use of ordinary care a reasonably prudent possessor would have discovered the defects inside the appliance. *Id.* However, the case at bar presents very different circumstances. Here, the golf course superintendent stated that he routinely inspected the course to check for potential hazards and that he had inspected most of the course on the morning of May 29, 2000. Thus, there is a fact question as to whether the club should have discovered and corrected any problem with the valve cover during routine inspection and maintenance procedures.

In *Jenkins, supra*, the court upheld the trial court's decision to grant summary judgment in favor of the appellee, a grocery store, and held that the store owner owed no duty to warn the appellant of any danger posed by an entrance ramp from the store's parking lot. The court in *Jenkins* clearly distinguished between the duty owed with respect to "dangers that are obvious," such as the entrance ramp, and the duty owed with respect to hidden dangers, such as "traps, snares, or pitfalls." *Id.* The entrance ramp in *Jenkins*, being clearly visible and obvious to the appellant in that case, is

easily distinguishable from the valve hole in this case. Here, there was evidence that the hole was covered in grass and was not visible at all.

Finally, in *McMullen v. New York*, 199 A.D.2d 603, 604 N.Y.S.2d 335 (1993), the claimant sustained injuries after she stepped into a small hole, obscured by grass, on a golf course. However, in that case, the origin of the hole was not known and there was no evidence that the hole was created by any action of the owner of the golf course. *Id.* The court found that the claimant's proof failed to establish that the hole existed for a sufficient length of time prior to the accident to permit the appellant's employees, in the reasonable performance of their duties, to discover and remedy it. *Id.* Here, unlike in *McMullen*, the sprinkler system's valve holes were created by the club, the club was clearly aware of the location of each hole containing a valve, and the club offered proof that it inspected each hole and was aware that each location required routine maintenance. The question of whether the club should have discovered the missing or defective valve cover during its routine inspection and maintenance procedures is one for the factfinder.

For the reasons stated herein, we reverse the trial court's grant of summary judgment in favor of the club and remand for further proceedings.

Reversed and remanded.

HART and CRABTREE, JJ., agree.

Homer Otis DRAPER and Colleen Draper *v.*
CONAGRA FOODS, INC.

CA 05-25 212 S.W.3d 61

Court of Appeals of Arkansas
Opinion delivered September 7, 2005

[redacted]

[redacted]

Jerrie Grady and *Blair & Stroud*, by: *H. David Blair*, for appellants.

Cross, Gunter, Witherspoon & Galchus, P.A., by: *David B. Vandergriff* and *Brian A. Vandiver*, for appellee.

WENDELL L. GRIFFEN, Judge. In this negligence action, appellants Homer and Colleen Draper appeal from an order granting summary judgment to appellee ConAgra Foods, Inc. They argue that the circuit court erred in ruling that, as a matter of law, the driver of the truck involved in the motor-vehicle accident in this case was not an agent or employee of appellee. Because a genuine issue of material fact remained regarding whether the driver of the truck had an employer-employee relationship with appellee, we reverse and remand for trial on the merits.

According to appellants' complaint filed August 4, 2003, appellant Homer Draper was driving west on Arkansas State Highway 58 when he collided with a truck and trailer driven by Charlie Garrett. The complaint alleged that Garrett was turning east onto Highway 58 but pulled onto the highway too soon, causing the collision. Appellant Homer Draper sought damages for his injuries, while appellant Colleen Draper sought damages for loss of consortium. Garrett was employed by Patterson-Salter

Trucking, Inc. (hereinafter "PST"), which had been hired by appellee to transport chickens to its facilities.[1]

On June 18, 2004, appellee filed a motion for summary judgment, arguing that it was entitled to judgment as a matter of law because PST was not its agent or employee. Appellee presented Garrett's deposition testimony as well as the deposition testimony of PST's owners, Jack Patterson and Lloyd Salter.

Patterson testified that PST had a hauling agreement with appellee from 1976 to June 1, 2003. The relevant portions of the contract read:

> 1) ConAgra has contracted with Independent Contractors to haul live chickens from broiler houses at certain farms in the State of Arkansas and deliver the live chickens to processing plants in Batesville and Clinton, Arkansas.
>
> 2) ConAgra agrees to pay Independent Contractor for chickens hauled and delivered to processing plant a base payment per load of $190.00 with adjustment factors for round trip distance to farms and diesel fuel prices as detailed herein. . . .
>
> * * *
>
> 5) Independent Contractor shall be responsible only for the hauling and delivery of the live chickens.
>
> 6) Independent Contractor hereby agrees to idemnify [sic] and hold ConAgra harmless against all expenses, obligations or losses of any kind whatsoever for claims, debts, personal injuries or property damage arising out of the work to be performed by Independent Contractor for ConAgra.
>
> 7) Independent Contractor shall pay for his own expenses, taxes and fees in connection with performance of this contract, shall obtain and pay for any required permits or leases and shall comply with all applicable government laws and regulations.
>
> 8) Independent Contractor shall employ for his own account all labor necessary for the performance of this contract, shall furnish

[1] PST was also named as a defendant in this suit; however, it was voluntarily dismissed from this suit before the circuit court entered summary judgment in favor of appellee.

any and all equipment necessary to perform the contract, and shall be responsible for and assume all responsibility for any and all acts of the Independent Contractor or his employees.

9) Nothing contained herein should be construed as reserving or granting ConAgra any rights to exercise control over the method or manner in which Independent Contractor performs this contract, it being explicitly understood to use his best judgment in the method and manner of performing this contract to achieve the results specified.

10) Independent Contractor shall within one (1) day after execution hereof, but before the beginning work [sic], furnish to ConAgra proof of complete workers' compensation insurance coverage and general liability insurance with a reputable company authorized to do business in the State of Arkansas, with general liability limits to be not less than $300,000.

11) Although Independent Contractor is free to use his best judgement in performing the contract as specified in P. 9, he hereby agrees that he will perform the contract in such manner as to reduce to a minimum bruising of or death to the broilers.

12) Independent Contractor agrees to follow and abide by all sanitation and other disease prevention procedures applicable to personnel and equipment established by ConAgra.

13) It is understood by the parties that Independent Contractor shall haul and deliver to processing plants as above provided as many chickens and at specific times and dates as ConAgra may specify.

14) Either ConAgra or the Independent Contractor may terminate this contract at any time for any reason by mailing or delivering written notice of termination to the other at his or its usual place of business, such termination to be effective 30 days from the date of delivery of said notice.

Patterson testified that, while it was under contract with appellee, PST did not haul for anyone else other than a couple of loads. Salter would tell the drivers where to go, what time to go, how many chickens to load, and from where they were loading the chickens. PST did not load the chicken cages or catch the chickens. When the cages were loaded on the driver's truck, the driver would tie down the

chickens using PST equipment and drive the truck to the processing plant. After the driver weighed the truck at the plant, appellee's employees would drop the trailer and take it back to its shed. Patterson testified that he and Salter hired employees at different times and that no one other than he or Salter had authority to hire or fire employees. He also stated that PST paid unemployment taxes and withheld income tax, social security, and Medicare from the drivers' wages.

Patterson testified that the trucks had PST's name on them, per State requirements. There were also numbers on the trailer, which Patterson testified were mostly for appellee so that it could tell what trailer was coming in case it had to check the weight. Patterson also testified that appellee paid PST differently over the years. At first, appellee paid by the pound. By January 2003, appellee paid by the load. PST paid for gasoline and licensing fees. When asked about what supervisory role appellee played, Patterson testified that PST employees had little contact with appellee. Appellee did not tell PST what type of vehicles to purchase or what types of cages to buy. In bad weather, PST installed sheets and sideboards to protect the chickens, and this equipment was owned by PST. When talking about PST's status, Patterson opined that PST's drivers were independent contractors.

On cross-examination, Patterson testified that the chickens were originally transported in coops; however, appellee eventually told PST to haul the chickens in cages. Appellee also wanted the cages to meet its requirements. He noted that, on a typical week, Salter would receive a sheet from appellee specifying the number of loads, where the loads were to be picked up, and the time the loads were to be picked up. PST hauled Sunday through Thursday, and these times were specified by appellee. In scheduling, appellee would coordinate the specifications on the trip sheets with their production times at the processing facilities. This was because appellee did not want the chickens sitting on the truck for a long time. Patterson testified that PST had no discretion on whether to take the loads to appellee immediately or a few days later. He also noted that PST had no real discretion about what route to take to the chicken houses because there was usually only one sensible route to take.

Garrett testified that PST paid him $35 per load weekly; withheld taxes, social security, and Medicare; and gave him a W-2 form at the end of 2002. He never considered himself an employee of appellee. He stated that he received his orders from a mailbox in

the shed of appellee's facility. Salter did not dispatch drivers to particular loads unless changes were made. Garrett testified that, on a typical day, he would get a truck, fuel up, drive to appellee's facility, and pick up a trailer. The cages would be loaded on the trailer. He would then go to the farm, where chicken catchers would load the truck. He would then return to appellee's facility, drop off the trailer, get another trailer, and go again. Garrett stated that he would typically make three loads a day, five days a week. If there were multiple routes to a farm, he would select the route to take. He stated that, if a tractor or trailer needed to be repaired, either Salter or Salter's mechanic would fix it.

On cross-examination, Garrett testified that he would receive a trip sheet, indicating which drivers were assigned to which loads. He noted that when he would pick up his tractor, the trailers and cages would be at appellee's facility. Garrett testified that, in hot weather, appellee would tell him to put the chickens under a fan or a particular sprinkler system.

In his deposition, Salter testified that his job was to dispatch trucks and inspect the safety and condition of the trucks at appellee's facility. PST paid for repairs to trucks and to cages. He noted that, had PST refused to use the coops or cages appellee wanted them to use, appellee would have terminated the agreement. Salter never regarded his drivers as appellee's employees. On cross-examination, he noted that, if one of his drivers had a breakdown, the driver would be excused from making it to appellee's facility on time; otherwise, drivers were expected to be at the plant when appellee expected them. He also noted that the provisions of the contract regarding mileage adjustments, pay rate, and dead chickens were abandoned before 2003.

In response to appellee's summary judgment motion, appellants presented the deposition testimony of Jeffrey Vanemburg. Vanemburg testified that he started working for appellee in May 1997 as a live production manager and that he held the same position with Pilgrim's Pride, who purchased appellee's operations in Batesville. His duties included overseeing the hatcheries, feed mills, live-haul operations, and broiler chickens in the field.

Vanemburg testified that he worked for a "vertically integrated poultry company." He explained that the company grew its own eggs through its own hens in breeder houses. The company paid farmers for taking care of the hens and gathering the eggs.

After the farmers gathered the eggs, appellee's W-2 employees[2] transported the eggs to its hatchery. When the chicks were hatched, they were transported to a broiler house by W-2 employees. Once the chickens reached broiler size, drivers transported them to appellee's facilities, where the chickens were killed and processed. The chickens were loaded on the truck by catchers, who are contracted by appellee. Vanemburg testified that the catch times were based on a kill time at the plant. The schedules were designed so that the chickens would arrive thirty to forty-five minutes before when they would actually be needed. While the drivers were considered by appellee to be independent contractors, appellee would take issue if a driver took a four-hour coffee break. In 2003, only PST and Broadwater were hauling broilers for appellees. Vanemburg testified that, as of January 2003, appellee had no W-2 employees catching chickens or hauling them from the broiler houses to the processing facility. He noted that, other than changing from contract personnel to W-2 employees and using its own trucks and equipment, Pilgrim's Pride made no changes to the procedure of hauling chickens after it took over appellee's operations in Batesville.

After a hearing on the motion, the circuit court entered summary judgment in favor of appellees. The circuit court stated:

> I think everybody has said the facts are not really in dispute, it's what the facts mean that I guess is in dispute. I want to state what my understanding of the relationship between Patterson-Salter and ConAgra was. I understand that Patterson-Salter was in the trucking business, not in the chicken processing business. It owned and licensed its own rolling stock, providing fuel and maintenance, and hired and fired its own employees. It set and paid wages to the employees, provided workers' comp, and withheld and paid payroll taxes on those employees' wages. Apparently, its only client was ConAgra and at one point, it entered into a written contract with ConAgra for the provision of those services that stated that this was an independent contractor arrangement. ConAgra did not hire or train the drivers of Patterson-Salter trucking and apparently did not control some parts of the drivers' operations like securing the load or particular routes taken although the argument has been made, and probably is well stated, that in these rural areas there's not too

[2] "W-2 employees" is a term Vanemburg used to distinguish between company employees and independent contractors.

> many ways to get to the plant without going a long way out of the way so as a practical matter the routes were probably fairly well fixed although I don't find anything that ConAgra required them to take a particular route. ConAgra did have a right to terminate the contract with Patterson-Salter and I think its contract called for 30 days notice but apparently it had no right to hire or fire particular drivers. ConAgra did control the time and place of the pickup and delivery of loads and my finding today is that that is necessary and consistent with ConAgra's expectation of successful results of the work of Patterson-Salter and its drivers. I'm finding as a matter of law that the relationship between ConAgra and the individual driver, in this case Charlie Vaughn Garrett, does not rise to the level of agency, a master servant, or an employee relationship between ConAgra and that driver, and the motion for summary judgment must be granted.

For its sole point on review, appellants argue that the circuit court erred in granting summary judgment in favor of appellee. Summary judgment should 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. *O'Marra v. Mackool*, 361 Ark. 32, 204 S.W.3d 49 (2005); *Riverdale Dev. Co. v. Ruffin Bldg. Sys. Inc.*, 356 Ark. 90, 146 S.W.3d 852 (2004). The burden of sustaining a motion for summary judgment is the responsibility of the moving party. *O'Marra v. Mackool, supra*; *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). Once the moving party has established a *prima facie* entitlement to summary judgment, the nonmoving party must meet proof with proof and demonstrate the existence of a material issue of fact. *O'Marra v. Mackool, supra*; *Pugh v. Griggs, supra*. We determine if summary judgment was appropriate based on whether the evidence presented by the moving party in support of its motion leaves a material fact unanswered, viewing the evidence in the light most favorable to the nonmoving party, resolving all doubts and inferences against the moving party. *O'Marra v. Mackool, supra*; *George v. Jefferson Hosp. Ass'n Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999); *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998). Our review is not limited to the pleadings but also focuses on the affidavits and other documents filed by the parties. *Hisaw v. State Farm Mut. Auto Ins. Co.*, 353 Ark. 668, 122 S.W.3d 1 (2003); *Brown v. Wyatt*, 89 Ark. App. 306, 202 S.W.3d 555 (2005). After reviewing the undisputed facts, we will reverse a grant of summary judgment if,

under the evidence, reasonable men might reach different conclusions from those undisputed facts. *Hisaw v. State Farm Mut. Auto Ins. Co., supra*; *Brown v. Wyatt, supra.*

Appellants argue that the circuit court erred in ruling that PST was not an agent or employee of appellee. Specifically, they contend that a reasonable jury could draw an inference that PST was subject to a degree of control requisite for a finding of an employer-employee relationship. An independent contractor is one who contracts to do a job according to his own method and without being subject to the control of the other party, except as to the result of the work. *Arkansas Transit Homes, Inc. v. Aetna Life & Cas.*, 341 Ark. 317, 16 S.W.3d 545 (2000); *Howard v. Dallas Morning News, Inc.*, 324 Ark. 91, 918 S.W.2d 178 (1996). One who employs an independent contractor is generally not liable for the torts of the contractor committed in the performance of the contracted work. *Stoltze v. Arkansas Valley Elec. Co-op. Corp.*, 354 Ark. 601, 127 S.W.3d 466 (2003); *Blankenship v. Overholt*, 301 Ark. 476, 786 S.W.2d 814 (1990). However, when the employer goes beyond certain limits in directing, supervising, or controlling the performance of the work, the relationship changes to that of employer-employee, and the employer is liable for the employee's torts. *Blankenship v. Overholt, supra.* Although the nature of an agency relationship is ordinarily a question of fact to be determined by the trier of fact, where the facts are undisputed and only one reasonable inference can be drawn from them, the nature of an agency relationship becomes a matter of law for the court to determine. *Howard v. Dallas Morning News, Inc., supra.* Because there is no fixed formula for determining whether an entity is an employee or an independent contractor, the determination must be made based on the particular facts of each case. *Arkansas Transit Homes, Inc. v. Aetna Life & Cas., supra.*

Our supreme court has adopted Restatement (Second) of Agency § 220(2) (1958) (hereinafter "Restatement § 220"), outlining several factors to consider when determining whether an employer-employee relationship exists between two parties:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not a business.

See Aloha Pools & Spas, Inc. v. Employer's Ins. of Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000); *D.B. Griffen Warehouse, Inc. v. Sanders*, 336 Ark. 456, 986 S.W.2d 836 (1999). The right to control, not the actual control, is the principal factor in determining the worker's status:

> The governing distinction is that if control of the work reserved by the employer is control not only of the result, but also of the means and manner of performance, then the relation of master and servant necessarily follows. But if control of the means is lacking, and the employer does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relation of independent contractor exists.

Arkansas Transit Homes, 341 Ark. at 321, 16 S.W.3d at 547 (quoting *Massey v. Poteau Trucking Co.*, 221 Ark. 589, 592, 254 S.W.2d 959, 961 (1953)).

Here, many of the Restatement factors favor a finding of an independent-contractor arrangement. PST owned the vehicles and other instrumentalities involved in the poultry hauling, and appellee paid PST by the load, not the hour. However, as appellants state often in their brief, these are not determinative of the

question. The parties dispute four of the remaining factors: the amount of control, the belief that the parties were creating an employer-employee relationship, whether PST was engaged in a distinct occupation or business, and whether or not poultry hauling was part of appellant's regular business.

Control

In support of its argument that PST's drivers were independent contractors, appellee relies on the Independent Contractor Agreement and evidence of PST's control of the drivers. Appellee contends that PST's control of its own drivers was not diminished by the agreement to reduce bruising of or death to the birds or by the agreement to haul the birds at specific times and dates. In contrast, appellants argue that appellees controlled the route to be taken, the drivers, the protection of the poultry, and the specific times and dates of hauling.

1. Route to be taken. While appellee argues that the drivers controlled the route to be taken, appellants argue that the drivers could not exercise judgment in the route to be taken because, in most instances, there was only one route to the assigned the designation. The circuit court agreed with appellants' view regarding routes, and this view is supported by the evidence. If there was nothing to control, as appellants argue, then drivers' routes do nothing to support a finding of employer-employee status.

2. Control of the driver. Appellee argues that PST's drivers exercised their best judgment in driving. It further contends "There is no evidence that ConAgra instructed PST's drivers how to drive, how fast to drive, how or when to stop at stop signs, or give them any other similar driving instructions." Appellee argues that PST had control of its drivers, including control of payroll, payroll taxes, hirings, and firings. To the extent that appellee is arguing that it did not instruct PST's drivers to obey basic traffic laws, their argument is absurd, as an exercise of best judgment would include obeying all basic traffic laws. However, even if appellee makes this argument to imply no control whatsoever, such micro-management is not required for a fact finder to find that appellee had control sufficient to establish an employer-employee relationship.

3. Protection of Poultry. Appellee argues that PST's control was not diminished by its agreement to reduce bruising of or death to its birds. It contends, "An independent contractor can

agree 'to use care and skill to accomplish a result and subject to the fiduciary duties of loyalty and obedience to the wishes of the principal' " (citing Restatement § 220 cmt. e). The Independent Contractor Agreement instructed PST to "perform the contract in such manner as to reduce to a minimum bruising of or death to the broilers." However, appellee specifically instructed PST's drivers to take certain precautions in extremely hot or cold weather. Appellee also ordered PST to use certain containers when hauling the chickens. While the agreement dictated that PST's drivers would be able to use their best judgment, appellee instructed PST's drivers on how to transport the chickens. In addition, Salter testified that, had PST not used the coops or cages appellee wanted, appellee would have terminated the agreement. This degree of control is evidence supporting an inference of an employer-employee relationship.

4. Specific Time and Date Requirements. Finally, the parties dispute whether appellee exercised control when it gave PST's drivers specific date and time requirements. Appellees cite favorably to *Blankenship v. Overholt, supra*:

> [W]here the contractor is to produce a certain result, according to specific and definite contractual directions, agreed upon and made a part of the contract, and the duty of the contractor is to produce the net result by means and methods of his own choice, and the owner is not concerned with the physical conduct of either the contractor or his employees, then the contract does not create the relation of master and servant.

Id. at 479-80, 786 S.W.2d 816.[3] Paragraph 13 of the agreement between PST and appellee provides, "It is understood by the parties

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[3] Appellee also notes the following in *Moore v. Phillips*, 197 Ark. 131, 140, 120 S.W.2d 722, 727 (1938):

> There are countless decisions of appellate courts construing stipulations in contracts, such as here involved, relating to the right of the owner "to give directions" — "orders" and "instructions" regarding the work as it progresses; and phrases such as "in accordance with instructions" — "as directed" — "In such manner as shall be directed" — "under supervision of owner's agent, as he may direct" — and "under the direction and supervision", are frequently construed. In all of the cases examined, some of which are cited, it is held that such phrases do not relate to the method or manner and do not govern the details or the physical means by which the work is to be performed.

that Independent Contractor shall haul and deliver to processing plants as above provided as many chickens and *at specific times and dates as ConAgra may specify*" (emphasis added). These instructions constitute specific and definite contractual directions. No employer-employee relationship was created by appellee's requirement that the loads be hauled at specific times.

Appellee exercised permissible control over the dates and times the poultry was to be hauled and had no control over the driving; however, appellee did exercise control over how the chickens were to be handled by PST's drivers. There is evidence showing that PST drivers could not exercise discretion in ensuring that they hauled unbruised, live birds. While the evidence supporting an employer-employee relationship is minimal, a reasonable fact finder could infer that the control factor supports a finding of employer-employee status.

Belief in the nature of the relationship being created

While appellants cite *Howard v. Dallas Morning News, Inc., supra*, for the proposition that "[t]he intent of the parties is not included among [the Restatement] factors," the *belief* that the parties are creating an employer-employee relationship is a relevant factor. *See* Restatement § 220(2)(i). The comments to Restatement § 220 state:

> *Belief as to existence of relation.* It is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one and submission to control by the other.

Restatement § 220 cmt. m. The initial agreement between the parties clearly contemplated an independent-contractor arrangement. Further, Patterson, Salter, and Garrett all testified that they never regarded the drivers to be appellee's employees. Appellants failed to present sufficient evidence to support an inference that this factor supports a finding of an employer-employee relationship.[4]

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[4] In making their argument that PST believed it was in an employer-employee relationship, appellants cite part of Salter's deposition testimony:

PST engaged in a distinct occupation or business

Appellee argues that PST was a separate trucking business, responsible for its own bookkeeping and insurance.[5] Appellants argues that appellee misinterpreted the meaning of this factor and notes that PST had no function other than providing poultry-hauling services to appellee. Appellee relies on *Arkansas Transit Homes, Inc. v. Aetna Life & Cas., supra.* There, our supreme court affirmed the circuit court's finding that the drivers in that case were employees. The appellant was in the business of transporting mobile homes. The drivers agreed to use their trucks

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Q: So if they knew you didn't know how to get [to a new place] they would maybe give you some instruction on it?

A: True.

Q: If you knew a better way to get there would you take a better way?

A: No, we'd go like they told us.

This deposition testimony, however, is part of a discussion of the time sheets. Just before this cited colloquy, the following exchange occurred:

Q: It didn't tell you how to get there?

A: No.

Q: Not on the time sheet?

A: Unless they was a new place.

Q: Would that be on the time sheet?

A: Well, if they knew we didn't know it they would try to explain to us, yeah.

When looking at Sarter's entire deposition, it is clear that Sarter did not consider himself or his employees to be appellee's employees.

[5] In its brief, appellee argues:

> PST was one of two trucking companies ConAgra used in north-central Arkansas. In fact, the other trucking company — Broadwater — had more trucks [than] PST and was responsible for more of ConAgra's hauling and delivery business. The trip sheets included directions for both PST drivers and Broadwater drivers. Thus, if Garrett was ConAgra's employee, then so too were Broadwater's drivers? [sic] The unreasonableness of such a conclusion is evident.

(Internal citations to the record omitted.) Appellee believes that a finding of an employer-employee relationship is absurd because of the number of truckers involved; however, it fails to show how the number of drivers would factor into the determination of whether someone was an employee or an independent contractor. It is possible that a court could find that Broadwater's drivers were indeed employees of appellee.

exclusively for the appellant's business. The circuit court found that the drivers were not engaged in a distinct occupation or business because the drivers did not engage in work other than hauling mobile homes for the appellant. *Arkansas Transit Homes, Inc. v. Aetna Life & Cas., supra,* is similar to the instant case in that regard. PST was created for the purpose of hauling poultry for appellee. There is no evidence that PST hauled for any other company after appellee terminated the arrangement with them. A reasonable juror could infer that this evidence favors a finding that PST was not engaged in a distinct occupation or business.

Poultry hauling as part of appellee's regular business

Finally, appellee argues that it is in the poultry business, not the trucking business. Meanwhile, appellants argue that trucking is an integral part of appellee's business. When determining whether or not work is part of the regular business of the employer, Arkansas courts have adopted Professor Larson's "relative nature of the work test." As our supreme court explained:

> Larson reasons that in a case such as the one at bar, the law should consider, in determining whether an employer-employee status exists, not only the matter of control but also the relationship between the claimant's own occupation and the regular business of the asserted employer. With regard to the latter aspect of the problem, two considerations have weight: First, how much of a separate calling or profession is the claimant's occupation? How skilled is it? To what extent may it be expected to carry its own share of the workmen's compensation responsibility? Second, what relationship does the claimant's work bear to the regular business of the asserted employer? Is there a continuous connection or only an intermittent one, or is there no connection at all?

Sandy v. Salter, 260 Ark. 486, 489-90, 541 S.W.2d 929, 931 (1976) (internal citations omitted); *see also Arkansas Transit Homes, Inc. v. Aetna Life & Cas., supra.* The more that the work resembles the work done by the employer, the more likely that the work had been done by an employee. *Arkansas Transit Homes, Inc. v. Aetna Life & Cas., supra.*

Regarding the first part of Larson's test, truck driving, while crucial to the poultry industry, is still a separate profession. Poultry companies are required to either hire employees for the purpose of

hauling poultry or contract an outside person or company to do it for them. In this case, appellee chose to contract outside companies to haul poultry. Further, the Independent Contractor Agreement required those companies to provide insurance to its drivers. Regarding the second part of the Larson test, appellee had an ongoing relationship with PST until June 2003. PST hauled poultry five days a week for appellee. Further, while appellee was not in the trucking business, appellee needed truck drivers as part of its operations. Also telling is Vanemburg's testimony that there had been no changes in the processes involved, other than the use of Pilgrim's Pride employees, trucks, and equipment, since PST ceased poultry-hauling operations. When applying Larson's test, reasonable jurors could reach different conclusions regarding the relative nature of PST's work.

Conclusion

While many of the factors clearly support a finding that appellee and PST were engaged in an independent-contractor arrangement, there is some evidence that creates a genuine issue of fact on whether the relationship was independent contractor or an employer-employee relationship. Accordingly, we reverse the grant of summary judgment in favor of appellee and remand this case for trial.[6]

Reversed and remanded.

GLOVER and ROAF, JJ., agree.

[6] While we hold that there was a genuine issue of material fact that precludes summary judgment, our opinion should not be read to preclude the trier of fact from finding that an independent-contractor relationship existed between PST and appellee. Rather, we merely remand the case so that the trier of fact can weigh the evidence and reach its conclusion.

ALLEN CANNING COMPANY *v.* J.D. WOODRUFF

CA 04-1364 212 S.W.3d 25

Court of Appeals of Arkansas
Opinion delivered September 7, 2005

[redacted]

Davis, Wright, Clark, Butt & Carithers, PLC, by: *Constance G. Clark*, for appellant.

Walker, Shock, Cox & Harp, PLLC, by: *J. Randolph Shock*, for appellee.

DAVID M. GLOVER, Judge. Appellant, Allen Canning Company, appeals the Workers' Compensation Commission's adoption of the administrative law judge's decision finding that appellee, J.D. Woodruff, suffered a compensable injury on July 7, 2003; that appellee was entitled to temporary-total disability for the period July 8-18, 2003; and that appellee's claim was not barred by the *Shippers* defense. Allen Canning asserts that there is no substantial evidence to support the Commission's finding that appellee sustained a compensable back injury while in the course and scope of his employment and that the Commission erred in finding that the *Shippers* defense was inapplicable. Woodruff cross-appeals, arguing that his period of temporary-total disability should not have ceased on July 18, 2003, but instead should continue until a date to be determined because he remained in his healing period. We affirm on direct appeal and on cross-appeal.

The standard of review in workers' compensation cases is well-settled. We view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm the decision if it is supported by

substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Geo Specialty, supra.* It is the Commission's function to determine witness credibility and the weight to be afforded to any testimony; the Commission must weigh the medical evidence and, if such evidence is conflicting, its resolution is a question of fact for the Commission. *Searcy Indus. Laundry, Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003). The Commission's resolution of the medical evidence has the force and effect of a jury verdict. *Jim Walters Homes v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003).

Prior to his employment at Allen Canning, appellee, a forty-eight-year-old man, had an extensive history of work-related back injuries. In 1992, he injured his lumbar spine while employed by Don Youngblood as a truck driver; as a result of this compensable injury, he did not work for over one year and was assigned a permanent physical-impairment rating of nine percent to the body as a whole. Appellee also suffered two compensable back-related injuries while he was employed by Wal-Mart — first on September 28, 2001, and then on July 20, 2002. Additionally, appellee has degenerative-disc disease and small-disc herniations in multiple levels of his lumbar spine.

Following treatment for his last Wal-Mart injury, appellee's physician, Dr. Kannout, released appellee on August 19, 2002, for return to work without any restrictions. Appellee subsequently went to work for appellant. On July 7, 2003, appellee was loading one of appellant's trucks with boxes of shoestring potatoes weighing about twenty pounds each when his back began to hurt. He said that he felt fine before he began working, that he must have bent the wrong way while he was picking up a box, that he felt a pop in his lower spine, that he felt severe pain in his back, and that he also felt pain shooting halfway down his right thigh. Appellee reported the incident to the forklift driver, who went to inform the warehouse manager. Appellee continued to work until Don James, the warehouse manager, arrived about ten minutes later and told him to go to the shoestring potato "lidder" line, a job that was not as difficult. Appellee testified that he believed that he needed

medical attention, but that James did not offer to fill out an accident report at that time. Appellee worked the "lidder" line until lunchtime, when he told James that he had to go home; he did not fill out an accident report prior to leaving work.

Although he was scheduled to work the following day, appellee called Don James and told him that he was not coming to work, and he went to see Dr. Kannout. Appellee said that James said nothing about an accident report at that time, and such a report was not completed until three or four days later. Appellee said that Allen Canning never offered him medical attention nor paid for his medical visits with Dr. Kannout or for physical therapy, which appellee had to discontinue after July 18 due to a lack of money.

On July 25, 2003, appellee saw Dr. Westbrook, who had treated him during his first workers' compensation claim, complaining of back pain. He said that Dr. Westbrook gave him an ESI shot and that he had not returned to see Dr. Westbrook since that time because he had not needed him.

Appellee testified that he was always in moderate pain; that some days were worse than others; that his back injury affected the way he walked; and that if he sat, stood, or bent for too long a period, his back hurt. He said that on a good day he could lift twenty pounds comfortably, but on a bad day he did not want to get out of bed. He said that he still needed additional medical attention for his back, but he had not been able to afford it.

Appellee stated that he felt that he could return to Allen Canning in some capacity, but that Allen Canning had not provided him with any work since his injury. He also stated that he had looked for work elsewhere but had not yet found a job.

During cross-examination, appellee asserted that before coming to Allen Canning, he had only experienced slight back pain, "hardly no pain at all," and he denied experiencing any severe back pain prior to going to work for appellant. He said that he did not think that lifting and bending would cause his slight back pain to become worse because his doctor had told him that he was fine and had released him for full work with no restrictions. He admitted that he had said in his deposition that he knew before he went to work for appellant that lifting could make his back worse, but he said that he was not doing any lifting when he began working for appellant. He had only loaded trucks twice before his injury, and he did not consider loading trucks to be one of his

regular job duties. Appellee said that he did not notify anyone at Allen Canning that lifting could make his condition worse because he felt fine, and that when he completed his employment application, he was not asked if lifting would make any physical condition he had worse. In response to the employment application question that asked him to describe his general health, he said that he had checked "good," but he denied that he had answered the question "Do you have any physical or mental conditions which may limit your ability to perform certain kinds of work?" at all. At the time he completed the employment application, appellee's doctor had released him to return to full duty work without any restrictions.

Don James, appellant's warehouse manager, testified that he was informed on the morning of July 7 that appellee had a problem with his back while loading a truck. When he went to check on appellee, he said that appellee told him that it was not a big deal, that it happened "two or three times a year," and that he just had to get some pills from a doctor to relax it. James said that he could not remember when he completed the accident report, but that he thought it might have been the next day. He said that appellee had never told him he had a bad back prior to July 7, 2003, or that lifting would hurt his back, and if he had known of those limitations, he would not have had appellee loading the truck.

In *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 464, 120 S.W.3d 150, 152-53 (2003), this court set forth the definition of a compensable injury:

> Arkansas Code Annotated section 11-9-102(4)(A)(i) (Supp. 1999) defines "compensable injury" as
>
> > An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence.
>
> A compensable injury must be established by medical evidence supported by "objective findings." Ark. Code Ann. § 11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i).

In the present case, the Commission found that appellee had sustained a compensable injury, even in light of the acknowledgment that appellee had an extensive history of work-related

low-back problems dating back to 1992 and that he suffered from degenerative-disc disease and small-disc herniations. Appellant does not argue that appellee did not suffer an injury or that it was not established by objective findings. Rather, appellant argues that it should not be responsible for appellee's injury because it was nothing more than a recurrence of his prior back injuries.

A recurrence exists when the second complication is a natural and probable consequence of a prior injury. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). In support of its argument, appellant points to appellee's numerous prior back injuries and argues that, contrary to his assertion, appellee had complained of additional back pain after August 19, 2002, because he filed an AR-C form on February 11, 2003, seeking additional medical expenses and benefits from Wal-Mart with regard to a compensable injury he suffered while employed there.

We hold that there was substantial evidence to support the Commission's finding that appellee suffered a compensable injury and that it was not a recurrence of his prior back injuries. Although acknowledging appellee's prior history of work-related back injuries, which was admittedly quite extensive, the Commission placed great weight on the fact that after appellee's last work-related injury appellee was released by Dr. Kannout without restriction to full regular-duty work as of August 19, 2002. Furthermore, the Commission obviously found appellee's testimony credible that he did not seek any additional medical treatment or take any medication other than aspirin from his release on August 19, 2002, until July 7, 2003, the date of the injury at issue in the present case. The Commission determines witness credibility, and we hold that reasonable minds could arrive at the Commission's decision that appellee had suffered a compensable injury.

Allen Canning also argues that the Commission erred in finding that the *Shippers* defense was not applicable to this case. In *Shippers Transport of Georgia v. Stepp*, 265 Ark. 365, 369, 578 S.W.2d 232, 234 (1979), our supreme court held that

> a false representation as to a physical condition in procuring employment will preclude the benefits of the Workmen's Compensation Act for an otherwise compensable injury if it is shown that the employee knowingly and wilfully made a false representation as to his physical condition, the employer relied upon the false represen-

> tation, which reliance was a substantial factor in the employment, and there was a causal connection between the false representation and the injury.

All three of the factors must be present in order to bar compensation; if any of the three factors is absent, then the employee is entitled to compensation. *Id.* at 370, 578 S.W.2d at 234.

In the present case, the Commission determined that Allen Canning had failed to prove each element of the *Shippers* defense by a preponderance of the evidence — specifically, that appellant failed to prove that appellee knowingly and willfully made a false representation as to his physical condition on his employment application. On the employment application, appellant was asked to describe his general health, and he checked the box stating "good." Appellant was also asked, "Do you have any physical or mental conditions which may limit your ability to perform certain kinds of work?" There is some type of mark through the box stating "no," although appellee denied at the hearing that he checked either "yes" or "no" in response to that question. Nevertheless, the Commission found that even if appellee had checked the box, the question was insufficient in and of itself to prove that appellee knowingly and willfully made a false representation as to his physical condition.

In support of its decision that the *Shippers* defense is inapplicable in this case, the Commission cites *College Club Dairy v. Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988), and *Knight v. Indus. Elec. Co.*, 28 Ark. App. 224, 771 S.W.2d 797 (1989). In those cases, this court held that the questions posed to the prospective employees were too general and too broad to support an application of the *Shippers* defense. In *College Club Dairy*, the employment application asked the question, "Do you have any physical defects," and in *Knight*, the question asked, "Do you have any physical condition which may limit your ability to perform the job applied for?" The Commission found that the question asked on the employment application in the present case, "Do you have any physical or mental conditions which may limit your ability to perform certain kinds of work," was essentially the same question asked in *Knight*.

We hold that the question asked on the employment application in the present case was even more broad and general than the question in *Knight* because it also included mental conditions

and asked if the physical or mental conditions limited his ability to perform "certain kinds of work," without specifying the type of work. Jody Yoakum, appellant's director of claims services, testified that as a general rule, people hired at the plant were not necessarily interviewing for a specific position, but for a general-labor position, and Yoakum could not say what appellee was told regarding what his job duties or assignment would be at the time he filled out his application. Furthermore, Yoakum testified that it was only after an employee was hired that the employee was asked to fill out a data card listing any conditions that would limit the employee's ability to perform any type of work. If this inquiry was not made until after appellee was hired, then appellant cannot argue that it relied upon the "false representation" and that it was a substantial factor in the employment decision, another requirement of the *Shippers* defense. We find no error in the Commission's determination that the *Shippers* defense is inapplicable in the present case.

Appellee cross-appeals the amount of temporary-total disability awarded him by the Commission, contending that he remained in his healing period after July 18, 2003, and therefore should be awarded temporary-total disability from July 8, 2003, until a date yet to be determined. We hold that there was no error in the Commission's determination that appellee's temporary-total disability benefits terminated as of July 18, 2003.

In order to be entitled to temporary-total disability benefits, a claimant must prove by a preponderance of the evidence that he remained in his healing period and suffered a total incapacity to earn wages. *Arkansas State Highway & Transp. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). In the present case, the Commission found that appellee failed to prove by a preponderance of the evidence that he was totally incapacitated from earning wages after July 18, 2003, and there is substantial evidence to support this finding. In arriving at this conclusion, the Commission relied upon several factors that were set forth in its opinion — the physical therapist's August 8, 2003 discharge report that stated that as of July 18, 2003, the last day appellee was seen, "significant improvement was noted"; the fact that appellee filed for and began receiving unemployment compensation benefits shortly after July 18, 2003; appellee's own testimony at the hearing that he believed that he could return to some type of work at Allen Canning and that he had made several job inquiries; and the fact that there was no medical evidence indicating that appellee was

totally incapacitated from working after July 18. Obviously, if appellee was applying for jobs, he was holding himself out as able to work. All of these findings support the Commission's decision that appellee was not totally incapacitated from earning wages after July 18, 2003, and therefore was no longer entitled to temporary-total disability benefits.

Furthermore, as pointed out by appellant, appellee's receipt of unemployment compensation benefits makes him ineligible to receive temporary-total disability benefits. Arkansas Code Annotated section 11-9-506(a) (Repl. 2002) provides in pertinent part that "no compensation in any amount for temporary total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment benefits under the Arkansas Employment Security Law." The Commission's determination that appellee's temporary-total disability benefits terminated as of July 18 is also affirmed.

Affirmed on direct appeal and on cross-appeal.

GRIFFEN and ROAF, JJ., agree.

Raymond L. BAXLEY *v.* Susan B. BAXLEY

CA 04-1131 212 S.W.3d 8

Court of Appeals of Arkansas
Opinion delivered September 7, 2005

D. Scott Hickam, for appellant.

Hobbs, Garnett, Naramore & Drake, P.A., by: *Ronald G. Naramore*, for appellee.

DAVID M. GLOVER, Judge. This is the second appeal in this divorce case contesting the division of certain financial accounts between appellant, Raymond Baxley, and appellee, Susan Baxley, who were married in July 1990 and divorced in June 2003. The parties entered into a property-settlement agreement regarding most of their marital assets, agreeing (1) that Susan got the bank accounts in her name, a 1998 Oldsmobile, two four-wheelers, the marital home (which she owned prior to the marriage), and property in Montgomery County; (2) that Raymond got the trailer, truck, and boat, as well as his fishing tackle, two muzzle loaders, ammunition, his clothing and the bank accounts and other accounts in his name; and (3) that Susan kept all remaining personal property at the residence. The only assets at issue are two accounts in Susan's name with Edward Jones, which are rollovers of her retirement accounts. Prior to their marriage, the accounts were valued at $22,257.65; at the time of the divorce, one account was valued at $232,846.95, and the other account was valued at $9275.07.

The court heard testimony regarding the retirement accounts on May 27, 2003. Raymond attended the hearing but did not testify. He had undergone open-heart surgery two weeks prior to the hearing.

Susan testified at the hearing that she and Raymond were very happy for a number of years after they got married. At the time of the marriage, and during the marriage, Raymond did not work due to injuries he had received in a 1989 automobile accident, although he had worked prior to the marriage for a pest-control company and as a fishing guide. Raymond began to

receive social-security disability in 1991; Susan testified that the checks were around $700 per month at first and that the most recent ones were $889 per month. Susan worked as a registered nurse during the marriage until she suffered a stroke in October 2001, and she was terminated from her position after using all of her leave time. At the time of the hearing, Susan was receiving approximately $1440 per month in social-security disability. Susan also was receiving a $280 per month UNUM disability, but she testified that those private payments only lasted eighteen months and that she began receiving the payments in October 2001.

Susan testified that she and Raymond maintained a joint checking account during the marriage, that her paychecks and his disability checks were deposited in the account, and that Raymond had "free run" of the account. She said that Raymond wrote "on average" $300-$600 per month in checks. She said that she paid out of the joint checking account the mortgage payments on the house they lived in during their marriage, which she owned, and that she was still making mortgage payments.

At the hearing, the trial judge awarded 100% of the contested accounts to Susan because "they're from her sole earnings." In her ruling from the bench on May 27, 2003, the trial judge stated:

> The Court looks to the factors set forth under A.C.A. § 9-12-315, concerning division of property in determining whether the Edward Jones accounts should be equally divided for the period from the time of marriage to the divorce. First of all, the length of the marriage was twelve, almost thirteen years. I have been married thirty-four years. It doesn't seem extremely long. As to age, health, and station in life, you have two individuals whose health is truly deteriorating. Although Mrs. Baxley seems very strong and has a good strong will, it still may be that she may have some unforeseen medical expenses that she might have difficulty trying to pay for. I know that my 89-year-old mother is relatively very healthy, but her Medicare doesn't always cover her expenses. As to amount and sources of income, they're both on social security. According to Exhibit 1, her income was always a great deal higher than his so her social security is appropriately higher. As to vocational skills and employability, they both did hard work, but she had a more advanced degree as far as her earnings.

> After looking at number 2 in 9-12-315 and each of these factors, the Court does deem that it would be appropriate to have an unequal division and to allow the plaintiff to keep as her sole and separate property these two accounts because they're from her sole earnings. During their thirteen year marriage she allowed her husband to have the fruits of her employment, but now she needs to have the fruits of her employment for her future medical expenses. . . . Primarily, he's 66 and she's 60 and she had planned many more years of work, but it didn't happen. They're both on social security and they both will be using Medicare. I do not feel that it is inequitable to have this unequal division.

Raymond appealed the trial court's decision to this court, and in an unpublished opinion delivered May 12, 2004, this court reversed and remanded the trial court's decision, holding:

> [S]imply reciting the source of the funds [did not] equate to a proper consideration of the contribution of each party in the acquisition, preservation, or appreciation of marital property. Although Ms. Baxley's earnings were the source of the funds in the investment account, the trial court's order makes no finding as to the contribution *of each party* as contemplated by Ark. Code Ann. § 9-12-315(a)(1)(A)(vii). In fact, the order makes no finding at all concerning Mr. Baxley's contribution, or lack thereof, and, consequently, there is no explanation as to why an equal division of the marital property was inequitable. In the absence of such an explanation, and in light of the presumption that marital property will be divided equally, we must reverse and remand for entry of an order that demonstrates proper consideration of the statutory factors.

The dissent asserts that the directions in the opinion from this court upon remand, in which Judge Baker was the writing judge, "clearly indicated that we were seeking identification by the trial judge of contributions including those of a non-monetary nature." It appears that this court's opinion upon remand was not as clear to the trial court as the dissent claims, because upon remand from this court, the trial judge again awarded Susan 100% of the two retirement accounts, stating:

> This is a case where the Court of Appeals found that the Court needed to state the reasons for its finding of an unequal distribution of marital property. I don't think we need an evidentiary hearing. I failed to give specific reasons why I had an unequal distribution. I thought I did when I stated that Mr. Baxley enjoyed the fruits of

> Mrs. Baxley's labor. There was evidence presented that he spent on his own personal use from 1994 to 1995 $6400 and that's what he did every year of the marriage.
>
> He had the benefit of her labor and earnings. If you look at the exhibit showing how much she earned, how much was put in the investment account, and how much the employer contributed and then you look at how much he earned, clearly she earned significantly more than he did. Her earnings could go for the food, some of the utilities, and certainly, his earnings went for something. Clearly, I think he benefitted from her income throughout the marriage.
>
> If you multiply $6400 times twelve, it doesn't equal his one-half, but it's pretty close. Based on her testimony and the fact that he didn't testify, those are the factors. I need to specifically say why I made the findings I made and that is what the Court of Appeals guided and instructed me to do.
>
> Mrs. Baxley was trying to build herself whatever she could from her earnings, but she was also very generous with the Defendant. Mrs. Baxley testified that she paid the bills, she knew what the opening balance was, she knew what the end balance was, and he liked to have cash on hand, and he did. He wrote checks for cash.

Raymond now appeals the trial court's decision after remand, arguing again that the trial court was clearly erroneous in awarding both of the retirement accounts to Susan. We agree with Raymond that the trial court judge was clearly erroneous when she failed to divide the marital portion of Susan's two retirement accounts equally and instead awarded the entire amount to Susan.

In *Copeland v. Copeland*, 84 Ark. App. 303, 307-08, 139 S.W.3d 145, 148-49 (2003) (citations omitted), this court set forth its standard of review for property division in divorce cases:

> This court reviews division of marital property cases *de novo*. The trial court has broad powers to distribute property in order to achieve an equitable distribution. The overriding purpose of Arkansas Code Annotated section 9-12-315 is to enable the court to make a division of property that is fair and equitable under the specific circumstances. Arkansas Code Annotated section 9-12-315 (Repl. 2002) provides that marital property is to be divided equally unless it would be inequitable to do so. If the property is divided

> unequally, then the court must give reasons for its division in the order. The code also provides a list of factors the court may consider when choosing unequal division. This list is not exhaustive. A trial judge's unequal division of marital property will not be reversed unless it is clearly erroneous.
>
> Arkansas Code Annotated section 9-12-315 does not compel mathematical precision in the distribution of property; it simply requires that marital property be distributed equitably. The trial court is vested with a measure of flexibility in apportioning the total assets held in the martial estate upon divorce, and the critical inquiry is *how the total assets are divided.* (Emphasis added.) The trial court is given broad powers, under the statute, to distribute all property in divorce cases, marital and non-marital, in order to achieve an equitable distribution.

The factors listed in section 9-12-315(a)(1)(A), although not an exhaustive list, include the length of the marriage; age, health and station in life of the parties; occupation of the parties; amount and sources of income; vocational skills; employability; estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income; contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and the federal income-tax consequences of the court's division of property.

In the present case, the parties had been married for almost thirteen years, and Raymond was already disabled at the time of the marriage. Raymond began receiving disability payments after the parties married. Susan worked as a nurse until her own health problems rendered her unable to work any longer as well. Now both parties are unable to work due to health issues, and both parties are receiving social-security disability. Susan testified that all of their sources of income went into a joint checking account, to which both parties had access. Susan received the house the parties lived in during the marriage, which was her house prior to marriage; however, Raymond was not given credit for any decrease of the amount of the mortgage during the duration of the marriage.

Furthermore, Susan's two retirement accounts grew from a little over $22,000 at the time of the marriage to over $240,000 at the time of the divorce almost thirteen years later. Susan also increased her annual contributions from less than $3000 in 1990 to almost $9000 in 2001, which resulted in a significant increase in her retirement savings during the course of the marriage.

The dissent states that the trial court calculated how much money Raymond spent during the marriage "purely on his own whims while the necessities of housing, food utilities, etc. were being provided for solely by [Susan's] contributions" and that it was " 'pretty close' to one-half of what was in the retirement account." The only testimony about what Raymond spent came from Susan at the hearing, and she testified that for the previous nine months, Raymond had written checks that averaged $300 to $600 per month. She also testified that Raymond's disability checks were $889 per month. The dissent assumes that Susan never spent any money "on a whim," since it disparages Raymond for spending less than the amount of his disability income. It would appear that the parties did not look at each other's income as "hers" and "his" until divorce proceedings were instigated, as evidenced by the fact that they deposited both of their checks into one checking account, which became "theirs." The dissent's implication that Raymond was a drain on Susan's income is unwarranted, especially in light of the fact that this approach to marriage worked for the parties for almost thirteen years.

Susan relies upon *Stout v. Stout*, 4 Ark. App. 266, 630 S.W.2d 53 (1982), in support of her position that she should retain all of her retirement funds. In *Stout*, this court affirmed the unequal distribution of an IRA in favor of the husband, holding that the fact that the husband was the person who contributed to the account was an acceptable reason to divide the account unequally. However, in *Stout* the wife received alimony for a period of one year, and this court pointed out that she had worked in various employment over the years and that she had the ability to earn a living. Mrs. Stout also received a generous property settlement, and the trial court found that the divorce was entirely her fault, a fact that this court held was warranted by the facts contained in the record.

The dissent asserts that we have misinterpreted the *Stout* holding. To the contrary, in reality the dissent has contorted that holding, where the trial court's specific holding with respect to Mr. Stout's IRA was, "The Court is not ordering that sold because we must consider Mr. Stout. He's getting along in years too, and *it's a retirement fund at [sic] he has built up.*" (Emphasis added.) At the time, this court held that was an acceptable reason for refusing to divide the IRA. The dissent now attempts to read various reasons

into the refusal to divide Mr. Stout's IRA when in fact the trial court's reason was simply because it was a retirement fund *that he had built up*. (Emphasis added.)

Subsequent to *Stout*, however, in *Stuart v. Stuart*, 280 Ark. 546, 660 S.W.2d 162 (1983), our supreme court held that it was not inequitable to treat property held in the wife's name, which was acquired during the marriage, as marital property to be divided equally when the wife was the primary breadwinner in the marriage. *Stuart*, decided the year after *Stout*, reiterated our appellate courts' erasure of property division based upon gender-based distinctions, regardless of who was the "primary breadwinner."

Although recognizing that the trial judge could divide marital property unequally if it was found that an equal division would be inequitable, Judge George Rose Smith, writing for the Arkansas Supreme Court in *Day v. Day*, 281 Ark. 261, 663 S.W.2d 719, (1984), ruled that absent a valid reason, spouses must be treated equally. In that case, our supreme court also held that

> [E]arnings or other property acquired by each spouse must be treated as marital property, unless falling within one of the statutory exceptions, and neither one can deprive the other of any interest in such property by putting it temporarily beyond his or her own control, as by the purchase of annuities, participation in a retirement plan, or other device for postponing full enjoyment of the property.

Day, 281 Ark. at 268, 663 S.W.2d at 722.

We are not unmindful of the fact that the contribution of each party in the acquisition of marital property is a factor to be considered by the trial judge in making a division of marital property. However, this should not be the sole factor considered. It is obvious from the trial judge's comments, both at the hearing and upon remand, that she awarded Susan 100% of the retirement accounts simply because Susan was the person who earned the money placed into the accounts. This is in direct contravention of the holdings in *Stuart, supra*, and *Day, supra*, and to the extent that *Stout, supra*, is in conflict with this opinion, it is overruled.

Our holding today in no way precludes an unequal division of retirement accounts or deferred compensation accounts if the facts so warrant, *e.g.*, if the account assets are retained by one party in exchange for other assets; however, we hold that the facts in the instant case do not justify such an unequal division. The parties

were married for almost thirteen years; Raymond was disabled at the time of the marriage and began receiving disability payments after the marriage; Susan was able to invest more into her retirement accounts after the marriage commenced; and this approach to the marriage worked until Susan had a stroke and lost her job. Now both parties are receiving social-security disability, and their financial outlooks are strained. We decline to hold that Susan's disability and need for financial security is more pressing than Raymond's disability and similar need simply because she was the "primary breadwinner" and made contributions to her retirement accounts.

We reverse and remand for entry of an order directing that the marital portion of the retirement accounts be divided equally between Raymond and Susan.

Reversed and remanded to enter an order consistent with this opinion.

PITTMAN, C.J., GLADWIN and BIRD, JJ., agree.

VAUGHT and BAKER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. I dissent from the majority's reversal of this case because the trial judge's findings in support of the unequal distribution of the wife's retirement accounts were not clearly erroneous. The trial judge on remand found that the retirement accounts were accumulated by the wife through her employment, the husband made no contribution to their acquisition, and the husband benefited from the income of the wife throughout their marriage. Additionally, the court found no evidence that the defendant made any substantial contribution to the marital estate. In our decision remanding the case we held:

> While we agree that no specific number of factors need be given, we disagree that simply reciting the source of the funds equates to a proper consideration of the contribution of each party in the acquisition, preservation, or appreciation of marital property. Although Ms. Baxley's earnings were the source of the funds in the investment account, the trial court's order makes no findings as to the contribution *of each party* as contemplated by Ark. Code Ann. § 9-12-315(a)(1)(A)(vii). (Emphasis added.) In fact, the order makes no finding at all concerning Mr. Baxley's contribution, or lack thereof, and, consequently, there is no explanation as to why an equal division of the marital property was inequitable. In the

> absence of such an explanation, and in light of the presumption that marital property will be divided equally, we must reverse and remand for entry of an order that demonstrates proper consideration of the statutory factors. *See Harvey v. Harvey,* 295 Ark. 102, 747 S.W.2d 89 (1988) (holding that the failure of the trial judge to explain why marital property was divided unequally between the parties required reversal and remand of award).

This quoted section of our opinion contained a footnote emphasizing that these contributions may be non-monetary. *See Davis v. Davis,* 79 Ark. App. 178, 84 S.W.3d 447 (2002) (one spouse's contribution to the marital property through providing household services, rearing children, and attending to other spouse's health needs was of equal value to the other spouse's producing income through farm labor and contributed to the farm's appreciation in value); *cf. Keathley v. Keathley,* 76 Ark. App. 150, 61 S.W.3d 219 (2001) (finding that there was no contribution to the martial property by the spouse in cleaning up after himself and taking care of the finances where his handling of the finances enabled him to defraud the other spouse by incurring debt in her name without her knowledge).

Our directions on remand indicated that we were seeking identification by the trial judge of contributions including those of a non-monetary nature. Non-monetary contributions were critical in the analysis of both *Stout v. Stout,* 4 Ark. App. 266, 630 S.W.2d 53 (1982) and *Stuart v. Stuart,* 280 Ark. 546, 660 S.W.2d 162 (1983). Neither *Stuart* nor *Stout* awarded marital property based on gender or upon identification of the primary breadwinner. Instead, our court in *Stout* emphasized that the alienation of the parties resulted in a lack of contribution to the marital estate by the wife. The wife in *Stout,* like the husband in *Keathley,* used marital resources during the course of the marriage and then by her actions caused a loss to the marital estate. Furthermore, because she and her husband maintained separate households during much of the marriage, there was no evidence of non-monetary contributions on her part such as household services or love and affection to support his monetary acquisitions.[1]

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[1] If *Stout* is interpreted as holding that an unequal division of marital assets can be made on the basis of gender or by identification of the primary breadwinner, I join the majority in saying it should be overruled.

In *Stuart* the trial court's equal division of property was also affirmed based upon consideration of non-monetary contributions to the marital estate:

> About 20 years after the parties were married Mrs. Stuart brought this suit for divorce, on the ground of indignities. Stuart did not contest the divorce, but he did resist his wife's assertion that she was entitled to more than half of the marital property because she had been the principal breadwinner. This appeal is from the chancellor's equal division of all the marital property, some of which had been acquired jointly and some in Mrs. Stuart's name only.
>
> At the time of their marriage Stuart was a painter and Mrs. Stuart a court reporter. Stuart suffered a work-related injury that kept him from working most of the time. He took care of the house and yard, did most of the cooking, worked when he was able to, and helped in his wife's business by proofreading and delivering transcripts. Mrs. Stuart worked steadily as a regular or free-lance court reporter, earning about two thirds of the family income. She testified that she knew what is meant by a feme sole and as such intended to acquire separate property in her own name.
>
> The chancellor was right in dividing the marital property equally. The appellant relies in part on our constitutional provision that a married woman may acquire and transfer property as if she were a feme sole, with such property being free from her husband's debts. Ark. Const. art. 9, § 7 (1874). That provision was meant to put a wife on an equal footing with her husband in the acquisition and transfer of property, but it does not purport to clothe the wife with superior property rights in the event of a divorce.
>
> Well before the many recent cases disapproving gender-based distinctions between spouses, we recognized the power of the court in a divorce case to divide property acquired by the joint efforts of the parties, even though title was in the name of only one spouse. *Stephens v. Stephens,* 226 Ark. 219, 288 S.W.2d 957 (1956). That principle has been embodied in our recent statute governing the division of marital property, Act 705 of 1979, for it directs the court to consider "services as a homemaker" (usually those of the wife) as a contribution to the acquisition of property during the marriage.

Ark. Stat. Ann. § 34-1214(A)(1)(8) (Supp.1983). We have said that the new statute was made applicable to all cases filed after its

> effective date and necessarily affected property acquired before that date. *Warren v. Warren,* 273 Ark. 528, 623 S.W.2d 813 (1981). If that were not so, equality between the sexes might not be achieved for a generation or more. The constitutionality of similar statutes has recently been upheld in several states, not only because public policy supports the recognition of the homemaker's efforts as contributing to the acquisition of property during the marriage, but also because under pre-existing law a married person had no reasonable expectation that his or her property would be immune from an equitable division upon termination of the marriage. *Kujawinski v. Kujawinski,* 71 Ill.2d 563, 17 Ill.Dec. 801, 376 N.E.2d 1382 (1978); *Fournier v. Fournier,* 376 A.2d 100 (Me.1977); *Rothman v. Rothman,* 65 N.J. 219, 320 A.2d 496 (1974). We agree with those decisions.
>
> As a second point for reversal the appellant argues that it is inequitable to divide the property equally when her earnings formed the greater part of the purchase price. To sustain that argument in this case would put the law right back where it was before gender-based distinctions were nullified, for the same contention would be made when it was the husband who had been the breadwinner — the usual situation.

Stuart v. Stuart, 280 Ark. at 162-63, 660 S.W.2d at 547-49.

Unlike *Stuart,* in this case there was no evidence before the trial judge that the husband took care of the house and yard, did most of the cooking, worked when he was able to, or otherwise helped his wife in any way. More like the wife in *Stout,* the evidence was that his spouse supported him during the course of the marriage, while he contributed nothing to the acquisition of marital assets, monetarily or otherwise. Nothing in the trial judge's findings indicates that her decision to make an unequal distribution of the retirement account was based on gender. Nor does it appear that the decision was based on a finding that the wife was the principal breadwinner during the marriage.

The trial judge on remand calculated how much money the husband in this case spent during the course of the marriage purely on his own whims while the necessities of housing, food, utilities, etc., were being provided for solely by the wife's contributions. Based on her calculations, the trial judge reached a figure that was "pretty close" to one-half of what was in the retirement account. Furthermore, the wife had become disabled during the marriage,

was younger than the husband, and would be unable to continue working to earn the income she had previously enjoyed. In contrast, the husband was disabled prior to the marriage and his earning potential was unchanged.

Given the trial judge's findings after consideration of these factors, in accordance with our directions on remand, the decision to make an unequal division of the retirement account was not clearly erroneous and should be affirmed.

VAUGHT, J., agrees.

John HILL, M.D. *v.* Anita BILLUPS, Individually and as Next Friend of Stephon Earl Billups, Deceased

CA 05-19 212 S.W.3d 53

Court of Appeals of Arkansas
Opinion delivered September 7, 2005

Baker & Whitt, by: *Darrell Baker*; and *Watts, Donovan & Tilley, P.A.*, by: *David M. Donovan*, for appellant.

Johnson, Odell & Kendall, by: *Linda Kendall Garner* and *Patricia A. Odell*, for appellee.

OLLY NEAL, Judge. This is the second time that this medical malpractice case has been before our court. On December 3, 1995, appellee Anita Billups brought her thirteen-day-old son, Stephon Billups, into the emergency room at Baptist Memorial Hospital in Forrest City, where he was treated by appellant, Dr. John Hill, a board-certified pediatrician. After examining Stephon, appellant discharged him and instructed appellee to give Stephon "Tylenol as needed" and Pedialyte. The following morning, after discovering that Stephon had stopped breathing, appellee returned to the emergency room with Stephon. Stephon was transferred to Arkansas Children's Hospital. Stephon died on December 6, 1995, as a result of a bacterial infection.

Subsequently, appellee filed suit, individually and as next of friend of Stephon, alleging medical malpractice. The case was tried to a jury February 19-26, 2003, in the St. Francis County Circuit Court. The jury returned a verdict for appellee in the amount of $250,000. Appellant appealed the verdict to this court. He alleged the following errors: (1) the trial court erred in excluding the

deposition of his expert witness; (2) the trial court should have excluded the testimony of appellee's expert witness because of a failure to disclose changed opinion testimony; (3) during voir dire, the jury was improperly influenced by a reference to medical malpractice insurance.

In *Hill v. Billups*, 85 Ark. App. 166, 148 S.W.3d 288 (2004), we agreed with appellant's assertion that the trial court had erred when it refused to rule on the admissibility of the deposition testimony of appellant's expert witness and remanded that portion of the case back to the trial court.[1] Upon remand, the trial court found that appellant's expert witness was not qualified to offer expert testimony, and therefore, excluded her deposition. Appellant now argues that the trial court abused its discretion when it excluded the testimony of his expert witness. We affirm.

Whether a witness qualifies as an expert in a particular field is a matter within the trial court's discretion, and we will not reverse such a decision absent an abuse of that discretion. *Brunson v. State*, 349 Ark. 300, 79 S.W.3d 304 (2002). Rule 702 of the Arkansas Rules of Evidence provides that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702 expressly recognizes that an expert's testimony may be based on experience in addition to knowledge and training. *Arrow Int'l v. Sparks*, 81 Ark. App. 42, 98 S.W.3d 48 (2003).

If a reasonable basis exists demonstrating that a witness has knowledge of a subject beyond that of ordinary knowledge, the evidence is admissible as expert testimony. *Id.* There is a decided tendency to permit the fact-finder to hear the testimony of persons having superior knowledge in a given field, unless they are clearly lacking in training and experience. *Id.* The fact that a medical expert is not a specialist in that particular field does not exclude that medical expert from offering testimony. *See First Commercial Trust Co. v. Rank*, 323 Ark. 390, 915 S.W.2d 262 (1996).

Appellant sought to introduce the deposition testimony of Dr. Rani Lewis, assistant professor in the OB/GYN Department at

[1] We affirmed appellant's remaining two points.

Vanderbilt University Medical Center in Nashville, Tennessee. Dr. Lewis's specialty is high-risk-maternal fetal medicine, which involves the care of either mothers or babies who are at high risk during the course of the mother's pregnancy. She said that she regularly saw mothers and babies who were at great risk for infection. While at the University of Tennessee in Memphis, Dr. Lewis cared for mothers and babies who had problems frequently associated with infection. Dr. Lewis has published numerous papers in peer review journals relating to infection issues, including HIV, as well as pre-term labor and pre-term premature rupture of membranes. Although she had previously practiced in Memphis, Dr. Lewis did not have a direct history of treating infants in the Forrest City area. Because her training included emergency-room treatment, Dr. Lewis was confident that she was familiar with the standard of care required of an emergency-room physician seeing a neonate. She explained that "in obstetrics and gynecology, in labor and delivery service, we act as our own ER physicians for the patient population."

Dr. Lewis testified that, in her current practice, she spent two days a week doing ultrasounds and tests on mothers and one day a week seeing patients in her private practice. She said that her current practice involved the examination of a few babies. Occasionally, Dr. Lewis will see a baby when its mother brings it in for evaluation. During her testimony, Dr. Lewis stated:

> In 1995 I was at the University of Tennessee. We did approximately ten thousand deliveries a year. So that would be thousands of moms. I cannot estimate exactly how many of those babies I saw and took care of. Generally if I was examining a baby for a circumcision we would take the baby, undress it, check the vitals. *I don't do vitals on neonates.* I just make sure by visual findings that there's no evidence of any neonatal infection. I check for appropriate reflexes, skin turgor, tone.

[Emphasis added.] She explained that she did not perform vitals on neonates because that was a function for the nurses. However, she said that she could possibly do the vital signs.

As to the appropriate standard of care, Dr. Lewis stated:

> I'm not aware of the standard of care specifically in the Forrest City area, but the standard of care for emergency room physicians taking care of any patient requires the ability to obtain as much

> information as you can objectively and subjectively. Generally, in the United States, the thing that we do most frequently as [sic] regards to examination of the infant is the APGAR scores which checks the baby's reflexes, baby's respirations, whether the baby can flex and extend. That can give a lot of information regarding how well the baby is doing.
>
> Generally, the care of a baby is turned over to a pediatrician. Obstetricians tend to pass the babies on to pediatricians who take care of children. *I don't take care of children, I take care of pregnant women and their infants in utero, although I have had multiple opportunities to evaluate the child in my care of the patient.* The standard of care relates to how a group of your peers would act in a similar situation. So if you're talking about a group of OB/GYN peers, I imagine that it is similar to how a group of pediatric peers act in a similar situation. But they would be taking care of different patients. I am a perinatologist, which is the same thing as a high risk fetal medicine sub-specialist. A group of peers for a pediatrician is going to be very different from a group of peers for an obstetrician. I'm not qualified to articulate a standard of care for pediatricians. I was not articulating a standard of care for pediatricians in the Forrest City area.

[Emphasis added.]

In its October 4, 2004 order, the trial court wrote the following:

> Stephon Earl Billups, the deceased, was a thirteen-day old neonate. The court finds that Dr. Rani Lewis admits that she does not perform vital signs on neonates and is thus not qualified to render competent expert opinion on the examination of the thirteen-day old neonate in the instant case. Uniquely critical to the case is what were the vital signs of the neonate at the time of the examination by Dr. John Hill.
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> . . . .
>
> The Court is also cognizant that, in the first trial of this case, the defendant's attorney, Mr. Darrell Baker, stipulated that Dr. Rani Lewis was not an expert in pediatrics. That stipulation, coupled with the admission and testimony of Dr. Lewis as set forth above, persuades this court that the 2003 deposition of Dr. Rani Lewis is properly excluded under the Rules as that [sic] Dr. Lewis is not qualified to render an expert competent expert opinion concerning the examination of the thirteen-day old neonate, Stephon Earl Billups, deceased.

. . . .

Accordingly, this court finds that the February 2003 deposition is not admissible. Although highly qualified to offer expert testimony on emergency-room care, Dr. Lewis was not an expert in the matter currently before the court. Dr. Lewis testified that, in her practice, she does not perform vitals on neonates nor does she examine children. Therefore, she was not knowledgeable in the matter before the court. Based on this evidence, we hold that the trial court did not abuse its discretion when it excluded Dr. Lewis's testimony.

Affirmed.

GLADWIN and BAKER, JJ., agree.

Mike TAYLOR *v.* Nathan GEORGE

CA 04-1173 212 S.W.3d 17

Court of Appeals of Arkansas
Opinion delivered September 7, 2005

Jesse B. Daggett, for appellant.

Raymond R. Abramson, for appellee.

TERRY CRABTREE, Judge. This appeal is from an order of the Phillips County Circuit Court awarding judgment to appellee Nathan George for a small portion of the damages he sought against Mike Taylor for breach of a 2002 agricultural-service contract. Taylor has appealed from this award to George, and George has filed a cross-appeal seeking more damages and attorney's fees. On direct appeal, we reverse the trial court's award of damages to George for breach of the parties' 2002 contract. Because Taylor has not appealed from an award to George regarding a separate agreement in 2001, we affirm that aspect of the decision and modify the judgment accordingly. We affirm on the cross-appeal.

Taylor is a farmer, and George is a custom cotton harvester. For several years prior to the fall harvest of 2002, George harvested at least a portion of Taylor's cotton crop. The parties agree that they entered into an oral contract for George to harvest all 1100 acres of Taylor's 2002 crop. They disagree, however, about when George was required to begin performance. According to Taylor, George was to begin harvesting his crop when it matured, which usually occurred the last week of September or the first week of October. George, however, maintains that he was not required to begin harvesting Taylor's crop until after he had finished harvesting a 2000-acre cotton crop for another farmer, Glen Kale. For many years, George harvested Kale's crop before he harvested Taylor's crop; this was possible because, in the past, Kale's cotton matured a few weeks earlier than Taylor's cotton, usually in early September.

In 2002, George's three 1993-model John Deere four-row, single-wheel cotton pickers, which lacked rear-wheel assists, were in need of extensive repairs. Before the 2002 harvest season, George hired a cotton-picker technician, Chuck Watkins, to overhaul the pickers, spending approximately $67,660, which George borrowed from his bank. George also performed some of the repairs himself. According to George, he entered into this debt for the overhaul of the pickers in reliance on Taylor's promise that he could harvest all of Taylor's crop. Taylor disputes this.

In 2002, Kale's cotton matured late, and George did not begin harvesting Kale's cotton until September 30. Taylor's cotton, however, matured at its usual time in late September. Around October 1, Taylor's son, Mike Taylor, Jr., came to see George in one of Kale's fields and told George that Taylor's cotton was ready for harvest and that, because the rainy weather was predicted to worsen, he had made arrangements to borrow a picker from the Christines, who were friends of the Taylors, and would begin harvesting with that picker. Taylor used the Christines' picker about a week and, with it, was able to harvest approximately 200 acres of his cotton. The rainy weather continued, and, while George was still harvesting Kale's cotton, Taylor leased a six-row John Deere picker with rear-wheel assists from a local equipment dealer, obtaining the dealer's permission to return that picker whenever George was able to help Taylor. Because of the steady rains, Taylor could not begin harvesting his crop with the leased picker until a week or so later. George learned that Taylor had leased this picker and contacted Taylor, who acknowledged that he had leased the picker to harvest as much of his crop as possible until George could arrive to complete the harvest. During this period of time, Mike, Jr., stayed in contact with George by telephone, each advising the other of the progress they were making in harvesting the crops. The weather remained rainy, and the fields were extremely muddy. When most of his crop had been harvested, Taylor borrowed from his friends, the Carnathans, some harvesting equipment that was capable of functioning in muddy conditions.

In early November, Alan Evans asked George to harvest his 900 acres of cotton. Without first contacting Taylor, George declined the offer. George completed his harvest of Kale's crop on November 11 and called Taylor to let him know that he would be at Taylor's farm the next day. Taylor then told George that his harvest would be complete the next day and there was, therefore, no need in George's coming. When George called Evans back about his offer, Evans had already made other arrangements.

On April 11, 2003, George sued Taylor for breach of contract, for which he sought $110,000; promissory estoppel, for which he sought $90,000 for the overhaul of his cotton pickers; and $12,500 that Taylor allegedly owed him for the harvest of 2001. In his answer, Taylor asserted that George was not ready, willing, and able to pick his 2002 crop in a timely manner and stated that he had received no bill for the balance due for 2001.

Taylor argued that the parties' agreement was based upon the expectation that George would harvest the crop in a timely manner and that he could make other arrangements if George was unable to perform. He also said that he had taken the necessary steps to harvest his crop because George was "bogged down in the fields of Glen Kale due to the wet weather." Taylor asserted that George's inability to timely harvest his crop excused Taylor's performance of the contract. In an amended answer, Taylor asserted that he had mitigated his damages by harvesting his own crop and that any expenses he incurred in doing so should be set off against any damages that George might recover. He also contended that George had a duty to mitigate his own damages by accepting other work once he knew that Taylor was harvesting his own crop, and that George failed to do so.

At trial, Taylor paid George for the amount due on the 2001 contract. George testified on his own behalf and offered the testimony of Chuck Watkins, Alan Evans, Glen Kale, Julie Aydelotte (his accountant), and Danny Moser (his banker). Taylor testified on his own behalf and presented the testimony of Robert Lee (his accountant), Ed Whatley (an agricultural entomologist), Chris Carnathan (a farmer), Harry Stevens (a farmer), Mike, Jr., and George.

In a February 6, 2004 letter opinion, the circuit judge found that the parties imposed no deadline for George to start harvesting Taylor's crop or any restrictions against the possibility of adverse weather conditions. The judge stated:

> Based upon ... the ... testimony provided the court finds that an open-end start date would not be reasonable term of agricultural contract. The court does not find that the Defendant entered into a contract containing a term of that nature. As testified, time of picking cotton is an important consideration to a farmer and harvester. While an exact date may not be agreed upon by the parties, in an [sic] verbal contract regarding crops, a reasonable time after maturity of the crops to commence harvest is a term and condition of the contract. As a general rule, Defendant's cotton matured after Plaintiff had finished with the Kale field's but not in 2002. Plaintiff was aware of the actions taken by the Defendant to ensure his crop was harvested in a timely fashion. Plaintiff was kept informed of this progress by the telephone conversation with Mike, Jr., Defendant's agent whom Plaintiff had dealt with in the past.

> In one of these conversations, Plaintiff was specifically informed the Defendant had approximately 500 acres remaining to be picked. Plaintiff was thereafter offered the 900 Evans land and made no effort to check with Defendant about the status of Defendant's harvest. Defendant, on the other hand did not inform Plaintiff of the additional assistance provided by the Carnathans.
>
> By borrowing the Christine picker, renting the 6 - row picker informing the Plaintiff of his actions, the Defendant was taking reasonable efforts to protect his crop and mitigate the potential loss. The use of the Carnathan picker was also an effort of similar nature however here the Defendant failed to inform Plaintiff of this step. Plaintiff testified, and the court finds this testimony credible, with this information he would have contacted Evans and obtained other work. However, due to the Defendant's failure to contact him, he did not have this option.
>
> The Plaintiff is entitled to recover the profit, that would have been realized from picking the 200 acres, that the court find was picked by the Carnathan equipment.

On March 5, 2004, the circuit judge entered a judgment incorporating her letter opinion, finding that Taylor had not entered into a contract with an open-ended starting date because that would not be a reasonable term of an agricultural contract. She also found that the time of picking cotton is an important consideration to a farmer and that, in a verbal agreement without an exact date, a reasonable time after maturity of the crop is a term and condition of the contract. She awarded judgment to George in the amount of $7500 for the profit he would have realized from picking the 200 acres that was picked by the Carnathan equipment. George moved for an award of attorney's fees and for prejudgment interest on the amount that Taylor had paid him for the 2001 harvest on the first day of trial. He also moved for reconsideration of the amount awarded him, which the court granted, finding that George's profit should have been $13,152. The judge also granted his request for prejudgment interest but denied his request for attorney's fees. An amended judgment increasing George's damages award to $13,152, granting judgment in the amount of $929.60 for the 2001 prejudgment interest, and denying his request for attorney's fees, was entered on April 7, 2004. Both parties appealed from the decision. Taylor does not, however, dispute the award to George of $929.60 for prejudgment interest on the amount he paid George at trial for his work in 2001.

Standard of Review

When reviewing a judgment entered by a circuit judge after a bench trial, we will not reverse unless we determine that the circuit judge erred as a matter of law or we decide that her findings are clearly against the preponderance of the evidence. *Vereen v. Hargrove*, 80 Ark. App. 385, 96 S.W.3d 762 (2003). We view the evidence in the light most favorable to the appellee, resolving all inferences in the appellee's favor. *Id.* Disputed facts and the determination of the credibility of witnesses are within the province of the circuit judge, sitting as the trier of fact. *Id.*

Taylor argues on appeal that the trial judge erred in awarding any damages to George because George breached the contract; that Taylor acted reasonably in mitigating his damages; and that George did not act reasonably in mitigating his own losses. He also contends that, even if damages to George were proper, the trial judge erred in failing to set off certain amounts and in calculating those damages. For his cross-appeal, George argues that the trial judge failed to enforce the parties' contract; erred in not awarding any damages on his promissory-estoppel claim; and abused her discretion in failing to award him attorney's fees. Logic requires us to first address George's enforcement-of-the-contract issue on his cross-appeal.

The Terms of the Agreement

George contends that the trial judge erred in failing to enforce the parties' express contract — that he would harvest all of Taylor's cotton crop after he finished harvesting Kale's crop, whenever that occurred. He asserts that the trial judge erred in considering Taylor's "custom in the trade" defense (that, if necessary, he could hire another harvester) and in finding that the contract was silent as to the time of performance. Thus, he contends, he should have been awarded all of the profits he would have received if the contract had been performed ($73,949).

The controlling issue, therefore, is whether the trial judge's findings of fact about the terms of the contract are clearly against a preponderance of the evidence. Certainly, the parties' testimony differed about their recollections of the conversation by which they entered into this contract. George testified that, in August 2002, he asked Taylor if he wanted George to pick his cotton, and Taylor replied that he did. George stated that he told Taylor he could do so but that "Glen's cotton is first." He testified that he

told Taylor that, in order to pick his cotton, he would have to overhaul his pickers, to which Taylor responded: "Don't worry about it, you're going to pick every row of my cotton." George testified that they discussed the fact that Kale's cotton was maturing late and that he left the meeting with the understanding that he would pick Taylor's crop "as soon as [he] finished Glen Kale's crop."

Taylor, however, testified that the parties' 2002 contract was the same as their prior contracts; that it is important to pick the cotton when it is ready; and that, in the past, Kale's cotton matured two or three weeks before Taylor's, making it possible for George to finish picking Kale's cotton by the time Taylor's was ready, which was usually around the first of October. Taylor stated that he was counting on George to be there when his cotton was ready and that he had not agreed to an "open-ended" contract whereby he would wait on George indefinitely. He said: "It's Nathan's responsibility to be there when the cotton is ready. That's understood . . . . I expect him to bring whatever equipment, work whatever hours and do whatever is necessary to get to my field in a timely manner."

Whether the parties agreed that George was to begin work for Taylor only after he was through with his work for Kale, whenever that was, or when Taylor's crop was mature and ready to be harvested, was a question of fact for the trial judge to determine. *See Landmark Sav. Bank v. Weaver-Bailey Contractors, Inc.*, 22 Ark. App. 258, 739 S.W.2d 166 (1987); *Country Corner Food & Drug, Inc. v. Reiss*, 22 Ark. App. 222, 737 S.W.2d 672 (1987). Where the pivotal issue is the credibility of interested parties whose testimony is in direct conflict, we defer to the trial judge's judgment. *Estate of Sabbs v. Cole*, 57 Ark. App. 179, 944 S.W.2d 123 (1997). Additionally, the testimony of an interested party is taken as disputed as a matter of law. *Ester v. Nat'l Home Ctrs., Inc.*, 335 Ark. 356, 981 S.W.2d 91 (1998).

The trial judge apparently did not believe George's testimony that Taylor agreed that George could perform after harvesting Kale's crop, no matter how long it took. As the finder of fact, it is within the trial judge's province to believe or disbelieve the testimony of any witness. *Found. Telecomms., Inc. v. Moe Studio, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000). The trial judge here found that Taylor did not agree to an "open-end[ed]" starting date but that the agreement contemplated that George would begin work

for Taylor within a reasonable time after Taylor's crop reached maturity. The evidence clearly demonstrated that, although in the past George had harvested Kale's crop first, he had also harvested Taylor's crop soon after it matured; in their prior dealings, George had not left Taylor's crop to rot in the field. A court may look to the conduct of the parties to determine their intent and to give substance to indefinite terms of a contract. *Joshua v. McBride*, 19 Ark. App. 31, 716 S.W.2d 215 (1986); *Welch v. Cooper*, 11 Ark. App. 263, 670 S.W.2d 454 (1984).

The rule is well established that, where there is no provision as to the time of the performance of the contract, the law implies that it must be performed within a reasonable time. *Excelsior Mining Co. v. Willson*, 206 Ark. 1029, 178 S.W.2d 252 (1944). What would be a reasonable time depends upon the intention of the parties at the time the contract was made, the facts and circumstances surrounding its making, or, in general, what was contemplated by the parties at the time. *Id.*; *see also Mo. Pac. R.R. Co. v. Evans,* 206 Ark. 20, 173 S.W.2d 1019 (1943).

Because we cannot say that the trial judge's finding of fact that George was obligated to harvest Taylor's crop within a reasonable time after it reached maturity was clearly against a preponderance of the evidence, we affirm on this issue.

The Award to George

Returning to Taylor's direct appeal, the next question is whether George materially breached the contract. Although the trial judge did not expressly say that he did, it is apparent that she thought so. When performance of a duty under a contract is contemplated, any nonperformance of that duty is a breach. *Vereen v. Hargrove, supra.* As a general rule, the failure of one party to perform his contractual obligations releases the other party from his obligations. *Id.*; *accord Stocker v. Hall*, 269 Ark. 468, 602 S.W.2d 662 (1980); *Cummings v. Lord's Art Galleries*, 227 Ark. 972, 302 S.W.2d 792 (1957); *Kelley v. N. Ohio Co.*, 210 Ark. 355, 196 S.W.2d 235 (1946). "It is an elementary rule that a person who has himself broken a contract cannot recover on it." *Witherspoon v. Choctaw Culvert & Mach. Co.*, 56 F.2d 984, 988 (8th Cir. 1932). Forfeitures, however, are not favored in the law, and a relatively minor failure of performance on the part of one party does not justify the other in seeking to escape any responsibility under the terms of the contract; for one party's obligation to perform to be

discharged, the other party's breach must be material. *Vereen v. Hargrove, supra.* An influential circumstance in the determination of the materiality of a failure fully to perform a contract is the extent to which the injured party will obtain the substantial benefit that he reasonably anticipated. *TXO Prod. Corp. v. Page Farms, Inc.*, 287 Ark. 304, 698 S.W.2d 791 (1985); *Vereen v. Hargrove, supra.*

Because George was not ready to perform until the last day of Taylor's harvest, and in light of the overwhelming evidence that it would have been disastrous for Taylor to leave the cotton in the field to deteriorate, especially in the rain, we hold that George's breach of the contract was material and that it relieved Taylor of any further obligation to George.

Taylor argues that the trial judge erred in awarding judgment to George for the profit he would have made from picking the 200 acres that Taylor harvested with the Carnathans' picker. The trial judge based this award on the fact that Taylor failed to notify George that he was borrowing the picker. She found that Taylor made reasonable efforts to mitigate his loss by borrowing the Christines' and the Carnathans' pickers and by renting the six-row picker. The doctrine of avoidable consequences limits the amount of recoverable damages in that a party cannot recover damages resulting from consequences that he could have reasonably avoided by reasonable care, effort or expenditure. *Bill C. Harris Constr. Co. v. Powers*, 262 Ark. 96, 554 S.W.2d 332 (1977); *Quality Truck Equip. Co. v. Layman*, 51 Ark. App. 195, 912 S.W.2d 18 (1995). One is required only to take such steps as may be taken at small expense or with reasonable exertion, and where the expense is so large as to make the requirement impractical, the doctrine has no application. *Enter. Sales Co. v. Barham*, 270 Ark. 544, 605 S.W.2d 458 (1980). Reasonable diligence and ordinary care are all that are required. *Id.* The burden of proving that a non-breaching party could have avoided some or all of the damages by acting prudently rests on the breaching party, not only on the question of causation of damages for failure to avoid harmful consequences, but also on the question of the amount of damage that might have been avoided. *See Bill C. Harris Constr. Co. v. Powers, supra.* In most cases, whether one acted reasonably in minimizing, mitigating, or avoiding damages is a question of fact. *Id.*; *Quality Truck Equip. Co. v. Layman, supra.*

We agree with Taylor that the trial judge erred in placing the burden on Taylor to notify George that he was borrowing the Carnathans' picker over a month after George materially breached

the contract and over a month after Mike, Jr., notified George that Taylor was going to begin harvesting his own crop. George's material breach of the contract released Taylor from any further obligation to him; thus, Mike, Jr.'s communications with George during October and early November about their progress were not necessary, and Taylor had no obligation to inform George that he was borrowing the Carnathans' picker. We therefore hold that the trial judge erred in making this award to George and reverse on this point. As discussed above, we modify the judgment for George to $929.60.

Promissory Estoppel

George also argues on his cross-appeal that the trial judge erred in failing to award him $67,660.03 for the overhaul of his cotton pickers, which he claims was undertaken in reliance on Taylor's promise that he could harvest all of Taylor's 2002 cotton crop. The trial judge did not expressly deny this claim. However, in her first letter opinion, she noted that Chuck Watkins testified that the overhaul was necessary "in any event, prior to commencing custom harvesting that year."

Promissory estoppel may be a basis for recovery only when formal contractual elements do not exist. *Cmty. Bank of N. Ark. v. Tri-State Propane*, 89 Ark. App. 272, 203 S.W.3d 124 (2005). In this case, the parties did have a contract; therefore, a claim for promissory estoppel was not appropriate. We affirm on this issue.

Attorney's Fees

George also asserts that he should have been awarded attorney's fees. We disagree. The trial judge was not required to award him any fees, and under the circumstances of this case, we do not believe that she abused her discretion in refusing to do so. Arkansas Code Annotated section 16-22-308 (Repl. 1999) provides that a reasonable attorney's fee may be awarded to the prevailing party in certain civil actions, including those for breach of contract. A trial judge is not required to award attorney's fees, and we usually recognize the superior perspective of the trial judge in determining whether to award them. *Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000); *C&W Asset Acquisition, LLC v. Whittington*, 90 Ark. App. 213, 205 S.W.3d 157 (2005). Whether to award attorney's fees under this statute is a matter within the trial

judge's discretion, and her decision will not be reversed in the absence of an abuse of that discretion. *Vereen v. Hargrove, supra.* We find no such abuse here.

Affirmed as modified in part and reversed in part on direct appeal; affirmed on cross-appeal.

HART and BIRD, JJ., agree.

James Everett NELSON *v.* STATE of Arkansas

CA CR 04-1289 212 S.W.3d 31

Court of Appeals of Arkansas
Opinion delivered September 7, 2005

Ray Bunch, for appellant.

Mike Beebe, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. James E. Nelson was convicted of possession of drug paraphernalia with intent to manufacture methamphetamine and illegal possession of pseudoephe-

drine in a jury trial and was sentenced as an habitual offender to fifty years' imprisonment. On appeal, Nelson argues that (1) the trial court erred in denying his motion to suppress evidence; (2) substantial evidence does not support his convictions; and (3) the trial court erred by allowing the State to introduce his fourteen-year-old prior methamphetamine-related convictions during the guilt phase of his trial pursuant to Ark. R. Evid. 404(b). We agree that the trial court erred in admitting the prior convictions, and reverse and remand.

After being charged, Nelson filed a motion to suppress evidence obtained during a search of the vehicle he was driving. The following was established at the suppression hearing.

On November 4, 2002, Officer Daniel Robbins observed a silver Ford Taurus pull into the Wal-Mart parking lot in the early a.m. hours. One of the occupants went into Wal-Mart for approximately ten minutes. Robbins drove past the vehicle and noticed that it had a cracked windshield. Robbins parked his patrol car across the street from Wal-Mart and observed the car leaving the parking lot at approximately 3:30 a.m. The driver failed to stop at the stop sign as he exited the Wal-Mart parking lot. Robbins testified that the driver's failure to stop at the stop sign raised his suspicion and that he had planned to at least stop the car and confront the driver about running the stop sign. He also noted during his testimony that a person sitting in a vehicle in a Wal-Mart parking lot at 3:30 a.m. raised his suspicions because he regularly received calls about people going into Wal-Mart to purchase items to manufacture methamphetamine. He admitted, however, that he did not know he would find any such items in Nelson's car and claimed that he was not searching for methamphetamine. While following the vehicle, Robbins ran the license plate, and the tags did not return to the vehicle; Robbins initiated a traffic stop.

Robbins discovered that Nelson was the driver of the vehicle and that Kurt Stanley was the passenger. There was also a bulldog in the back seat. Robbins asked Nelson for his driver's license, registration, and proof of car insurance. Robbins testified that Nelson was nervous and that his hands were shaking as he retrieved his driver's license from his wallet. Nelson could not locate the proof of insurance. At that time, Robbins asked Nelson to step out of the vehicle, arrested him for "no insurance," placed Nelson in handcuffs, and escorted him to his patrol car. Robbins admitted that although he sometimes arrests for failure to provide proof of insurance, most of the time he only writes a citation. He

also admitted that Nelson had told him that the vehicle belonged to his mother, and provided her telephone number. While placing Nelson in the patrol car, Robbins asked whether he had any drugs, weapons, or anything illegal in the vehicle. Nelson said that he did not, and Robbins asked whether Nelson "would care if we took a look." According to Robbins, Nelson either said, "he didn't care," "okay," or "yes," but Robbins could not be certain that Nelson used the word "yes." Robbins stated that he took Nelson's response as "yes you can search the vehicle." Robbins stated that it was not possible that Nelson said he did mind if he searched the car. Robbins further stated:

> I am not saying that the reason I searched the car was because Mr. Nelson gave me permission to search it. Any time we make an arrest out of a vehicle, whether it be the passenger's side or the driver's side — I arrested the driver from the vehicle and I had probable cause to search the scope of his area.

Robbins returned to the vehicle and instructed Stanley to take the dog out of the vehicle and wait until Animal Control could arrive and remove the dog. Officer Christopher Webber waited with Stanley and the dog until Animal Control arrived twenty or thirty minutes later, and the dog was taken away.

After Animal Control left, Robbins and Webber began a search of the vehicle. Behind the driver's seat, Robbins found a plastic Wal-Mart bag containing a juice bottle with white pills inside, a torn Actifed package, two bottles of Heet, a propane bottle, two Wal-Mart receipts, one dated the same day as the traffic stop and another dated the day before, and twenty-five feet of clear plastic tubing. On the passenger-side visor, he located a Marlboro cigarette box with the lid taped shut. Robbins removed the tape and found more white pills. At that point, Stanley was arrested and was placed in Webber's patrol car. During the search, Webber found the vehicle's proof of insurance on the floor mixed in with other papers. After the search, Nelson and Stanley were transported to the police station. No further inventory search was conducted, and the vehicle was locked and left on the Wal-Mart parking lot. Nelson's mother was called and notified that she could come and retrieve her vehicle.

Nelson testified that he was on his way to visit his fianceé and that he had given Stanley a ride from Rogers to the Farmington Exit in Fayetteville. He stated that Stanley wanted to stop by

Wal-Mart; that he did not know why Stanley wanted to go to Wal-Mart; and that, until the search, he did not know what was in the Wal-Mart bags. Nelson denied running the stop sign. Nelson said that he was immediately arrested once he told Robbins that he could not locate the insurance papers, even though he had explained that the car belonged to his mother and that he was only borrowing it. He also said that he never gave Robbins consent to search the vehicle and that, when asked whether he would mind if the officers took a look inside his vehicle, he replied, "Sure do."

In denying the motion to suppress, the trial court noted that probable cause supported the stop because Robbins observed a violation of the traffic laws in his presence. The trial court also found that the search was a proper consent search, crediting the officer's testimony against Nelson's as the person most interested in the outcome of the case.

On April 22, 2003, another pretrial hearing was held regarding the admissibility of Nelson's prior convictions. The State sought permission to introduce prior convictions for possession of methamphetamine, illegal delivery of methamphetamine, and possession of drug paraphernalia. The offenses occurred in 1987, and the convictions were entered on November 18, 1988. The State argued that the prior convictions were independently relevant to show intent, plan, preparation, knowledge, and absence of mistake. Regarding the age of the convictions, the State argued that remoteness of time is merely one factor for the trial court to consider under the 404(b) balancing test and that, in this case, the probative value of the prior convictions was not substantially outweighed by any prejudicial effect, even considering the remoteness of time. Nelson objected to the admission of the prior convictions, arguing that, due to their remoteness, they were not independently relevant and that the prejudicial effect far outweighed any probative value. Nelson argued that the effect of admitting the convictions would be to prove that he had bad character. The trial court ruled that the prior convictions for possession of methamphetamine and for delivery of methamphetamine were admissible to show intent, knowledge, and lack of mistake.

During the trial, Officer Robbins's testimony was substantially the same as his testimony at the pretrial hearing on the motion to suppress. The contents of the Wal-Mart bag and the Marlboro Ultra Lights cigarette box containing the white pills were admitted into evidence, during his testimony. Robbins

testified that those items were associated with manufacturing methamphetamine and that the number of pills found in the car exceeded the legal limit for possession of psuedoephedrine. The police report indicated that there was a total of 497 pills.

The two Wal-Mart receipts were also entered into evidence. One of the receipts showed purchases made at the Rogers Wal-Mart on November 3, 2002, at 11:30 p.m., and the other receipt showed purchases made at the Fayetteville Wal-Mart on November 4, 2002, at 2:40 a.m. The receipt for November 3 showed purchases for paper towels, toilet paper, and light bulbs; however, the receipt did not show a purchase for the juice, and none of the other items from the receipt were found during the search.

Officer Webber's trial testimony was also similar to his pretrial testimony. He testified that, based on his experience and training, the items recovered during the search can be used to make methamphetamine. He also stated that the items could be considered drug paraphernalia, but he admitted that all of the things found had legitimate uses.

Jeff Bruce, a forensic chemist for the Arkansas State Crime Lab, testified that he received the juice bottle and that it contained two types of pills. He testified that each pill contained sixty milligrams of pseudoephdrine, and that there was a total of 310 pills in the juice container, which amounted to approximately 18.6 grams of psuedoephedrine. Bruce testified that the Marlboro cigarette box also contained two different types of pills. There was a total of 186 sixty-milligram tablets in the cigarette box, which amounted to approximately 11.1 grams of pseudoephedrine. The total amount of pseudoephedrine recovered from the two State's exhibits was 29.7 grams. According to Bruce's testimony, pseudoephedrine is precursor that can be converted into methamphetamine by extraction. He admitted that the ephedrine pills could be used for a sinus cold, but stated that no one would use 29.7 grams at one time to treat a sinus cold.

Detective Mike Henderson testified on behalf of the State about the process used to make methamphetamine from pseudoephedrine and about the use of the other items found in the car. Henderson explained that Wal-Mart has become active in identifying people who purchase items that may be used to manufacture methamphetamine. As a result, persons seeking to purchase these items either purchase a few and then wait a while before returning to purchase more, or visit more than one Wal-Mart in an effort to escape detection by Wal-Mart's employees.

Following Henderson's testimony, the trial court admitted State's Exhibit Eleven, entitled "Prior Methamphetamine Convictions of Jimmy Nelson" into evidence, and the State rested. Nelson then moved for a directed verdict on both counts, arguing that the State had failed to prove the elements of possession of drug paraphernalia with intent to manufacture and, as to the possession of pseudoephedrine, the State failed to prove that he possessed the pills. His motion was denied, and Nelson raised an objection to the jury instruction setting out accomplice liability. This motion was also denied.

Florence Morrison testified on Nelson's behalf. She testified that she was his fiancée and that she was expecting Nelson sometime around 4:30 a.m., that she did not know Kurt Stanley, and that he and Nelson did not have a relationship. Layvon Clark, Nelson's mother, testified that the Ford Taurus that Nelson was driving on the night of his arrest belongs to her and her boyfriend. She said that she rarely drove the car, and that her boyfriend used it most of the time. She stated that she had loaned the car to several other people in November 2002, including Wayne Beck who, according to Clark, is currently incarcerated for methamphetamine-related crimes. She denied that she owned the items seized during the search of her car.

Nelson testified on his own behalf. He testified that he was familiar with Stanley, but that they were not friends. He said that Stanley had asked for a ride to Fayetteville, and that he agreed to give him a ride because he was planning on visiting his fiancée in Fayetteville the next day. Nelson stated that Stanley had a backpack that was present in his car during their ride to Fayetteville and that it contained Stanley's tools and a propane tank that he carried around with him. The backpack was admitted into evidence during Nelson's testimony. Nelson stated that, when he picked Stanley up in Rogers, Stanley said that he needed to go to Wal-Mart. Nelson testified that he did not enter the store with Stanley and that he did not know what Stanley purchased. Nelson said that, when Stanley returned to the car from the Wal-Mart in Rogers, he had four or five Wal-Mart bags and that he just threw them on the back-seat floorboard. During this testimony, counsel for Nelson showed him a check apparently written to the Rogers Wal-Mart for the items that were identified on the receipt from that location. Nelson testified that the check did not belong to him and that he did not write the check.

When they arrived in Fayetteville, Stanley told Nelson that he was not able to get something that he needed from the Rogers Wal-Mart, and Nelson took him to the Wal-Mart in Fayetteville. Nelson testified that he sat in the car while Stanley went into the store and that he did not know what Stanley had purchased. Nelson said that as the two were leaving Wal-Mart, he was pulled over by the police. Nelson said that, until the police found the juice container with the pills and the other items found in the car, he had never seen them before, and that the items did not belong to him. On direct examination, Nelson admitted that he had pled guilty to three charges involving methamphetamine in 1988 and was sentenced for those crimes.

After Nelson rested, he renewed his directed-verdict motions, which were denied, and the State recalled Officer Robbins, who testified that he had not seen the backpack that was admitted into evidence during Nelson's testimony on the night he searched the vehicle. He also stated that he did not find several Wal-Mart bags and that he did not find any paper towels, toilet paper, dish soap, or any of those items that were on the Rogers Wal-Mart receipt in the car. Following this testimony, Nelson renewed his directed-verdict motions, which were again denied. The jury returned a guilty verdict on both counts, and Nelson appeals.

On appeal, Nelson challenges the sufficiency of the evidence supporting his convictions. Although he raises these arguments as his second point on appeal, preservation of Nelson's freedom from double jeopardy requires us to examine his sufficiency arguments before addressing trial errors. *Brown v. State*, 74 Ark. App. 281, 47 S.W.3d 314 (2001). A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003). On appeal from a denial of a motion for directed verdict, the sufficiency of the evidence is tested to determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is that evidence which is of sufficient force and character to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* Only the evidence supporting the guilty verdict need be considered, and the evidence is viewed in the light most favorable to the State. *Id.* It is well-settled that matters of credibility are within the sound province of the jury and will not be disturbed on appeal. *Johnson v. State*, 71 Ark. App. 58, 25 S.W.3d

445 (2000). Further, it is for the jury to resolve matters of inconsistencies in a witness's testimony. *Id.*

The record and abstract show that Nelson failed to make a proper directed-verdict motion. Arkansas Rules of Criminal Procedure 33.1(a) and (c) (2004) govern the procedure for challenging the sufficiency of the evidence at a jury trial. Rule 33.1(a) requires that the motion for directed verdict shall state the specific grounds therefor, and Rule 33.1(c) provides that a motion must specify the respect in which the evidence is deficient.

Moreover, an appellant must make a specific objection that apprises the trial court of his current argument and may not change the argument on appeal. *Foreman v. State*, 328 Ark. 583, 945 S.W.2d 926 (1997). Absent such a specific objection informing the trial court of the nature of the error alleged on appeal, this court will not reverse. *Id.* Furthermore, general objections are not sufficient to apprise the trial court of the specific deficiency, and therefore, are not sufficient to preserve an issue on appeal. *Ashlock v. State*, 64 Ark. App. 253, 983 S.W.2d 448 (1998). Finally, this court will not consider arguments raised for the first time on appeal. *Simmons v. State*, 90 Ark. App. 273, 205 S.W.3d 194 (2005).

In his motion made at the close of the State's case, Nelson made only a general directed-verdict motion on the charge of possession of drug paraphernalia with intent to manufacture. Nelson stated "the State has not met the burden of the elements of that offense." On appeal, he argues in essence that because all of the items found had legitimate uses and because there was no methamphetamine residue or instructions for making the drug found, the conviction was based upon speculation and conjecture. However, the general motion made at trial was insufficient to apprise the trial court of any alleged deficiencies of the State's case, and we cannot address the merits of this argument on appeal. *Ashlock, supra.* Regarding the possession of pseudoephedrine charge, Nelson's motion merely stated that the State failed to prove "that Jimmy Nelson possessed those pills." Again, this general motion does not apprise the trial court of a specific deficiency. *Id.* On appeal, Nelson argues that the State failed to show constructive possession or accomplice liability. These specific arguments were not made to the trial court, and we thus do not consider them. *Simmons, supra.*

Nelson also argues that the trial court erred in denying his motion to suppress the evidence found in his car because the search violated his right to be free from unreasonable searches and seizures pursuant to the Fourth and Fourteenth Amendments to the United States Constitution and Article 2 § 15 of the Arkansas Constitution.

When reviewing the trial court's denial of a motion to suppress, this court makes an independent determination based on the totality of the circumstances. *Lancaster v. State*, 81 Ark. App. 427, 105 S.W.3d 365 (2003). The appellate court will reverse a denial of a motion to suppress only if the trial court's ruling was clearly against the preponderance of the evidence. *Id.*

Nelson argues that the trial court erred in not finding that his arrest was pretextual and in failing to suppress the evidence obtained as a result of the pretextual arrest. In *Arkansas v. Sullivan*, 522 U.S. 769 (2001) (*Sullivan I*), the Arkansas Supreme Court had affirmed the suppression of evidence obtained as a result of pretextual arrest, rejected the State's argument that the holding in *Whren v. United States*, 517 U.S. 806 (1996) makes the "ulterior motives of police officers irrelevant so long as there is probable cause for the traffic stop," and denied the State's petition for rehearing. The Supreme Court accepted the State's petition for a writ of certiorari. *Id.*

The Supreme Court held that the Arkansas Supreme Court's decision was contrary to controlling precedent and reversed and remanded. The Supreme Court stated that its decision in *Whren* makes it clear that it will not entertain Fourth Amendment challenges based upon the subjective motivations of the officers. *Id.* The Court noted its decision in *United States v. Robinson*, 414 U.S. 218 (1973) wherein it stated, "a traffic-violation arrest . . . [will] not be rendered invalid by the fact that it was 'a mere pretext for a narcotic search.' " *Id.*

Accordingly, Nelson's challenge to his pretextual arrest under the Fourth and Fourteenth Amendments to the United States Constitution is without merit. Here, Robbins testified that he stopped Nelson because he ran a stop sign while leaving the Wal-Mart parking lot. Further, Nelson was unable to locate his proof of insurance when asked to do so, and was arrested for lack of proof of insurance. As stated in *Robinson, supra*, and reiterated in *Sullivan I, supra*, Nelson's traffic-violation arrest will

not be invalidated under the federal Constitution by the fact that it was a mere pretext for a narcotics search. *Sullivan I, supra.*

Nelson also refers to Article 2 § 15 of the Arkansas Constitution in the caption of his suppression argument. In *State v. Sullivan*, 348 Ark. 647, 74 S.W.3d 215 (2002) (*Sullivan II*), on remand from the Supreme Court, our supreme court determined that, under Article 2 § 15 of the Arkansas Constitution, pretextual stops are unconstitutional. The supreme court noted that there is no longer a pretext inquiry under federal law, but concluded that it could interpret the Arkansas Constitution more broadly than the federal court interprets the federal constitution. *Id.* However, Nelson did not raise the issue of the Arkansas Constitutional protection to the trial court. In his motion to suppress, Nelson referenced only the Fourth and Fourteenth Amendments to the United States Constitution and the "Arkansas Rules of Criminal Procedure."

On appeal, he now contends that the search was not authorized under the Arkansas Rules of Criminal Procedure and was "therefore in violation of [Nelson's] State Constitutional rights." Nelson cites to Ark. R. Crim. P. 12.1 and 12.4 concerning warrantless searches of a person or vehicle incident to lawful arrest, but makes no argument regarding the Arkansas Constitution. However, the trial court found that Nelson consented to the search after a valid, custodial arrest, and did not rely upon the rules cited by Nelson. Although the officer also testified that he believed that he had authority to search the vehicle incident to arrest, he testified unequivocally that it was not possible that Nelson objected to the search. Here, the testimony of the officer and Nelson was in conflict, and the trial court determined that Officer Robbins was more credible than Nelson on the issue of whether consent was given. Conflicts in testimony are for the trial judge to resolve, and the judge was not required to believe any witness's testimony, especially that of the accused, since he has the most interest in the outcome of the proceedings. *Sanders v. State*, 76 Ark. App. 104, 61 S.W.3d 871 (2001).

For his final point on appeal, Nelson argues that the trial court erred when it permitted the State to introduce his prior convictions from 1988 in its case in chief. The general rule is that evidence of other crimes by the accused, not charged in the indictment or information and not a part of the same transaction,

is not admissible at the trial of the accused. *Smith v. State*, 351 Ark. 468, 95 S.W.3d 801 (2003). It is axiomatic that evidence of prior misconduct is not admissible to show that the person on trial is a bad person and is therefore more likely to have committed the act in question. *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d 584 (1994).

However, pursuant to Arkansas Rule of Evidence 404(b), evidence of other crimes may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, and identity, or absence of mistake or accident. *Smith*, *supra*; Ark. R. Evid. 404(b) (2004). To be admissible under Ark. R. Evid. 404(b), the evidence must be independently relevant to the issue at hand, meaning that the evidence must tend to prove some material point rather than merely to prove that the accused is a criminal. *Smith*, *supra*. Then the evidence may be admissible with a proper cautionary instruction by the trial court to the jury. *Id.* Once it has been established that the evidence has independent relevance, the inquiry does not end. The trial court must then perform the balancing test required pursuant to Arkansas Rule of Evidence 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ark. R. Evid. 403 (2004). That is, the probative value of the evidence must not be outweighed by the danger of unfair prejudice. The trial court has broad discretion in deciding evidentiary issues and those decisions will not be reversed absent an abuse of discretion. *Smith*, *supra*.

In *Cary v. State*, 259 Ark. 510, 534 S.W.2d 230 (1976), the appellant was convicted of possession with intent to deliver heroin. The information alleged that the offense occurred on January 10, 1974. *Id.* On appeal, the appellant argued that the trial court had erred in admitting testimony that he participated in marijuana sales on November 22, 1971; May 3, 1972; and December 20, 1973, because the first two were too remote in time from the date he was alleged to have committed the crime charged. *Id.* The supreme court stated, "The matter of remoteness is addressed to the sound judicial discretion of the trial judge, which will be interfered with by a reviewing court only when it is clear that the questioned evidence has no connection with any issue in the case." *Id.* at 514, 534 S.W.2d at 234. *See also Holloway v. State*, 293 Ark.

438, 732 S.W.2d 796 (1987) (upholding admission of prior bad acts that had occurred eleven months prior); *Lincoln v. State*, 12 Ark. App. 46, 670 S.W.2d 819 (1985) (upholding admission of prior bad acts that had occurred one year earlier).

We can find no relevant Arkansas case involving admission of prior convictions after a lapse of fourteen years as occurred in this case, notwithstanding the inapposite Arkansas case cited and relied upon by the dissent.[1] And, we are neither persuaded nor barred by the other precedent put forward in the dissent. Unlike Ark. R. Evid. 609, which involves the use of prior convictions for impeachment, Ark. R. Evid. 404(b) does not have a ten-year limit on the admission of such convictions. However, the underlying rationale behind the exclusion of such old convictions must also apply to Rule 404(b). While it is true that the admission of remote convictions has been left to the sound discretion of the trial court, *see Cary, supra*, since the adoption of Rule 404(b) our appellate courts have held that remoteness is a factor to be considered when determining the probative value of evidence of a prior crime. *Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998) (holding that two years was not too remote). In this instance a fourteen-year lapse is so remote that the evidence is rendered significantly less probative, and the danger of unfair prejudice correspondingly outweighs any probative value. Here, the State relied on the old convictions to bolster a weak case, without regard to the significant lapse in time.

Moreover, although the 1987 offenses involved possession and delivery of methamphetamine, the 2002 charges were related to possession of pseudoephedrine and possession of paraphernalia with intent to manufacture. In order for evidence of prior bad acts to be relevant, the prior acts must be similar to the offense with which the defendant is charged. *Johnson v. State*, 333

[1] *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993), involved the admission of testimony about threats made to appellant's ex-wife "in the late 1970s and early 1980s" to kill her under circumstances similar to the death of the appellant's current wife in 1990, which the supreme court characterized as having been made "several years earlier." However, Brenk did not involve the remoteness of the prior acts and contained no discussions whatsoever of this issue. Moreover, the *Brenk* court relied upon *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), which involved more contemporaneous acts and likewise contained no discussion whatsoever on the issue of remoteness of the prior acts.

Ark. 673, 972 S.W.2d 935 (1998). The 2002 offenses are different in nature, as they are related to the actual manufacture, further lessening the probative value of the earlier convictions. We do not agree with the State's assertion that Nelson's prior convictions for possession and delivery of methamphetamine were necessarily probative of his intent to manufacture the drug. In sum, we agree that the prior convictions were improperly admitted during the guilt phase of Nelson's trial, and reverse and remand for new trial.

Reversed and Remanded.

GLOVER, NEAL and BAKER, JJ., agree.

VAUGHT and CRABTREE, JJ., dissent.

TERRY CRABTREE, Judge, dissenting. I dissent from the majority's opinion as I believe that appellant's prior 1988 convictions were properly admitted before the trial court pursuant to Arkansas Rule of Evidence 404(b). At trial, appellant defended his case by claiming that he was merely present in the vehicle that the police had searched. Appellant claimed that the drugs belonged to his passenger. Clearly, this defense raised issues of knowledge and intent. As a result, I believe that the trial court admitted appellant's prior bad acts to allow the State to prove appellant's knowledge and intent at the time of the traffic stop. *See Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998). I suggest that appellant's prior bad acts were admitted for a purpose other than proving his past bad character and the likelihood that his present behavior conformed to it.

To be admissible under Arkansas Rule of Evidence 404(b), evidence must be similar in kind and not overly remote in time to the crime charged. *See Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997). When admitted for the purpose of showing intent, the prior acts need not be duplicates, but must be sufficiently similar to support an inference of criminal intent. *United States v. Burkett*, 821 F.2d 1306 (8th Cir. 1987). In fact, the degree of similarity between the earlier crimes and the present one need not be striking. *Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001). I am convinced that appellant's prior bad acts were sufficiently similar in kind to the offenses charged in this case. Here, appellant's prior bad acts, possession and delivery of methamphetamine, involved the very type of crime involved in the instant offenses. The evidence of the prior convictions demonstrates appellant's knowledge of the methamphetamine manufacturing process based upon his hands-on experience with the substance.

Prior bad acts and the current offenses must not be too separated in time or the evidence will be considered unduly remote. *See United States v. McCarthy*, 97 F.3d 1562 (8th Cir. 1996), *cert. denied*; *Thompson v. United States*, 519 U.S. 1139 (1997) (holding a seventeen-year conviction not too remote in time); *United States v. Engelman*, 648 F.2d 473 (8th Cir. 1981) (holding thirteen-year-old offense not too remote in time); *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993) (admitting thirteen-year-old threats made to ex-wife). The length of time between the incidents clearly affects the relevance of the offered evidence, but there is no specific number of years beyond which prior bad acts are no longer relevant to the issue of intent. *See* Ark. R. Evid. 404(b). The Eighth Circuit applies a reasonableness standard to determine whether a prior offense occurred within a relevant time frame for purposes of Rule 404(b). *United States v. Green*, 151 F.3d 1111 (8th Cir. 1998). In the case at bar, approximately fourteen years had elapsed between appellant's 1988 convictions and his February 2002 arrest. As the Eighth Circuit has applied the reasonableness standard and deemed seventeen and thirteen-year-old offenses to be acceptable, *see Thompson, supra*; *Engelman, supra*, I believe that use of appellant's fourteen-year-old convictions is also reasonable.

Finally, the probative value of the evidence must not be substantially outweighed by unfair prejudice. *Carter v. State*, 295 Ark. 218, 748 S.W.2d 127 (1988). This determination lies within the sound discretion of the trial judge. *Id.* Here, appellant's prior convictions and the present offenses involved the intent element relating to the illegal substances. Thus, the probative value of the prior convictions was high. Furthermore, I cannot say that the probative value was substantially outweighed by any unfair prejudice as the trial court gave cautionary instructions when admitting the evidence.

Evidence of a defendant's prior bad acts may be admissible with a proper cautionary instruction by the court. *Abernathy v. State*, 325 Ark. 61, 925 S.W.2d 380 (1996). In this case, the trial court gave the jury two limiting instructions regarding the impermissibility of considering appellant's previous convictions as propensity evidence. I believe that the trial court carefully precluded the admission of certain possibly prejudicial aspects of appellant's prior convictions. Based upon the foregoing analysis, I cannot say that the trial court abused its discretion in allowing the admission of the 1988 convictions for a limited and proper purpose.

VAUGHT, J., joins.

Luis Eduardo RENDEROS *v.* STATE of Arkansas

CA CR 04-1056 213 S.W.3d 37

Court of Appeals of Arkansas
Opinion delivered September 14, 2005

Milligan Law Offices, by: *Kevin L. Hickey*, for appellant.

Mike Beebe, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The appellant in this criminal case was charged with sexual indecency with a child, a violation of Ark. Code Ann. § 5-14-110(a)(1) (Supp. 2003). After a jury trial, he was convicted of that offense, fined, and sentenced to imprisonment and community service. On appeal, he argues that his conviction is not supported by substantial evidence because there was no evidence that he "solicited" sexual contact with the victim. We disagree, and we affirm.

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Heape v. State*, 87 Ark. App. 370, 192 S.W.3d 281 (2004). Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Id.* A person commits sexual indecency with a child if, being eighteen years old or older, the person solicits another person who is less than fifteen years of age or who is represented to be less than fifteen years of age to engage

in sexual intercourse, deviate sexual activity, or sexual contact. Ark. Code Ann. § 5-14-110(a)(1). Appellant admits that he had sexual intercourse with the victim and that their ages meet the statutory requirements for the offense. The issue is simply whether appellant's conduct constituted "solicitation" of the victim to engage in sexual intercourse, deviate sexual activity, or sexual contact.

In *Heape v. State, supra,* we adopted a definition of "solicitation" for Ark. Code Ann. § 5-14-110, stating that:

> The definitions of the verb "solicit" in *Webster's Third New International Dictionary* 2169 (1993) include the following:
>
> > 3: to make petition to: ENTREAT, IMPORTUNE . . .; *esp*: to approach with a request or plea (as in selling or begging) . . .
> >
> > 4: to move to action . . .
> >
> > 7: to endeavor to obtain by asking or pleading: plead for . . .; also to seek eagerly or actively
> >
> > 10: to serve as a temptation . . . [.]

The gravamen of the offense set out in Ark. Code Ann. § 5-14-110(a) is the inducement of a child to engage in a sexual act. *Compare Gattem v. Gonzales,* 412 F.3d 758 (7th Cir. 2005). We do not think that the statute should be read so narrowly as to require that inducement be expressed verbally where there is evidence of unambiguous nonverbal inducement.[1] Here, appellant admitted at trial that he and the victim were alone in the attic of a garage when he pulled the victim's pants down and had sexual intercourse with her. The victim testified that she did not consent, repeatedly said "no" and attempted to pull her pants back up, but that appellant pinned her arms down by her side. We think that the finder of fact could reasonably conclude that the act of forcibly and

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[1] A nonverbal act was held to constitute solicitation in *People ex rel. Friedman v. Framer,* 208 Misc. 236, 139 N.Y.S.2d 331 (N.Y. Mag. Ct. 1954), where the court held that "[t]he only thing that is necessary is that the means employed for the asking of something, whether by oral or mute conduct, justify the person importuned or implored in treating the request as a serious request that such person be moved to action." 208 Misc. at 242, 139 N.Y.S.2d at 337.

persistently pulling a girl's pants down against her wishes while alone with her in a garage attic is unmistakably importuning her to commit sexual indecency, and we affirm.

Affirmed.

GLADWIN and GLOVER, JJ., agree.

GUARANTEED AUTO FINANCE, INC. *v.* DIRECTOR, ESD, *et al.*

E 04-377 213 S.W.3d 39

Court of Appeals of Arkansas
Opinion delivered September 14, 2005

Cypert, Crouch, Clark & Harwell, by: *R. Jeffery Reynerson*, for appellant.

Allan Pruitt, for appellee.

LARRY D. VAUGHT, Judge. Guaranteed Auto Finance, Inc., appeals from the decision of the Board of Review reversing the Arkansas Appeal Tribunal Hearing Officer. The Board of Review found that Melvin Flores voluntarily left his work for good cause connected to the work, and he was entitled to unemployment benefits. We agree and affirm.

Melvin Flores began working as a salesman for Guaranteed on January 14, 1999. In March and April of 2004, Flores attended several religious seminars and began to observe Saturday as the Sabbath. On May 17, 2004, Flores met with his regional manager, Mike Phillips, to discuss his situation and ask that he be allowed Saturday off work for worship. Flores explained that it was his deeply held religious belief that Saturday was a day of rest and that to work on that day would violate his moral beliefs. He offered to work on Sunday instead or to work Wednesday, his other day off. Although the company is not officially open for business on Sunday, Flores testified that some of the sales personnel come in and work extra hours on Sunday. He argued that although administrative and managerial personnel were not available on Sunday, it was possible for sales representatives to work on Sunday taking applications and drumming up additional business. However, Flores admitted that people who worked extra on Sunday were also required to work Saturday.

Until 2004, Flores had always worked on Saturday. Although every sales representative received two days off a week — Sunday plus one day during the week — all sales personnel were required to work on Saturday because of the amount of business conducted on that day. Flores had worked every Saturday since he was hired except for when he was off for vacation. Flores stated that this was not a problem for him in the beginning because he only recently began celebrating Saturday as the Sabbath.

Flores testified before the hearing officer that after meeting with Phillips, he waited a couple of weeks to receive news regarding what the company had decided to do. Flores stated that he then asked about the status of his request, and he was told nothing had been decided. Flores stated that he had started getting "antsy" because he was still working on Saturday, which he felt violated his religious beliefs. At one point, he asked his manager, Greg Adams, what to do. Flores stated that Adams said he did not want to see Flores fired but that was what would happen if he took Saturday off without permission. Adams told him to take the next Saturday off as a sick day, which Flores did. The next Friday, June 4, 2004, Flores met with John Holbert, who presented the company's refusal to accommodate Flores's request. Holbert explained to Flores that if he did not show up for work on Saturday, he would be fired. Flores then cleaned out his office and left. He did not work on Saturday and did not return to work on Monday.

John Holbert also testified before the hearing officer. He stated that the company was closed on Sunday and provided no administrative support on that day. He stated that the main reason for not being open on Sunday was to provide a positive work environment for his staff — to give them two days off a week, Sunday and one day during the week. Sunday was chosen as the day off for everyone because that was the day most of the company's suppliers and lenders took off. Holbert stated that as an accommodation, he offered Flores the opportunity to apply for any position within the company's other departments that did not work on Saturday. These departments included administration, shop, and detail. Holbert stated that Flores did not apply for a position, but Holbert admitted that he did not know if there was an available position in any of those departments at that time or not. He stated that the company could not have created a position for Flores if one did not exist. There was a high probability that Flores's salary would have been reduced significantly if a position had been open in another department. Holbert disagreed with

Flores's description of what would happen should Flores not show up for work the following Saturday. Holbert stated that he told Flores that if he did not show up for work, he would be treated in accordance with the employee handbook like anyone else who did not show up. Holbert stated that the first occurrence would warrant reprimand and the second would result in termination.

We must decide whether the Board of Review's decision to award Flores unemployment benefits was supported by substantial evidence. In unemployment compensation cases, the scope of review is governed by the substantial evidence rule. *Haig v. Everett*, 8 Ark. App. 255, 650 S.W.2d 593 (1983). We review the evidence in the light most favorable to the appellee, and if there is substantial evidence to support the decision by the Board of Review, it must be affirmed. *Id.* at 258, 650 S.W.2d at 595. Substantial evidence is defined as such relevant evidence as a reasonable person might accept as adequately supporting the conclusion. *Id.*, 650 S.W.2d at 595.

Arkansas Code Annotated section 11-10-513(a)(1) (Supp. 2005) provides 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." Under Ark. Code Ann. § 11-10-515(c) (Repl. 2002), factors to be considered when determining whether an employee had good cause to voluntarily terminate his or her employment under section 513 include: risk involved to his or her health, safety, and morals; physical fitness and prior training; experience and prior earnings; length of his or her employment; prospects for obtaining work in customary occupation; distance of available work from residence; prospects for obtaining local work. Good cause has been defined as "a cause that would reasonably impel the average able-bodied, qualified worker to give up his or her employment" and is ordinarily a question of fact for the Board of Review to determine. *Thornton v. Director*, 80 Ark. App. 99, 91 S.W.3d 523 (2002). As a prerequisite for receiving unemployment benefits, an employee is required to make every reasonable effort to preserve his job rights before leaving employment. *Booth v. Director*, 59 Ark. App. 169, 954 S.W.2d 946 (1997).

We recognized in *Haig* that the Supreme Court of the United States has held that conditioning availability of benefits upon a person's willingness to violate "cardinal principles" of their

religious faith effectively penalized the free exercise of constitutional liberties.[1] *Haig*, 8 Ark. App. at 257, 650 S.W.2d at 595 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)). The Supreme Court in *Sherbert* held that the lower court's ruling denying the claimant benefits forced "her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 404. Additionally, our opinion in *Haig* cites to *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), where the Supreme Court, relying on *Sherbert*, held that the denial of unemployment-compensation benefits violated the claimant's First Amendment right to the free exercise of religion. In that case, the Court stated that "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas*, 450 U.S. at 717–18.

■■ After a review of the record, we are satisfied that there is substantial evidence to support the Board's decision granting benefits to Flores on a finding that he voluntarily quit his last work for good cause. Flores left his job because his company's requirement that he work on Saturday conflicted with his religious belief that Saturday was the Sabbath. Flores requested an accommodation and attempted to resolve the matter before quitting; however, Guaranteed could not accommodate Flores because it required all its sales personnel to work on Saturday. Although Guaranteed argues that Flores did not make every reasonable effort to preserve his job rights because he did not apply for other positions within the company, there was no evidence presented

[1] It should be pointed out that our opinion in *Haig* affirmed the Board's denial of the claimant's compensation benefits. 8 Ark. App. at 258–59, 650 S.W.2d at 595–96. However, our decision was based on the fact that the claimant's reasons for voluntarily quitting his employment were personally motivated, rather than motivated by conduct mandated by his religious beliefs. Therefore, because the claimant was not required to choose between his job duties or his religious beliefs, he did not have good cause to terminate his employment.

that any other employment opportunities were available within the company at the time Flores left. Flores testified that it was his deeply held belief that working on Saturday violated the tenets of his religion. We agree with the Board that Flores had good cause to leave Guaranteed once his constitutionally protected religious beliefs diverged with his job requirements. Moreover, based on *Sherbert* and *Thomas*, Flores cannot be denied unemployment compensation solely because he chose his religion over his job. Therefore, we affirm.

Affirmed.

HART and NEAL, JJ., agree.

Charles McCLELLAND *v.* Joel M. MURRAY

CA 05-124 213 S.W.3d 33

Court of Appeals of Arkansas
Opinion delivered September 14, 2005

Compton, Prewett, Thomas & Hickey, L.L.P., by: *Matthew J. Shepherd*, for appellant.

Shackleford, Phillips, Wineland & Ratcliff, P.A., by: *Casey Castleberry*, for appellee.

KAREN R. BAKER, Judge. Charles McClelland appeals from an order of the Union County Circuit Court denying his petition to adopt his minor step-children, A.M. and S.M. McClelland argues that the circuit court erred in finding that the best interest of the minor children was served by denying his adoption petition and by finding that appellee Joel M. Murray had justifiable cause for his failure to communicate with his daughters. We reverse.

The facts in this case are largely not in dispute. At the time the adoption petition was heard, Charles McClelland had been married to Alicia McClelland for more than nine years. A.M. and S.M. are twin girls born of Alicia's previous marriage to Joel M. Murray. That marriage ended when the twins were eighteen months old. In the ensuing fourteen years, Murray had no contact with his children. He did, however, faithfully pay child support, and his obligation was current as of the date of the hearing. McClelland stipulated that regardless of whether the adoption was granted, A.M. and S.M. would continue to live with him.

At the hearing, McClelland testified that he had acted as a father to the twins since he married their mother and that he loved them with all of his heart. He stated that he was a Deacon at the First Baptist Church and that the girls have a "good Christian foundation and background." According to McClelland, A.M. and S.M. were excelling as students with 3.9 grade-point averages at Westside Christian School. McClelland asserted that he was proud of the girls, and regardless of the adoption, he considered them to be his daughters. He also claimed that he would not stand in the way of Murray contacting the girls if he adopted them.

Alicia McClelland testified that she consented to the adoption and wished that McClelland would become the twins' adoptive father. She confirmed that the girls last had face-to-face contact with Murray on Mother's Day of 1989, and he had not attempted to visit with them since that time. She asserted that Murray knew where her parents lived and could have ascertained her whereabouts if he had desired contact with the children. She claimed that if he had called, she would not have discouraged contact. Alicia opined that it would be in the girls' best interest to be adopted because McClelland "has been in their life for nine or ten years," taught them to drive, had been to every school activity, and had helped them to be active in the church. She stated that when McClelland married her, "he also married them." According to Alicia, the girls considered McClelland to be their father and even called him "Daddy." She also stated that if the adoption were granted, she would not prevent Murray from contacting the girls.

On cross examination, Alicia admitted that she sought restricted visitation in her divorce action and opposed allowing visitation at Murray's home out-of-state. She also admitted that she had made accusations of inappropriate sexual comments by Murray concerning her then-infant daughters.

Both S.M. and A.M. testified that they desired to be adopted by McClelland, that they considered him their father, and that they called him "Daddy." The girls confirmed that McClelland had been an active participant in their lives and that they had no contact with Murray.

Murray testified that he currently lived in New Jersey and was working for the government in a position that required him to have a top secret security clearance. He stated that at the time of his divorce from Alicia, he was living in Missouri and subsequently moved to Nevada. Although he and Alicia filed for divorce almost simultaneously, and although he never lived in Arkansas, he was advised that Arkansas was the proper forum for matters relating to the custody of the children. Ultimately, Murray came to Arkansas to establish child support and secure visitation. However, during the pendency of that action, he testified that Alicia levied allegations against him that he might "possibly cause bodily harm to my daughters in a sexual nature." Fearing that this type of allegation would jeopardize his top secret security clearance and deciding it was in his daughters' best interest not to put them through the kind of ordeal associated with fighting the allegations, he chose simply not to have contact with his daughters. He felt that in order to

exercise visitation, he would have to fly to Arkansas and stay in a hotel, and to completely protect himself from spurious allegations, he would have to take the girls to a doctor to be examined before and after the visit. Further, Murray stated that he contacted Alicia approximately a year after the divorce and found her to be uncooperative and threatening. He also stated that he tried contacting Alicia's parents, but Alicia's mother told him that she had been instructed not to tell him where the girls were. He asserted that his relationship with his daughters early in their lives was "taken away" from him, and he intended to reestablish a relationship with the girls when they were in college so they could at least know who their father was. Murray characterized his decision to relinquish his right to visit the girls as putting them first, his job second, and himself third. Regarding telephonic communication, he admitted that he last attempted it when the girls were twenty-two months old and at that time, "they had no clue of how to communicate with [him]." He also admitted that he did not attempt to write to his daughters and that he last sent them Christmas presents in 1990.

After taking the matter under advisement, the trial judge denied the adoption petition. He found "reasonable" Murray's belief that sexual misconduct allegations would require that he have the children medically examined before and after his visitation made such visitation "not feasible" and that such allegations would also jeopardize his security clearance and thus his employment. Accordingly, the trial court ruled that Murray's lack of contact with his children was justified. The trial court noted, however, that "such a complete forbearance is excessive and has its risks" in that when the children turned eighteen, Murray's consent to the adoption would not be required. The trial judge also found that the children were "well adjusted in their academic, religious, and social lives, excelling and performing responsibly." However, he reasoned that the children's "accomplishments" were gained without the benefit of adoption and that therefore "their performance will continue at the same level with or without adoption." On this basis, the trial judge concluded that there was no evidence presented that the adoption would be in the best interest of the children.

On appeal, McClelland argues that the trial court erred in finding that the best interests of the children was served by denying the adoptions, contending that despite the fact that the twins will "no doubt continue to be outstanding young ladies," the trial

court "overlooks" that there is "something to be said" for having a "legally recognized father-daughter relationship with the man who raised you." He contends that it is in the girls' best interest to have a parent-child relationship because he has "been there for them" and they consider him their father, rather than to preserve a relationship with a man to whom they have not talked and whom they had not seen in over fourteen years. McClelland also argues that the circuit court erred in finding that Murray had "justifiable cause" for his failure to communicate with the twins. He cites *Ray v. Sellers*, 82 Ark. App. 530, 120 S.W.3d 134 (2003), for the proposition that failure to communicate without justifiable cause is "one that is voluntary, willful, arbitrary, and without adequate excuse," and that not even a total failure to communicate with a child is required under Ark. Code Ann. § 9-9-207(a)(2) (Supp. 2003). Regarding the latter point, he characterizes Murray's failure to communicate with his children as not merely significant, but "total." Regarding the former standard, he argues that Murray's failure to communicate was voluntary and willful because it was his own decision and although he was granted visitation rights he chose not to exercise them. McClelland characterized the lack of communication as "arbitrary and without adequate excuse" because Murray claimed to be concerned over the possibility of allegations of sexual misconduct, which had not previously been made. We agree.

Arkansas Code Annotated section 9-9-207(a) provides in pertinent part that consent to adoption is not required of:

> (2) [a] parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree[.]

It is settled law that adoption statutes are strictly construed, and a person who wishes to adopt a child without the consent of the parent must prove that consent is unnecessary by clear and convincing evidence. *In re Adoption of Lybrand*, 329 Ark. 163, 946 S.W.2d 946 (1997). A finding concerning the necessity of a parent's consent in an adoption proceeding will not be reversed unless clearly erroneous. *In re Adoption of K.F.H. and K.F.H.*, 311 Ark. 416, 844 S.W.2d 343 (1993). We view the issue of justifiable cause as factual but one that largely is determined on the basis of the credibility of the witnesses.

This court gives great weight to a trial judge's personal observations when the welfare of young children is involved. *Id.* at 423, 844 S.W.2d at 347.

We are mindful that Murray testified, and the trial judge found it credible, that even an allegation of sexual misconduct involving his minor children would jeopardize his security clearance and, consequently, his employment. The trial court noted that this total lack of contact was "excessive," and we agree. Further, although Murray had the means to establish supervised visitation and enforce his visitation rights through the court, he instead abandoned all contact with the girls. However, no sexual abuse allegation could arise from a letter, a phone call, or a birthday present. We hold that this failure to communicate was not justifiable. Because Murray failed to significantly communicate with his children for more than one year, without justifiable cause, his consent to the adoption was not required under Ark. Code Ann. § 9-9-207.

We also reverse the trial court's finding that the best interests of the children were served by denying the adoptions. We simply do not subscribe to the trial judge's logic that because the children have thrived without being adopted by McClelland, there was no advantage in formalizing his status as their father. We hold that under these circumstances, the best way to guarantee that the children continue in the current successful nurturing environment was to grant McClelland's adoption petition. We therefore reverse and remand this case to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

ROAF and BIRD, JJ., agree.

Deborah Broadway HUTCHESON *v.*
STATE of Arkansas

CA CR 04-1034 213 S.W.3d 25

Court of Appeals of Arkansas
Opinion delivered September 14, 2005

[Rehearing denied October 26, 2005.]

Dustin D. Dyer, for appellant.

Mike Beebe, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Deborah Broadway Hutcheson was charged as an accomplice for two counts of rape and one count of second-degree sexual assault for acts committed against her daughter, A.M.H. A Saline County jury found Hutcheson guilty of all three counts and recommended a sentence of twenty-five years for each of the rape convictions and ten years on the second-degree sexual assault conviction. The jury also recommended that the sentences be consecutive. The trial judge accepted the jury's recommendations, and Hutcheson was sentenced to a total of sixty years' imprisonment. On appeal, Hutcheson argues that the trial court erred (1) in denying her motions for directed verdict because there is insufficient evidence to establish accomplice liability; (2) in overruling her objections during voir dire and allowing the State to improperly commit the jury to a position on factual situations; (3) in ruling that her co-defendant's statements made to the investigating officer were admissible as an exception to the hearsay rule; and (4) in instructing the jury on accomplice liability by instructing the jury that she had a legal duty to prevent criminal acts of sexual abuse as set out in Ark. Code Ann. § 9-27-303(35) (Supp. 2003). We find no merit to these arguments, and we affirm.

Hutcheson is the mother of two children: A.M.H., the victim in this case, and Michael Hutcheson. Sometime in 1995, Hutcheson permitted Kenneth Ragan to live with her and her two children. For two years, Ragan sexually assaulted A.M.H., who was then eight or nine years old. Although A.M.H. reported the abuse to Hutcheson, Hutcheson did nothing, and no action was taken until A.M.H. reported the rapes to her school counselor. School officials reported the abuse to the Department of Human Services, and DHS opined that Hutcheson had been wrong in failing to report the abuse of her child. Charges were filed against Ragan, and he was convicted and incarcerated for the crimes committed against A.M.H. and another child.

Shortly thereafter, Hutcheson permitted Gary Anderson and his mother, Maxine Anderson, to live with her family. Anderson also sexually assaulted A.M.H., then ten years old, for a period of approximately five years. Hutcheson again turned a deaf ear to her daughter's complaints, opting instead to take A.M.H. to the doctor to get birth-control pills. After Hutcheson refused to help her, A.M.H. again reported the abuse to her school officials, and another DHS investigation was initiated. When Hutcheson learned that DHS had been contacted, she took A.M.H. and Michael and fled from Garland County to Benton, in Saline County. Although Anderson had been jailed for the sexual-assault allegations, upon his release, Hutcheson permitted him to move back with her family in Benton. Each time A.M.H. told Hutcheson about the assaults, Hutcheson instructed her not to tell anyone about what had happened.

When A.M.H. reported an incident of rape by use of a bottle to Hutcheson, Hutcheson refused to listen to A.M.H. and refused to seek medical attention for the child even though A.M.H. reported to her mother that she was bleeding and in pain. When Maxine Anderson witnessed Gary Anderson raping A.M.H., she reported the incident to Hutcheson, and A.M.H. asked Hutcheson to repair the door to her bedroom so that she could keep Anderson out. Hutcheson refused, and she did not call the police or seek medical attention for her A.M.H.

Approximately two months following the bottle incident, Anderson went to jail, and Hutcheson permitted Ragan to move back in with her and her children. Even though Ragan had already been convicted of molesting A.M.H. and was classified as a level-three-sex offender, Hutcheson allowed him to keep some of his belongings in A.M.H.'s room and sleep there on a few occasions. When asked why she permitted Ragan to sleep in A.M.H.'s room over her protests, Hutcheson responded, "Because really I didn't care." While living with the Hutchesons, Ragan was employed delivering newspapers. On at least four occasions, Hutcheson forced A.M.H. to accompany Ragan on his paper route from Benton to Hot Springs even though A.M.H. stated that she did not want to go, and the route lasted from 10:30 p.m. until 5:00 a.m. and A.M.H. had to awake for school at 7:00 a.m. During the drive from Benton to Hot Springs, Ragan molested A.M.H., then age fifteen, and on at least one occasion he pulled over and raped her. These incidents were also reported to Hutcheson, who again did nothing.

Following Ragan's arrest, Hutcheson gave a taped statement, in which she admitted that she was jealous of her daughter; that she did nothing when her daughter reported that Anderson and Ragan were assaulting her; that she did not care that A.M.H. was being assaulted because she was jealous of her; that she refused to confront her daughter's assailants because she feared that they would leave; and that she needed Ragan and Anderson for transportation and income. During the statement, Hutcheson also admitted that she used A.M.H. to keep men around the house and to keep income coming in. Hutcheson was tried and convicted in the Saline County Circuit Court on April 1, 2004, and this appeal ensued.

For her first point on appeal, Hutcheson argues that the trial court erred in denying her motions for directed verdict because there is insufficient evidence establishing accomplice liability. For her fourth point on appeal Hutcheson argues that the trial court erred in instructing the jury on accomplice liability by instructing them that she had a legal duty to protect A.M.H. from criminal sexual acts as set out in Arkansas Code Annotated § 9-27-303(35) (Supp. 2003). Because these two points are related, we have discussed them together.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Lowry v. State*, 90 Ark. App. 333, 205 S.W.3d 830 (2005). On appeal from the denial of a motion for directed verdict, the sufficiency of the evidence is tested to determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Circumstantial evidence may provide the basis for support of the appellant's conviction, but it must be consistent with the appellant's guilt and inconsistent with any other reasonable conclusion. *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004). Substantial evidence is that evidence which is of sufficient force and character to compel a conclusion one way or the other beyond suspicion or conjecture. *Lowery, supra.* This court considers only the evidence supporting the guilty verdict, and the evidence is viewed in the light most favorable to the State. *Id.* Determinations of credibility are left to the jury. *Nelson, supra.*

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 solicits, advises,

encourages, or coerces the other person to commit it; or aids, agrees to aid, or attempts to aid the other person in planning or committing the offense; or having a legal duty to prevent the commission of the offense, fails to make proper effort to do so. Ark. Code Ann. § 5-2-403(a)(1)-(3) (Repl. 1997). Factors relevant in determining whether a person is an accomplice include the presence of the accused near the crime, the accused's opportunity to commit the crime, and association with a person involved in the crime in a manner suggestive of joint participation. *Releford v. State*, 59 Ark. App. 136, 954 S.W.2d 295 (1997). Typically, mere presence or negative acquiescence and passive failure to disclose a crime are neither separately nor collectively sufficient to make one an accomplice. *Lear v. State*, 278 Ark. 70, 643 S.W.2d 550 (1982). Further, knowledge that a crime is being or is about to be committed usually cannot be said to establish accomplice liability; nor can the concealment of knowledge, or the mere failure to inform the officers of the law when one has learned of the commission of a crime. *Id.* In short, *absent a legal duty*, presence, acquiescence, silence, knowledge, or failure to inform an officer of the law is not sufficient to make one an accomplice. *Scherrer v. State*, 294 Ark. 227, 742 S.W.2d 877 (1988).

In this case, Hutcheson was convicted as an accomplice of two counts of rape and one count of second-degree sexual assault.[1] On appeal, she argues that the trial court's ruling is erroneous because the State did not show that she aided, or agreed to aid, attempt to aid, solicit, advise, or encourage Anderson or Ragan in their acts against her daughter. Relying on *Scherrer, supra*, Hutcheson first points out that mere presence at the scene of a crime does not make her an accomplice and further asserts that

[1] A person commits rape if she engages in sexual intercourse or deviate sexual activity with another person: by forcible compulsion; or who is incapable or consent because he or she is physically helpless, mentally defective, or mentally incapacitated; or who is less than fourteen years of age. Ark. Code Ann. § 5-14-103(a)(1)(A)-(C) (Supp. 2003). A person commits sexual assault in the second degree if the person: engages in sexual contact with another person by forcible compulsion; engages in sexual contact with another person who is incapable of consent because the person is physically helpless, mentally defective, mentally incapacitated; being eighteen years of age or older engages in sexual contact with another person, not the person's spouse, who is less than fourteen years of age. Ark. Code Ann. § 5-14-125 (Supp. 2003).

neither her knowledge that the crimes had been committed, nor her concealment of knowledge makes her an accomplice. We disagree.

In *Scherrer, supra*, the appellant was found guilty of first-degree murder for the rape and murder of Debbie Watts. Terry Harrison, the appellant's accomplice, and Billy Ivey were the principal witnesses at the trial. *Id.* Their testimony essentially established that the appellant raped Watts, cut her throat, and then put her body in a nearby canal. *Id.* The supreme court held that the evidence showed that Harrison was clearly an accomplice but that Ivey was not. *Id.* The evidence established that Ivey was present at the scene, witnessed the crime, and failed to notify the police, but did not participate. *Id.* The jury found that Ivey was not an accomplice, and the supreme court affirmed. *Id.*

The proposition set out in *Scherrer, supra*, is correct: mere presence or knowledge, or failure to act, does not make one who, without a legal duty to do so, an accomplice. However, that is not the circumstance in the case at bar, and the *Scherrer* holding is not applicable to this case. Hutcheson, as A.M.H.'s parent, had a legal duty to protect A.M.H. from Ragan and Anderson, and her silence, knowledge, concealment, and failure to inform law enforcement officers of the sexual assaults committed against her daughter makes her an accomplice to those assaults. An accomplice is someone who has a legal duty to prevent the commission of an offense and fails to make a proper effort to do so. As the supreme court stated in *Burnett v. State*, 287 Ark. 158, 697 S.W.2d 95 (1985) (overruled on other grounds), each parent has a duty to prevent injury to their child. Accomplice liability for permitting child abuse has also been upheld in *Williams v. State*, 267 Ark. 527, 593 S.W.2d 8 (1980). The supreme court held that the evidence sufficiently established that the appellant committed first-degree battery upon her ten-month-old daughter. *Id.* The court noted that the man with whom the appellant lived was abusing the child; that there was no doubt that the appellant could not have been around the child without knowing of the injuries; and that our courts no longer make a distinction between the principal and accessory. *Id*; *see also Burnett, supra* (stating that the evidence of abuse was overwhelming; that the evidence shows that both parents could not have been ignorant of the abuse; and that each parent had a duty to prevent injury to the child).

Here, Hutcheson had a legal duty to protect A.M.H. from Ragan and Anderson. There is no doubt that Hutcheson was aware that the two men were raping her daughter at various times when the girl was between eight or nine and fifteen years of age. Hutcheson admitted that A.M.H. told her of the assaults and, at one time, requested that a lock be put on her door. Maxine Anderson told Hutcheson that she observed her son engaging in sexual intercourse with A.M.H., and A.M.H. verified her allegation. Despite the fact that Ragan had served time for sexual assault upon A.M.H., Hutcheson allowed him to move in with them and forced A.M.H. to accompany him on an overnight paper route. Hutcheson admitted that she moved from one county to another to evade DHS's investigation after being told that she had been wrong in failing to report the sexual abuse of her daughter. Because Hutcheson had a legal duty to protect A.M.H. when she became aware of the offenses being committed against her daughter, and because she concealed her knowledge and failed to act, she is an accomplice to those offenses committed by Ragan and Anderson. *Burnett*, *supra*; *Williams*, *supra*.

Likewise, we find that it was not error for the trial court to give the jury an instruction regarding parental duty to protect children from abuse. Hutcheson argues that the trial court abused its discretion by instructing the jury concerning Hutcheson's legal duty to protect her child from abuse, by permitting the State to modify the model jury instruction on accomplice liability. Relying on Ark. Code Ann. § 9-27-303 (Supp. 2003), the jury was instructed:

> A parent has a legal duty to prevent the abuse of her child when the parent knows or has reasonable cause to know the child is or has been abused. A parent has a legal duty to take reasonable action to protect her child from abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness where the existence of this condition was known or should have been known. A parent has a legal duty to appropriately supervise her child and prevent the child from being left alone at an inappropriate age or in inappropriate circumstances which put the child in danger.

Hutcheson essentially argues that this jury instruction extends accomplice liability and allows courts to criminally punish on the basis of "bad parenting."

An AMCI instruction is to be used unless the trial judge finds that it does not accurately state the law. *Love v. State*, 281 Ark. 379, 664 S.W.2d 457 (1984). If there is no instruction on a subject upon which the judge determines the jury should be instructed, an appropriate instruction can be given. *Id.* Because the AMCI instruction did not contain a definition of parental duty, and because the jury should have been instructed regarding Hutcheson's legal duty to protect her child, the trial court did not abuse its discretion in permitting the modified instruction.

Lastly, under this point, Hutcheson argues that the trial court's admission of an order terminating her parental rights to A.M.H. was so prejudicial that it denied her due process of the law because the jury was bound to find that she had violated her legal duty to A.M.H. because a court had already made that determination. The termination order was admitted into evidence without objection, and Hutcheson cannot now complain on appeal. *London v. State*, 345 Ark. 313, 125 S.W.3d 813 (2003).

For her second point on appeal, Hutcheson argues that the trial court improperly permitted the State to ask inappropriate questions during voir dire in an attempt to get each juror to commit to a vote of guilty based on similar fact patterns before the jury had heard evidence in the instant case. During voir dire, the prosecutor asked the jury several questions relating to parental duty. For example, the prosecutor asked a juror whether a mother should be held accountable if something happened to her baby while she was passed out after taking methamphetamine. The juror responded in the affirmative. The prosecutor also asked whether the jurors agreed that teachers have a duty to protect children while they are in their custody and whether the jurors agreed that our society has established laws to protect children because they cannot protect themselves. The jury agreed.

The purposes of voir dire examination are to discover if there is any basis for challenges for cause and to gain knowledge for the intelligent exercise of peremptory challenges. *Nutt v. State*, 312 Ark. 247, 848 S.W.2d 427 (1993). Those purposes do not include an attempt to commit the jurors to a decision in advance. *Id.* "Prospective jurors may not be questioned with respect to a hypothetical set of facts expected to be proved at trial and thus commit the jury to a decision in advance, but . . . they may be questioned . . . about their mental attitude toward certain types of evidence, such as circumstantial evidence." *Id.*; *see also*

Haynes v. State, 270 Ark. 685, 66 S.W.2d 563 (1980) (holding that it was improper to excuse a juror for cause where she commented during voir dire that she was unaware of whether she would be able to impose the maximum sentence without hearing all of the evidence). The conduct of voir dire is left to the broad discretion of the trial court. *Sharp v. State*, 90 Ark. App. 81, 204 S.W.3d 68 (2005). Unless the trial court's discretion is clearly abused, it will not be reversed. *Sanders v. State*, 278 Ark. 420, 646 S.W.2d 14 (1983).

It appears that the State was merely posing questions to the jury in an effort to establish that the jury pool understood the concept of parental duty, a key issue in the instant case. The questions posed by the prosecution thus were a permissible use of voir dire examination. Because the trial court is given broad discretion over the conduct of voir dire, we affirm. Moreover, Hutcheson never requested an admonition or mistrial, and she, therefore, cannot demonstrate prejudice. *Sanders, supra.*

For her third point on appeal, Hutcheson argues that the trial court erred in admitting statements that Ragan, her co-defendant, made to Randy Gibbins, the investigating detective. During the trial, Gibbins testified that he investigated A.M.H.'s allegations that Ragan had sexually assaulted her during the paper-route trips from Benton to Hot Springs. During his investigation, Gibbins spoke with Ragan regarding the allegations, and a statement was taken. Over Hutcheson's objection, Gibbins testified that he showed Ragan a map and that Ragan showed him where the specific acts had taken place in Saline County. Gibbins also testified that Ragan admitted that he had raped A.M.H. in Saline County. Hutcheson also objected to this testimony, and the trial court allowed the testimony pursuant to the statement-against-interest exception to the hearsay rule.

Admissibility of evidence is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Taylor v. State*, 88 Ark. App. 269, 197 S.W.3d 31 (2004). 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) (2005); *Taylor, supra.* Hearsay testimony is gener-

ally inadmissible. Ark. R. Evid. 802 (2005); *Taylor, supra.* Rule 804(b)(3) (2005) allows for the admission of a statement made by an unavailable[2] declarant, which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, that a reasonable man in his position would not have made the statement unless he believed it to be true. Notwithstanding that exception, the last sentence of Rule 804(b)(3) provides that a statement or confession offered against the accused in a criminal case, made by a co-defendant or other person implicating *both* himself and the accused, is not within the statement-against-interest exception to the hearsay rule. Ark. R. Evid. 804(b)(3); *Jones v. State*, 45 Ark. App. 28, 871 S.W.2d 403 (1994) (holding that the trial court did not err in admitting the witness's testimony where the court excluded any evidence of the declarant's statement implicating the appellant, and where no "statement" was offered to prove the truth of the matter asserted); *Burkett v. State*, 40 Ark. App. 150, 842 S.W.2d 857 (1992) (reversing and remanding the case for new trial where the trial court admitted the appellant's girlfriend's statement at his trial for possession of a controlled substance and her statement was offered against the appellant, implicated them both, and therefore did not fall within the statement-against-interest exception to the hearsay rule).

Hutcheson's reliance on *Jones v. State, supra*, for her assertion that a statement or confession by a co-defendant or other person implicating himself is not within the statement-against-interest exception to the hearsay rule, is misguided. Both *Jones, supra*, and *Burkett, supra*, make it clear that the last sentence of Rule 804(b)(3) requires that the declarant's statement be offered against the accused and implicate both the declarant *and* the accused to take it outside the exception. In *Jones, supra*, the court noted that the trial court excluded any evidence implicating the appellant, and found that the appellant's reliance on Rule 804(b)(3)'s final sentence was thus unavailing. Similarly, Ragan's statement that he

[2] Ark. R. Evid. 804(a) (2005). We note that it does not appear that the trial court found that Ragan was unavailable at Hutcheson's trial. However, she did not object to the State's reliance on Rule 804(b)(3), which requires that the declarant be unavailable.

raped A.M.H. in Saline County did not implicate Hutcheson, and her reliance on the last sentence of Rule 804(b)(3) and the *Jones* holding is likewise unavailing.

Affirmed.

BIRD and BAKER, JJ., agree.

Sue MONK *v.* Judy GRIFFIN

CA 04-419 213 S.W.3d 651

Court of Appeals of Arkansas
Opinion delivered September 21, 2005

Keith N. Wood, for appellant.

William Randal Wright, for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Sue Monk, appeals from the circuit court's order approving a final accounting, final distribution, and payment of fees in the estate of Ruby C. Griffin.[1] On appeal, appellant argues that appellee, Judy Griffin, who

[1] This case began as a guardianship of Ruby Griffin's estate in which appellee was appointed guardian of the estate. Following Ruby Griffin's death, appellee and appellant were appointed co-executrixes of the estate, and appellee, without filing an inventory or

was Ruby Griffin's guardian and later the co-executrix of Ruby Griffin's estate, improperly spent funds from a certificate of deposit held jointly by appellant and Ruby Griffin that was cashed but not spent by appellee during the eleven days preceding Ruby Griffin's death. Further, appellant contends that appellee, in her capacities as guardian and as co-executrix, improperly spent funds from the estates, including expenditures on the farm where appellee resided and that was devised to her through Ruby Griffin's will. Finally, appellant challenges the award of attorney fees. We reverse and remand.

Only one hearing was held and that was on appellee's petition for approval of the "First and Final Accounting" in the decedent's estate administration, which was filed January 13, 2003, just short of two years after Ruby Griffin's death. Appellee testified that she and appellant were sisters and, as provided by their mother's will, their mother's sole beneficiaries. According to appellee, her mother owned a cattle farm and the residence — neither of which were included in the accounting — where appellee had resided with her mother for fifty years. Her mother had a stroke on June 24, 1998, and she was placed in a nursing home, never returning to the residence. Appellee was appointed guardian in August of 1999, and according to appellee, she assisted her mother in her care two to three times a week.

Appellee discussed a number of payments she made during the guardianship. She paid $1394.29 to Still's Auto Service for repairs on a car and a farm truck owned by her and her mother, which she testified were proper expenditures for the maintenance of her mother's property during the time she was acting as guardian. She also testified that while acting as her mother's guardian, she paid $3593.11 for the management and maintenance of her mother's property. These expenditures included items such as funds for the repair of a water pump; water, gas, and electric utility payments; and payments to Terminix, an appliance store, and a plumbing business. She testified that these expenses were proper for the maintenance of the property while her mother was in the nursing home. She further stated that she was "spending my money mostly, when it played out I didn't see anything wrong with spending some of that money and besides she would expect

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obtaining an approval of any accounting in the guardianship case, probated the estate as part of the same case. Appellee filed three accountings, two in the guardianship and one in the decedent's estate.

me to spend some of the money on the utilities because I was spending money for everything else out of there out of my check." She stated that her mother was not living there but that it was her mother's house. She also admitted that she wrote herself several checks. She testified that "[t]here was things that I needed out there to work with and my mother did not care, she already knew what I did. I didn't take money from her. Every once in a while when I took money she knew about it." She testified that she did not know whether her mother benefitted from this but that the farm benefitted.

Appellee also testified that on February 13, 2001, she was maintaining a banking account numbered 758558 for the payment of her mother's nursing-home expenses. On that day, she transferred to that account funds from a certificate of deposit, numbered 16822, in the amount of $19,960.53, that was held jointly by her mother and appellant with rights of survivorship. She testified that she did so because there were not enough funds in the bank account to pay for the next month of nursing-home charges. She acknowledged that there were other certificates of deposit that she could have placed in the account, but that they were of larger amounts, and that the certificate of deposit she used would have matured within a month. Her mother, however, died on February 24, 2001, and she did not spend any of the funds from the certificate of deposit prior to her mother's death.

In March 2001, following her mother's death, appellee opened another account numbered 768154, which she described as the farm account. According to appellee's first and final accounting, she transferred $20,016.15 into the new account. The transfer included the funds that appellee obtained when she cashed certificate of deposit 16822. From March 2001 to August 27, 2002, appellee deposited a total of $40,129.32 into that account. During that time, she spent all the money in that account except for $3102.33.

She testified that she put the funds from the certificate of deposit into that account "to take care of things on the farm." She stated that she "had one check coming in that was mine. I had to pay my bills and those bills too." She acknowledged that her mother's will provided that she would inherit the farm, the cows, and the farm implements. As for the certificate of deposit, she stated that it was her mother's money and she spent it on her mother for what she needed and that appellant was entitled to the remainder. She further stated that after her mother died, she

continued to expend funds on the farm, just as she did prior to her mother's death. Finally, she acknowledged that all farm equipment and implements belonged to her and that everything spent on them since her mother's death was for appellee's benefit only.

In its ruling, the court stated that appellee did not have to return any funds because the funds were paid on the farm, which the court concluded remained estate property. The court also stated that the guardian and personal representative had an obligation to maintain the estate property and spend money on the farm. The court further found that the attorney fees were fair for the work done on behalf of the estate. In an order filed December 19, 2003, the court granted appellee's petition for approval of the accounting and distribution of the estate and for payment of attorney fees.

On appeal, appellant argues that the court erred in ruling that, following their mother's death, appellee properly spent the funds from the certificate of deposit. As we have noted, the certificate was held jointly by appellant and her mother with rights of survivorship. Eleven days before her mother's death, appellee withdrew the funds from the certificate and deposited the funds into a separate account for payment of nursing-home expenses. The funds were not spent prior to her mother's death; instead they were transferred into a new account and spent after her death on maintenance of the farm.

Even though one has a right to withdraw funds from a joint bank account, a joint tenant may not, by withdrawing funds in a joint tenancy, acquire ownership to the exclusion of the other joint tenant. *Dent v. Wright*, 322 Ark. 256, 909 S.W.2d 302 (1995). When one withdraws in excess of his moiety, he is liable to the other joint tenant for the excess withdrawn. *Id.*; *Hogan v. Hogan*, 313 Ark. 374, 855 S.W.2d 905 (1993). We are mindful that appellee, as guardian of her mother's estate, could withdraw the funds from the certificate of deposit to pay for her mother's nursing-home expenses. *See Brasel v. Estate of Harp*, 317 Ark. 379, 877 S.W.2d 923 (1994). But here, her mother died, and the funds were not used for the purpose of paying the nursing-home expenses. Rather, appellee placed the funds in a farm account to spend on the farm, which was devised to appellee in her mother's will.

As noted by Justice Newbern's concurrence in *Brasel* in his examination of cases from other states, a "guardian of the estate of

an incompetent person does not become the alter ego of the ward and has no authority to change an act by which the ward exercised personal discretion before becoming incompetent." *Brasel*, 317 Ark. at 383, 877 S.W.2d at 926. Here, appellant was entitled to her moiety in the funds upon her mother's death, which would have been the entire sum, as it was not spent on Ruby Griffin. Otherwise, appellee as guardian would have effectively changed decisions made by the parties' mother before she became incompetent, under the guise of gathering in the assets of their mother's estate.

Appellee argues that the case of *South v. Smith*, 326 Ark. 774, 934 S.W.2d 503 (1997), is similar to this case. That case, however, did not concern, as here, withdrawal of funds in excess of a joint tenant's moiety. Rather, in *South*, the withdrawal of funds by the joint tenant was consistent with the joint tenant's survivorship interest in the account. There, an estate sought funds from a certificate of deposit held by the deceased and a joint tenant. The court noted that upon the decedent's death, the funds properly went to the joint tenant and that even if the joint tenant withdrew the funds before the decedent's death, it did not terminate the joint tenant's survivorship right in the property. The court concluded that "[j]oint accounts are often used as substitutes for testamentary disposition, and people who establish such account must be able to know with certainty that the courts will follow their desired disposition of their property." *South*, 326 Ark. at 784, 934 S.W.2d at 508. We observe that *South* instead supports our conclusion that appellant's survivorship right in the funds from the certificate of deposit remained even after the funds were withdrawn. We reverse and remand on this point.

Appellant also argues that, following their mother's death, appellee improperly spent funds on the farm. Appellee argues that Ark. Code Ann. § 28-49-101(b)(2) (Repl. 2004) permits a personal representative to preserve and maintain real property, and therefore, she was entitled to spend the funds on maintaining the farm.[2] Title to real property, however, vests in the

[2] Subsection (b) provides in part as follows:

(b)(1) Real property shall be an asset in the hands of the personal representative when so directed by the will, if any, or when the court finds that the real property should be sold, mortgaged, leased, or exchanged for any purpose enumerated in § 28-51-103, irrespective of whether any personal property of the estate, other than money, is available for such a purpose.

devisee immediately on the testator's death, and not at the probate of the will, if the will does not postpone the vesting of title. *Blair v. Bradley*, 238 Ark. 191, 379 S.W.2d 5 (1964). The statute referred to by appellee provides that "[r]eal property shall be an asset in the hands of the personal representative when so directed by the will," or "when the court finds that the real property should be sold, mortgaged, leased, or exchanged" for various purposes, none of which are relevant here. Ark. Code Ann. § 28-49-101(b)(1) (Repl. 2004). Here, there is no indication in the will that title was not to vest immediately. Furthermore, there was no showing, as required by statutory provision cited by appellee, that it was "necessary" that appellee expend funds on the farm "for the preservation of the property, for protecting the rights and interests of persons having interests therein, or for the benefit of the estate." Ark. Code Ann. § 28-49-101(b)(2) (Repl. 2004). And finally, we note that no real property, farm equipment, or farm animals, were listed as an asset of the estate, suggesting that appellee did not consider them property of the estate. Accordingly, we reverse the circuit court's approval of any expenditures on the farm made after the death of Ruby Griffin. Thus, in addition to appellee paying to appellant funds received from the certificate of deposit jointly held by appellant and Ruby Griffin, appellee shall also pay a sum equal to one-half of all other funds expended from or remaining in the farm account.

■ Appellant further contends that appellee, in her capacity as guardian, improperly used funds during the guardianship and while administering the estate. On the approval of funds spent during the guardianship, the court found that funds were paid out for maintenance on the farm. This finding, however, does not address the ultimate issue of whether the payments were proper.

> (2) When real property has become an asset in the hands of the personal representative as provided in this section or when and as long as the court finds it necessary for the preservation of the property, for protecting the rights and interests of persons having interests therein, or for the benefit of the estate, the personal representative may collect rents and earnings from the property, pay taxes and special assessments thereon, make necessary repairs thereon, maintain the property in tenantable condition, preserve it against deterioration, protect it by insurance, and maintain or defend an action for the possession of the property, or to determine or protect the title until the real property is sold, mortgaged, leased, exchanged, or is delivered to the distributees thereof, or until the estate is settled.

Ark. Code Ann. § 28-49-101(b)(2) (Repl. 2004).

The duties of a guardian of an estate include the duty to "exercise due care to protect and preserve it." Ark. Code Ann. § 28-65-301(b)(1)(A) (Repl. 2004). Thus, the ultimate issue is whether appellee, in fulfilling her duties as guardian of the estate, exercised due care to protect and preserve the estate. *See Robinson v. Hammons*, 228 Ark. 329, 307 S.W.2d 857 (1957) (reversing the probate court's allowance of credits to guardian where the guardian failed to meet his burden of showing that he exercised due care to protect and preserve the estate of his ward).

While payments made for maintenance on the farm may be relevant to the question of whether appellee met her statutory obligations as guardian, it does not answer the question at bar. For instance, payments made for maintenance on the farm could have been made, not to preserve and protect the estate, but to enable appellee to live on the farm while her mother remained in the nursing home. We remand for further findings on expenses paid during the guardianship only. *See Robinson v. Merritt*, 229 Ark. 204, 314 S.W.2d 214 (1958) (clarifying its decision in *Robinson v. Hammons* as permitting the probate court to take further proof on the credits claimed by the guardian).

Finally, we reverse and remand for reconsideration the circuit court's award of $7500 in attorney fees. The court awarded a lump sum and did not differentiate between the guardianship and the probate of the estate. Furthermore, in awarding attorney fees for the guardianship pursuant to Ark. Code Ann. § 28-65-319 (Repl. 2004), the circuit court did not consider the factors set forth in *Bailey v. Rahe*, 355 Ark. 560, 142 S.W.3d 634 (2004), and that we discussed in *Scott v. Esate of Prendergast*, 90 Ark. App. 66, 204 S.W.3d 110 (2005). As for the award of attorney fees pursuant to Ark. Code Ann. § 28-48-108(d) (Supp. 2005), we are unable to discern whether the fee was "based on the total market value of the real and personal property reportable to the circuit court" or whether it was based on some other measure. We do note that certificates of deposit were inexplicably cashed and placed in a trust and then listed as assets. For purposes of determining attorney fees, which are based in part on the size of the estate, assets listed in the estate should be assets that are properly estate assets. Thus, we remand for reconsideration of this issue as well.

Reversed and remanded.

NEAL and VAUGHT, JJ., agree.

Benjamin EAGLE *v.* STATE of Arkansas

CA CR 04-1314 213 S.W.3d 661

Court of Appeals of Arkansas
Opinion delivered September 21, 2005
[Rehearing denied October 26, 2005.]

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

Mike Beebe, Arkansas Attorney General, by: *Clayton K. Hodges*, Assistant Attorney General, for appellee.

SAM BIRD, Judge. Benjamin L. Eagle was tried for first-degree forgery in Pulaski County Circuit Court, Fifth Division, and was convicted of second-degree forgery. He raises six points on appeal from the conviction, contending that the trial court erred (1) in declining to direct a verdict because the State failed to prove his identity; (2) in imposing liability on second-degree forgery because it is not a lesser-included offense of first-degree forgery; (3) in failing to provide an impartial tribunal for trial; (4) in allowing admission of another allegedly forged document under Ark. R. Evid. 404(b); (5) in imposing an illegal sentence of $23,000 restitution; and (6) in imposing an illegal sentence of 120 days in jail "purgeable" by paying $1,400 restitution. Because we agree that error was committed regarding the second point, the conviction is reversed.

A felony information of August 25, 2003, charged Eagle with the crime of "violating Ark. Code Ann. 5-37-201 FORGERY IN THE FIRST DEGREE," which the State alleged was committed in the following manner:

> The said defendant(s), in Pulaski County, on or about April 17, 2001, unlawfully, feloniously, and with the purpose to defraud, did draw, make, complete, alter, possess, or utter a written instrument issued by a government, to-wit: RELEASE OF JUDGMENT, purporting to be, or is calculated to become, or to represent if

> completed the act of LOWE'S COMPANIES INC, who did not authorize that act, against the peace and dignity of the State of Arkansas.

First-degree and second-degree forgery are statutorily defined at Ark. Code Ann. § 5-37-201 (Repl. 1997):

> (a) A person forges a written instrument if with purpose to defraud he draws, makes, completes, alters, counterfeits, possesses, or utters any written instrument that purports to be or is calculated to become or to represent if completed the act of a person who did not authorize that act.
>
> (b) A person commits forgery in the first degree if he forges a written instrument that is:
>
> > (1) Money, a security, a postage or revenue stamp, or other instrument issued by a government; or
> >
> > (2) A stock, bond, or similar instrument representing an interest in property or a claim against a corporation or its property;
>
> (c) A person commits forgery in the second degree if he forges a written instrument that is:
>
> > (1) A deed, will, codicil, contract, assignment, check, commercial instrument, credit card, or other written instrument that does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status;
> >
> > (2) A public record, or an instrument filed or required by law to be filed, or one legally entitled to be filed in a public office or with a public servant; or
> >
> > (3) A written instrument officially issued or created by a public office, public servant, or government agent.

Eagle was tried before the bench on July 19, 2004.[1] He made a motion to dismiss at the conclusion of the State's case, which was denied. He offered no evidence in his defense.

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[1] At the beginning of the trial, Eagle's attorney declined to adopt a pro se motion to dismiss that was file-marked March 2, 2004, in the circuit court. Setting forth the statutory elements of first-degree and second-degree forgery, the motion noted that first-degree is a

At a bench trial, a motion to dismiss is a challenge to the sufficiency of the evidence. *See* Ark. R. Crim. P. 33.1 (2004). When a defendant challenges the sufficiency of the evidence that led to a conviction, the evidence is viewed in the light most favorable to the State. *See Stewart v. State*, 362 Ark. 400, 208 S.W.3d 768 (2005). Only evidence supporting the verdict will be considered. *Id.* The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence forceful enough to compel the fact-finder to make a conclusion one way or the other without resorting to speculation or conjecture. *Id.*

Eagle's first two points on appeal arise from his motion for a directed verdict.

1. *Whether the trial court erred in declining to direct a verdict on the basis that the State failed to prove Eagle's identity*

Eagle argued in his motion to dismiss that there was no proof that he was the person who filed the forged document at issue, no proof that he saw the document before possessing it, and no proof of intent to defraud. On appeal he again asserts that the State did not present substantial evidence of his identity as the forger. He argues that although witnesses saw him in the circuit clerk's office and there was an unauthorized signature on the filing, no forensic evidence connected him to the forged release of judgment and no witness testified as to personal knowledge of who prepared and filed it. We do not agree.

The evidence viewed in the light most favorable to the State shows that attorney Richard Peel filed a civil complaint against Eagle on behalf of Lowe's, alleging default of a payment for approximately $23,000 worth of building materials. In a subsequent consent judgment filed in the Pulaski County Circuit Court Clerk's office, Eagle agreed to pay $23,000 and was given additional time to do so. Eagle came into the clerk's office seeking certified copies of a satisfaction of judgment that had been filed in the case. The attorney's signature on the release of judgment was described by Sherry Bruno, supervisor of the clerk's office, as not

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Class B felony while second-degree is a Class C felony. The motion asserted, "Defendant charged herein does not know from which statute to frame his defense against the awesome charges of the state."

being an original signature. The signature was described as "fishy" by Arlene Ladd, an employee of a local title company to whom Eagle had presented a certified copy of the release when he was trying to buy some land.

The trial court, sitting as fact-finder, had before it Peel's testimony that he had not signed the release of judgment that contained his purported signature and that was filed in the circuit clerk's office. Also before the trial court was Peel's testimony that Eagle, rather than denying to Peel the act of forgery, expressed a desire to "make it right" and an understanding of Peel's being upset about the forged signature. This could have been viewed by the fact-finder as an acquiescence in Peel's statement that Eagle had forged Peel's name. *See Gatlin v. State*, 320 Ark. 120, 124, 895 S.W.2d 526, 529 (1995) (defining an adoptive admission as one where a fact-finder can reasonably infer that the party-opponent heard and understood the statement, and that, under the circumstances, the statement was such that the party-opponent would normally have responded if he did not believe the statement to be true). A person's admission to committing an offense, accompanied with other proof that the offense was committed, constitutes substantial proof of guilt. *E.g.*, *Tinsley v. State*, 338 Ark. 342, 344, 993 S.W.2d 898, 899 (1999). Thus, there is no merit to Eagle's argument that no substantial evidence supports his identity as the forger.

2. *Whether the trial court erred in finding Eagle guilty of second-degree forgery when it is not a lesser-included offense of first-degree forgery*

The following exchange took place during Eagle's motion to dismiss:

> DEFENSE COUNSEL: Also, Mr. Eagle is charged with forgery in the first degree. Forgery in the first degree, statute 5-37-201, the forgery statute says, B, a person commits forgery in the first degree if he forges a written instrument that is: Money, a security, a postage or revenue stamp, or any other instrument issued by a government; or a stock, bond, or similar other instrument representing an interest in property or a claim against a corporation or its property. And the document in question is neither one of these, Your Honor. So I would ask that he be found — or I don't believe the State has made their prima facie case.

DEPUTY PROSECUTING ATTORNEY: The first point, it is a release of judgment in a case where the defendant, in the civil case, approximately $23,000 and this release of judgment says it has been settled for the sum of $2,000, difference there of 21,000 dollars. I think that shows he was possessed with the intent to defraud. As far as the second argument goes, this is a document that was filed for the court of law. Obviously the court is part of the government. And if you do not think it rises to the level of forgery in the first degree, Your Honor, part of 5-37-201, under C, . . . creates a document that transfers, terminates or otherwise affects the legal interests. Forgery in the second degree, we could do that if you so chose.

DEFENSE COUNSEL: I don't believe the State can amend their felony information after they have rested their case.

DEPUTY PROSECUTING ATTORNEY: I have not amended the information. I am just — forgery in the second is not a lesser-included offense of forgery in the first, Your Honor.

THE COURT: Okay. I will deny the motion for a directed verdict.

The court then found Eagle guilty of second-degree forgery.

In Eagle's second point on appeal, he contends that the trial court erred in imposing liability for second-degree forgery because it is not a lesser-included offense of first-degree forgery. He argues that, because the offense was not charged in the charging instrument and it is not a lesser-included offense of first-degree forgery, the trial court erroneously found him guilty of second-degree forgery. His argument is well-taken.

The determination of whether an offense is included in another offense depends on whether it meets one of the three tests set out in Ark. Code Ann. § 5-1-110(b)(Repl. 1997). *Owens v. State*, 354 Ark. 644, 662, 128 S.W.3d 445, 456 (2003). That subsection provides:

> (b) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:

> (1) It is established by proof of the same or less than all the elements required to establish the commission of the offense charged; or
>
> (2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included within it; or
>
> (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

Ark. Code Ann. § 5-1-110(b). The second of these three tests is not at issue in the present case because there was no evidence of an attempt to commit first-degree forgery or another offense otherwise included within it. Our analysis therefore focuses on the first and third tests of this subsection.

The test of Ark. Code Ann. § 5-1-110(b)(1) requires that the lesser charge be established by proof of the same or less than all the elements required to establish the commission of the offense charged. *Owens*, 354 Ark. at 663, 128 S.W.3d at 457. In other words, an offense is included in another offense if the statutory definition of the greater offense encompasses all of the statutorily defined elements of the lesser offense, or if it is not possible to commit the greater offense without committing the lesser one. *Id.*

The offenses of first-degree and second-degree forgery are differentiated by the types of documents listed in Ark. Code Ann. § 5-37-201(b) and (c). The greater offense, first-degree forgery, requires proof that a person forges money, a security, a postage or revenue stamp, or other instrument issued by a government; or a stock, bond, or similar instrument representing an interest in property or a claim against a corporation or its property. Ark. Code Ann. § 5-37-201(b). The lesser offense, second-degree forgery, requires proof that a person forges an instrument that is a deed, will, codicil, contract, assignment, check, commercial instrument, credit card, or other written instrument that does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status; a public record, or an instrument filed or required by law to be filed, or one legally entitled to be filed in a public office or with a public servant; or a written instrument officially issued or created by a public office, public servant, or government agent. Ark. Code Ann. § 5-37-201(c). The lists of

documents are exclusive of one another, and none of those listed in second-degree forgery are included in the list for first-degree forgery: the greater offense clearly does not encompass all statutorily defined elements of the lesser charge. Thus, the first test of the three tests set out in Ark. Code Ann. § 5-1-110(b) is not met.

The State argues that, under the third test of section 5-1-110(b), second-degree forgery is a lesser-included offense of first-degree forgery because the lesser offense differs from the greater one "only in the respect that a less serious injury or risk of injury to the [. . .] public interest . . . suffices to establish its commission." Both parties point to the Official Commentary to Ark. Code Ann. § 5-37-201:

> Subsection (b), defining forgery in the first degree, singles out for special treatment the forgery of easily negotiated instruments typically drawn on issues with impeccable financial institutions. Because such instruments are readily accepted at face value, their forgery is more difficult and usually requires careful planning and sophisticated equipment. Prior law also imposed stronger sanctions for forging instruments of this type.
>
> Subsection (c) defines forgery in the second degree and is concerned with forgery of deeds, wills, contracts, commercial instruments, credit cards, and documents purporting to be filable with or issued from a public office.

The State further argues that the forgery of documents described in the second-degree forgery statute, typically affecting one or a limited number of persons, carries less widespread risk to the public than the documents listed in the definition of first-degree forgery, which carry the potential of defrauding a large number of persons or interests.

We need not decide whether forgery of a document constituting second-degree forgery carries less widespread risk to the public than does forgery of documents listed in first-degree forgery. Under the third test of Ark. Code Ann. § 5-1-110(b), a lesser charge is not included in the greater offense when the lesser offense "does not differ from the offense charged *only* in the respect that it requires a less serious injury or risk of injury or a lesser kind of culpable mental state." *Owens*, 354 Ark. at 664, 128 S.W.3d at 458. As previously discussed in this opinion, second-degree forgery requires proof of documents different from those for first-degree forgery. Consequently, they are two separate

crimes. Because second-degree forgery does not differ from first-degree forgery *only* in the respect that it requires a less serious injury or a lesser kind of culpable mental state, the third test for determination of whether the lesser offense is included in the greater offense has not been met.

Conclusion

None of the three tests set out in Ark. Code Ann. § 5-1-110(b) have been met. Thus, second-degree forgery is not a lesser-included offense of first-degree forgery. The trial court erred in finding Eagle guilty of second-degree forgery because it is not a lesser-included offense of the greater offense set forth in the charging instrument and under which trial proceeded.

The evidence presented by the State obviously showed a form of forgery in some degree, but the document at issue was not one listed in Ark. Code Ann. § 5-37-201(b) (Repl. 1997) as a element of first-degree forgery. Eagle could have been charged with second-degree forgery under subsection (c) for forging a written instrument of the nature described in that subsection.

The prosecutor elected to charge Eagle with first-degree forgery under subsection (b) of the statute. This was wrong, and requires our reversal. *See Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987) (reversing a capital-murder conviction because the State charged and tried the defendant under the wrong capital-murder provision). Because we reverse the conviction for second-degree forgery, we need not address the remaining points on appeal.

Reversed.

HART and CRABTREE, JJ., agree.

Eric Justin FLOWERS *v.* STATE of Arkansas

CA CR 05-21 213 S.W.3d 648

Court of Appeals of Arkansas
Opinion delivered September 21, 2005

Ashcraft, Freeman & Homan Davidson, PLLC, by; *Cecilia Ashcraft*, for appellant.

Mike Beebe, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., for appellee.

SAM BIRD, Judge. Following a bench trial, appellant Eric Flowers was convicted of failing to register as a sex offender in Arkansas. He received a three-year suspended sentence and a $1000 fine, and he was required to pay court costs and to perform thirty days

of community service. On appeal, he contends (1) that the trial court erred in finding substantial evidence to support his conviction and (2) that it is fundamentally unfair to require him to register as a sex offender. We affirm.

The undisputed facts of this case are as follows. On August 6, 1998, Flowers pled guilty in the Criminal District Court of the Parish of Orleans, Louisiana, to the solicitation of unnatural carnal copulation for compensation, which is prohibited under La. Rev. Stat. Ann. § 14:89(A)(2) (West 2005). He was sentenced to one year in the Louisiana Department of Corrections. Pursuant to La. Rev. Stat. Ann § 15:542(A) (West 1998), Flowers was required to register as a sex offender in Louisiana, and he did so. Flowers was later paroled, but his parole was revoked because he moved to Texas without following the proper procedure. He was returned to Louisiana to serve the remainder of his sentence, and he was released in December 2001. He then moved to Arkansas to live with his mother.

At trial, Detective Steve Weaver of the Van Buren Police Department testified that, in March 2003, the Department received notice from the State of Arkansas's Crime Information Center that Flowers was moving to 314 Crestview in Van Buren, which is located in Crawford County. Detective Weaver said that he attempted to locate Flowers at the residence for "seven or eight months" but was never able to do so. Weaver said that, because the Department never received any paperwork from Flowers, he obtained an arrest warrant due to Flowers's failure to register. In February 2004, Weaver received information that Flowers was living in Fort Smith, which is in Sebastian County. Shortly thereafter, Flowers was arrested in Fort Smith for failure to register as a sex offender.

At the close of the State's case, Flowers moved to dismiss, arguing that Crawford County was an inappropriate venue because no offense occurred in that county and because his duty was to register in Sebastian County. Furthermore, he claimed that he could not be compelled to register in Arkansas, apparently arguing that the Supreme Court of the United States had struck down a similar statute outlawing another sex crime, sodomy, as unconstitutional. The trial court denied the motion.

Flowers then testified in his own defense, claiming that he did move to 314 Crestview in Van Buren to live with his mother after he was released from prison in Louisiana, but he was not

aware that he was required to register as a sex offender. He admitted that he resided at 314 Crestview for "quite a long time, until May or June of 2003." He said that he then moved to Elm Street in Van Buren and lived there until November 2003. After that, he moved to Fort Smith and resided there until he was arrested on February 14, 2004. On cross-examination, Flowers claimed that, while he lived at 314 Crestview, he never went to register with Detective Weaver (of the Van Buren Police Department) because he was not told that he had to do so. Flowers renewed his motion to dismiss at the close of all of the evidence, and the trial court again denied the motion. The court subsequently found Flowers guilty of failing to register as a sex offender in Arkansas.

Flowers's first point on appeal is that the court erred in finding substantial evidence to support his conviction because he did not possess the requisite mental state under the statute requiring him to register as a sex offender. We consider this argument first due to double-jeopardy considerations. *See Stenhouse v. State*, 362 Ark. 480, 209 S.W.3d 352 (2005). The standard of review in cases challenging the sufficiency of the evidence is well established. We treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. *Id.* Our supreme court has repeatedly held that 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. *Id.* We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

Arkansas Code Annotated section 12-12-904(a)(1) (Repl. 2003) provides that a person who fails to register as a sex offender shall be guilty of a Class D felony. Our supreme court has said that no scienter is required to trigger this provision; the offender's failure to register alone is sufficient. *Kellar v. Fayetteville Police Dep't*, 339 Ark. 274, 5 S.W.3d 402 (1999). A "sex offender" includes a person who has been adjudicated for an offense of the law of another state when that adjudication requires registration under the other state's sex-offender-registration laws. *See* Ark. Code Ann. § 12-12-903(13)(A) & (12)(A)(iii)(*b*) (Repl. 2003).

Here, Flowers argues that he did not act "purposefully, knowingly, or recklessly" and, therefore, he should not have been found guilty of failing to register as a sex offender. However, this argument is raised for the first time on appeal, and, consequently, it is not preserved for appellate review. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998). A party cannot change the grounds for objection on appeal, but is bound by the scope and nature of the arguments made at trial. *Henderson v. State*, 329 Ark. 526, 953 S.W.2d 26 (1997). Flowers did not raise his argument concerning mental state below; thus, he is precluded from raising it for the first time on appeal. Furthermore, even were we to address this argument, we would still affirm the denial of Flowers's motion to dismiss because his argument clearly ignores our case law stating that no scienter is required to trigger Arkansas's sex-offender-registration statute.

As his second point, Flowers contends that it is fundamentally unfair to require him to register as a sex offender in Arkansas. Apparently, Flowers is asking this court to consider the solicitation of oral sex — the crime of which he was convicted in Louisiana — to be equivalent to sodomy or, alternatively, to prostitution. He asserts that, because any law prohibiting sodomy is now unconstitutional in Arkansas, *see Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), and because prostitution is not a "sex offense" for which one must register as a sex offender in Louisiana or Arkansas, it is "fundamentally unfair" to require him to register as a sex offender in Arkansas.

We reject Flowers's argument. Here, Flowers pled guilty to the solicitation of unnatural carnal copulation for compensation (*i.e.*, the solicitation of oral sex), which is clearly prohibited under La. Rev. Stat. Ann. § 14:89(A)(2). The Louisiana Supreme Court has said that there is nothing constitutionally offensive in prohibiting this crime. *See State v. Thomas*, 891 So. 2d 1233 (La. 2005).

Furthermore, Flowers was required to register as a sex offender in Louisiana and did so. Arkansas law plainly provides that one who is convicted of a crime in another state and is required to register in that state as a sex offender is also required to register in Arkansas. As the State points out in its brief, it is simply immaterial whether Arkansas would punish the solicitation of oral sex as Louisiana does.

Affirmed.

BAKER and ROAF, JJ., agree.

Garrett Kirby HUNT *v.* STATE of Arkansas

CA 05-178 213 S.W.3d 667

Court of Appeals of Arkansas
Opinion delivered September 21, 2005

Cullen & Co., PLLC, by: *Tim Cullen*, for appellant.

Mike Beebe, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., *Maggie C.B. Smith,* Law Student Admitted to Practice Pursuant to

Rule XV(E)(1)(b) of the Rules Governing Admission to the Bar of the Supreme Court, and *Darnisa Evans Johnson*, Deputy Att'y Gen., for appellee.

DAVID M. GLOVER, Judge. The Sharp County Circuit Court adjudicated appellant, Garrett Hunt, delinquent for the crime of harassment and sentenced him to the Division of Youth Services for a term to be determined by the facility or alternatively, to a stay at the Sheriff's Ranch. The trial judge ordered that if appellant was not admitted to the Sheriff's Ranch, then the period of detention by DYS was not to exceed two years. On appeal, appellant argues (1) that there was not substantial evidence to prove that he committed the crime of harassment, and (2) that the trial court's sentence to DYS for a period not to exceed two years was retributive punishment rather than in his best interest. We agree that substantial evidence did not exist to prove that appellant committed harassment, and we reverse.

The standard of review for sufficiency of the evidence in a juvenile proceeding is the same as in a criminal case. *Pack v. State*, 73 Ark. App. 123, 41 S.W.3d 409 (2001). In reviewing a juvenile-delinquency case, we look at the record in the light most favorable to the State to determine whether there is substantial evidence to support the conviction. *J.R. v. State*, 73 Ark. App. 194, 40 S.W.3d 342 (2001). Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without mere speculation or conjecture. *Id.* In determining whether there is substantial evidence, we only consider that evidence tending to support the verdict, and we do not weigh the evidence presented at trial, as that is the responsibility of the finder of fact. *Pack, supra.*

In the present case, Natoshia Ivy testified that when she boarded the school bus after school on August 20, 2004, appellant asked her, "Has Daddy lost any money yet?" Natoshia stated that she initially ignored him, but that later appellant started saying, "Ivy's Daddy sucks, Daddy sucks." Natoshia said that she then told him that he had better shut up, and appellant responded, "Ivy's daddy sucks his own balls." Natoshia testified that appellant did not touch her, but that she was very upset and offended by his comments. She said that she talked to the bus driver about the incident the following day.

Colbert English, the bus driver, testified that one day Natoshia told him that appellant had said mean things to her and was

cursing at her, and that he yelled back at appellant not to say anything to her. English said that he planned to separate the two on the bus, but that day was the last day appellant rode the bus.

Beatrice Sharp, the Highland Chief of Police, testified that appellant admitted to her during an interview to making vulgar comments about Natoshia's father, but that he did not think that anyone had heard him. However, she admitted that she did not take a statement from appellant, and that there was nothing in her notes stating that appellant admitted making vulgar comments about Natoshia's father.

Several students who were on the bus on the day in question testified for the defense. Chris Eash stated that he was on the bus, that he did not hear appellant say anything vulgar to Natoshia, and that he did not notice that Natoshia was upset or that she talked to the bus driver. Adam French testified that he did not see tears in Natoshia's eyes when she got off the bus, but that she was in a hurry to get off the bus. French stated that he had never seen appellant cause Natoshia any problems.

John Wolverton, appellant's older brother, testified that he was sitting a couple of rows behind appellant on the bus and that the only comment he heard appellant make to Natoshia was to ask if her dad lost any more money that day in court. Wolverton denied hearing appellant use any vulgar language, and he said that Natoshia did not look upset. Amanda Hunt, appellant's sister, testified that she was sitting right in front of appellant on the bus and only heard him ask Natoshia if her dad lost any money. Hunt said that Natoshia was acting normal when she got off the bus.

Appellant moved to dismiss the charges on the basis that the comments were not made in a manner likely to provoke a violent and disorderly response. In denying that motion and adjudicating appellant delinquent, the trial judge stated:

> My problem with this case is not what was said but what wasn't said. The one thing that has been consistent from the witnesses of the defendant was the fact that he asked if her daddy had lost any money. With the history of this matter . . . it's the air and attitude upon which these things are said that could have provoked some type of response that would, in fact, violate the statute as far as harassment.
>
> The court feels the statement met the burden that it was intended to provoke this person. The testimony of Ms. Ivy indicates that it

> went beyond that. That he made remarks, that if she'd been a boy, she'd tried to take him on. I feel like it was the tone and environment in which the statement was made that makes this a violation. The court makes a true finding of harassment.

The trial judge also stated that he was afraid that if appellant went home that "this" would never be over — that someone would get hurt and "we'll have a funeral going on."

A person commits the offense of harassment if, "with the purpose to harass, annoy, or alarm another person, without good cause, he, in a public place, directs obscene language or makes an obscene gesture to or at another person in a manner likely to provoke a violent or disorderly response." Ark. Code Ann. § 5-71-208(a)(2) (Repl. 1997).

Appellant divides his sufficiency argument into two parts — that the inquiry about whether Natoshia's father had lost any money was not obscene, and that the comments were not likely to provoke a violent response. In the first part of his argument, appellant focuses on the statement appellant made about Natoshia's father losing any money, and argues that it is not obscene. However, appellant fails to address, either at trial or on appeal, whether the remaining portion of his statement that Natoshia testified about — that her daddy "sucks his own balls" — is obscene. In his motion to dismiss at trial, appellant only argued that the comments were not made in a manner likely to provoke a violent and disorderly response. Because appellant has never made an argument that the statement that Natoshia's daddy "sucks his own balls" is not obscene, we will not address it.

However, the second prong of appellant's sufficiency argument is precisely what he argued to the trial court — that the comments were not made in a manner likely to provoke a violent or disorderly response. We agree.

In accordance with the statute, the State had to prove that appellant's comments were made in a manner likely to provoke a violent or disorderly response. Viewing the evidence in the light most favorable to the State, we hold that this element was not proved. Natoshia did not respond to appellant's comments in a violent or disorderly manner. Moreover, Natoshia did not testify that she wanted to do anything violent or disorderly — she just said that appellant's comments made her very upset and that she was offended by them.

The trial judge commented, "My problem with this case is not what was said but what wasn't said. . . . [I]t's the air and attitude upon which these things are said that could have provoked some type of response that would, in fact, violate the statute as far as harassment. . . . if she'd been a boy, she'd tried to take him on." The problem with the trial court's rationale, however, is that the statute sets forth two types of conduct that will constitute harassment: obscene language or obscene gestures. Here, there was no evidence that appellant made any gestures, and even though appellant clearly directed comments at Natoshia, the trial judge specifically noted that it was not the spoken words that gave him a problem in this case; rather, it was "what wasn't said." Under the statute appellant was charged with violating, without accompanying obscene gestures, unspoken words do not constitute harassment because silence is not likely to provoke a violent or disorderly response. Moreover, although the trial judge speculated that if Natoshia had been a boy, she would have tried "to take [appellant] on," the fact remains that Natoshia is not a boy, and she did not testify to having such a reaction to appellant's words. The trial court's supposition is simply irrelevant.

Because we reverse this case upon appellant's first argument, we need not address his second argument concerning the length of his sentence. However, we note that appellant would have served less time had he been charged as an adult with the Class A misdemeanor crime of harassment than he was ordered to serve when he was adjudicated delinquent.

Reversed and dismissed.

PITTMAN, C.J., and GLADWIN, J., agree.

Jerrell YANCEY *v.*
B&B SUPPLY and Federated Mutual Insurance Co.

CA 04-684 213 S.W.3d 657

Court of Appeals of Arkansas
Opinion delivered September 21, 2005

[redacted]

Frederick S. Spencer, P.A., for appellant.

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

LARRY D. VAUGHT, Judge. Jerrell Yancey appeals the decision of the Workers' Compensation Commission finding

that he had been made whole by the proceeds of a third-party lawsuit and that appellees, B&B Supply and Federated Mutual Insurance Company, were entitled to subrogation pursuant to Ark. Code Ann. § 11-9-410 (Supp. 2005). We reverse the decision of the Commission and remand for an award of benefits.

On August 24, 1999, Yancey worked as a truck driver for B&B Supply. While having his truck loaded at the premises of a third party, he was struck by a forklift driven by an employee of the third party. Yancey was thrown into the air and received injuries to his back and left knee, requiring surgery on the knee. Appellees initially accepted Yancey's claim and paid benefits. Appellees later argued Yancey was not entitled to permanent disability benefits. The Administrative Law Judge conducted a hearing and assigned a permanent impairment rating of two percent to Yancey's left lower extremity and ten percent impairment to his body as a whole as a result of the back injury.

Yancey also filed a civil action against the third party seeking damages for past and future medical expenses, permanent injury, and pain and suffering. The jury awarded him $235,000. The jury found that Yancey was thirty percent at fault for the accident, so his award was reduced to $164,500. The jury also awarded Yancey's wife damages in the amount of $15,000, which was reduced to $10,500 due to Yancey's contributory negligence.

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. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005). Substantial evidence is that evidence that a reasonable person might accept as adequate to support a conclusion. *Id.* The issue is not whether this court might have reached a different result from that of the Commission or whether the evidence would have supported a contrary finding. *Id.* We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Id.*

Under Ark. Code Ann. § 11-9-410, employers or workers' compensation insurance carriers have a statutory lien against proceeds recovered from a third party for the injury sustained by the employee. However, that right is not absolute;

rather, the insurer's lien right against an insured's settlement with a third party is subject to a court's approval after the carrier has been afforded an opportunity to be heard. *S. Cent. Ark. Elec. Coop. v. Buck*, 354 Ark. 11, 117 S.W.3d 591 (2003); *see also Gen. Accident Ins. Co. v. Jaynes*, 343 Ark. 143, 33 S.W.3d 161 (2000); *Phillip Morris USA v. James*, 79 Ark. App. 72, 83 S.W.3d 441 (2002). An insured's right to be made whole takes precedence over an insurer's right to subrogation, and an insured must be fully compensated before the insurer's right to subrogation arises. *Buck*, 354 Ark. at 18, 117 S.W.3d at 595. Therefore, the insurer's right to subrogation arises only in situations where the recovery by the insured exceeds his or her total amount of damages incurred. *Id.*, 117 S.W.3d at 595.

Our supreme court has stated that "the precise measure of reimbursement is the amount by which the sum received by the insured from the [third party], together with the insurance proceeds, exceeds the loss sustained and the expense incurred by the insured in realizing on his claim." *Franklin v. Heathsource of Ark.*, 328 Ark. 163, 168, 942 S.W.2d 837, 839–40 (1997); *see also Buck*, 354 Ark. at 20, 117 S.W.3d at 597.

The court's analysis in *Buck* is illustrative of how to apply the formula. In *Buck*, the claimant was removing a limb from a power line for his employer when he was hit by a car driven by a third party. He received workers' compensation benefits in the amount of $21,979.33 (medical expenses and lost wages). The claimant subsequently filed a lawsuit against the third party for lost wages, medical expenses, and pain and suffering. The compensation carrier intervened asserting its right of subrogation. The jury found the claimant had sustained damages of $80,000, but the jury reduced the award by forty percent because of the claimant's contributory negligence and awarded the claimant $48,000. The court found that the claimant had not been made whole and applied the formula in the following way:

> Here, the jury determined that [the claimant] incurred damages of $80,000. He actually received a judgment of $48,000. From that judgment amount, costs and attorneys' fees totaling $21,973.22 must be deducted, leaving $26,026.78 in settlement proceeds. This amount combined with the $21,979.33 that [the claimant] received in compensation benefits totals $48,006.11. Clearly this amount does not exceed the damages incurred by [the claimant]. Assuming arguendo that the jury did take into account the $21,979.33 paid by

> [the compensation carrier], [the claimant] still incurred $58,020.67 in non-reimbursed losses; thus, the judgment of $48,000 is still less than the damages incurred by [the claimant].

Buck, 354 Ark. at 20, 117 S.W.3d at 597.

In applying our supreme court's analysis to the facts of the present case, the jury determined that Yancey incurred damages amounting to $235,000. Yancey actually received a judgment in the amount of $164,500, which totaled $166,334.18 including interest. After deducting $77,762.34 for Yancey's costs and attorneys' fees, Yancey had $86,737.66 in proceeds. This amount added to the $21,335.50 in compensation benefits paid to Yancey totals $108,073.16, an amount clearly not exceeding the total amount the jury found Yancey had incurred as damages — $235,000. Even if we added the amount awarded to his wife, $10,500, to the total amount, it would not exceed the total amount the jury had determined as Yancey's damages.

Appellees argue that allowing Yancey to keep his third-party proceeds and his workers' compensation benefits establishes double recovery. However, the jury awarded him damages in an amount more than what had been paid by the compensation carrier. In *Franklin*, the supreme court found that the claimant was not made whole because the compensation insurance carrier had not paid all of the claimant's medical expenses, let alone any of the additional expenses he had incurred as a result of the incident. 328 Ark. at 168, 942 S.W.2d at 840. Furthermore, in *Logan County*, *supra*, we stated that a third-party settlement is a tort action, for which a portion of the jury award can be due to pain and suffering — a damage award not available through workers' compensation. The jury could base its award of damages on more than just past medical expenses and permanent injury. It could also award damages for mental anguish and pain and suffering.

Based on our previous case law and the mandate of our supreme court, we reverse the decision of the Commission. The Commission's order did not attempt to apply the formula established in *Franklin* and applied in *Buck*. It is clear from our calculations using the formula that Yancey was not made whole by the third-party recovery. For this reason, the Commission's decision was not supported by substantial evidence.

Reversed and remanded.

HART and NEAL, JJ., agree.

Susan T. VER WEIRE *v.*
CNA FINANCIAL CORPORATION
and Continental Casualty Insurance Company, Inc., *et al.*

CA 04-1355 213 S.W.3d 646

Court of Appeals of Arkansas
Opinion delivered September 21, 2005

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Byron Freeland* and *Leigh Anne Shults*, for appellees.

PER CURIAM. Appellant, Susan Ver Weire, appeals a Washington County Circuit Court order granting summary judgment in favor of appellees Continental Casualty Insurance Com-

pany, Inc., Continental Assurance Company, American Bar Insurance Plans Consultants, Inc., American Bar Insurance Group Trust, and Shawn Bingham. We do not address the merits of this case because the order appellant appeals from does not resolve all of her claims against all of the defendants and, therefore, is not a final, appealable order as required by Ark. R. Civ. P. 54(b).

This action initially was brought by appellant and her then husband, William Ver Weire, against defendants, CNA Financial Corporation, Continental Casualty Insurance Company, Inc., Continental Assurance Company, American Bar Insurance Plans Consultants, Inc., American Bar Insurance Group Trust, Shawn Bingham, individually, Timothy Pfeiffer, individually, and John Does Nos. 1 through 50, for their failure to provide insurance coverage for appellant under a medical-insurance plan offered by the American Bar Association. The Ver Weires' complaint alleged causes of action against the defendants for fraud, detrimental reliance, bad faith, breach of fiduciary duty, violation of the Arkansas Deceptive Trade Practices Act, breach of contract, and civil conspiracy and sought both compensatory and punitive damages.

All of the defendants, except the John Doe defendants, were served with process, and a single answer was filed on behalf of the "Defendants." Separate defendant CNA Financial Corporation was dismissed from the lawsuit by an order entered May 12, 2004. On May 21, William Ver Weire's claims against the defendants were voluntarily dismissed with prejudice.[1] Thereafter, the court granted a partial summary judgment and dismissed, with prejudice, appellant's claims for fraud, detrimental reliance, bad faith, breach of fiduciary duty, and civil conspiracy against defendants Continental Casualty Insurance Company, Inc., Continental Assurance Company, American Bar Insurance Plans Consultants, Inc., American Bar Insurance Group Trust, and Shawn Bingham. On August 25, 2004, the court entered a supplemental summary judgment that dismissed appellant's remaining claims for breach of contract and violation of the Arkansas Deceptive Trade Practices Act against these defendants with prejudice. The orders entered by the court did not address appellant's claims against the remaining defendants, Timothy Pfeiffer and John Does Nos. 1 through 50.

[1] The Ver Weires were divorced on February 25, 2004.

Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure – Civil provides that an appeal may be taken only from a final judgment or decree entered by the trial court. The question of whether an order is final and subject to appeal is a jurisdictional question that the court will raise on its own. *Moses v. Hanna's Candle Co.*, 353 Ark. 101, 110 S.W.3d 725 (2003). Under Rule 54(b) of the Arkansas Rules of Civil Procedure, an order is not final that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties. *Hambay v. Williams*, 335 Ark. 352, 980 S.W.2d 263 (1998); *see also Shackelford v. Arkansas Power & Light Co.*, 334 Ark. 634, 976 S.W.2d 950 (1998) (holding that an order granting summary judgment to the defendant was not a final, appealable order because an order of dismissal had not been entered for the appellant's claims against the John Doe defendants.)

Rule 54(b) allows a trial court, when it finds no just reason for delaying an appeal, to direct entry of a final judgment as to fewer than all the claims or parties by executing a certification of final judgment as it appears in Rule 54(b)(1). However, absent this required certification, any judgment, order, or other form of decision that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action. *See Jackson v. Delis*, 76 Ark. App. 436, 67 S.W.3d 596 (2002).

In the instant case, there is neither a final order as to defendants Pfeiffer and John Doe Nos. 1 through 50, nor is there a Rule 54(b) certification. We therefore do not have jurisdiction to hear this appeal.

Appeal dismissed without prejudice.

Salvador AYALA *v.* STATE of Arkansas

CA CR 04-1332 214 S.W.3d 282

Court of Appeals of Arkansas
Opinion delivered September 28, 2005
[Rehearing denied November 2, 2005.*]

Ken Swindle, for appellant.

Mike Beebe, Arkansas Attorney General, by: *Misty Wilson Borkowski*, Assistant Attorney General, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. Appellant in this criminal case was convicted in district court of harassment.

* GLADWIN, CRABTREE, and BAKER, JJ., would grant rehearing.

He appealed to circuit court and requested a jury trial. The circuit court dismissed the appeal on the grounds that appellant's attorney failed to appear at a pretrial hearing. Appellant's attorney filed a motion for reconsideration asserting that he never received notice of the pretrial hearing. The trial court took no action. On appeal, appellant argues that the trial court erred in dismissing his appeal because to do so denied him his right to a jury trial without the express and unambiguous waiver thereof required by *Duty v. State*, 45 Ark. App. 1, 871 S.W.2d 400 (1994). Appellant is correct.

In *Harrell v. City of Conway*, 296 Ark. 247, 753 S.W.2d 542 (1988), the supreme court held that a circuit court's dismissal on its own motion of an appeal from municipal court denied the appellant his statutory right to a jury trial in circuit court, and reversed on that basis. Furthermore, Arkansas Code Annotated § 16-96-508 (1987) provided in part that, if the appellant from the judgment rendered by an inferior court fails to appear in the circuit court when the case is set for trial, the circuit court may affirm the judgment of the inferior court and enter judgment against the appellant for the same fine or penalty that was imposed in the inferior court.[1] In *Williams v. State*, 79 Ark. App. 216, 85 S.W.3d 561 (2002), we held that this section authorized dismissal only if the appellant fails to appear for trial and did not apply where the appellant merely failed to appear at a pretrial readiness hearing. The dismissal in the present case was based on failure to appear at a pretrial hearing and, as in *Williams,* the dismissal of appellant's appeal was not authorized by the statute. The burden is on the trial court to assure that, if there is to be a waiver of the right to a jury trial in a criminal case, it be done in accordance with the provisions of the Arkansas Constitution by the defendant personally making an express declaration to that effect in writing or in open court. *Duty v. State, supra.* Because dismissal of the appeal from district court was not authorized by section 16-96-508, the effect of the trial court's action was to deny appellant his right to a jury trial without the express waiver thereof required by the Arkansas Constitution, and we reverse and remand on that basis.[2]

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[1] Subsequent to the operative events in this case, minor amendments were made to this section by Act 1994 of 2005. *See* Ark. Code. Ann. § 16-96-508 (Supp. 2005).

[2] We are not reversing based on *Williams v. State*, 79 Ark. App. 216, 85 S.W.3d 561 (2002). We cite that case only in response to the State's argument that appellant's right to a

There are some procedural irregularities in this case. Appellant's notice of appeal was filed in time to appeal the dismissal of his circuit court appeal, but was not timely with respect to appellant's motion for reconsideration in that court. The significance of this is that appellant made no objection or argument below except in his motion for reconsideration. Although this failure to object would in most cases be fatal to appellant's appeal to this court, *see Wicks v. State,* 270 Ark. 781, 606 S.W.2d 366 (1980), the contemporaneous objection rule is inapplicable to the failure to afford one a trial by jury. *See Harrell v. City of Conway, supra* (error addressed although raised for the first time on appeal); *Duty v. State, supra.* The reason for this exception is that the right to a jury trial is so ancient and fundamental to our jurisprudence that its denial is an error of such gravity that every judge should, on his own motion, intervene to prevent. *Winkle v. State,* 310 Ark. 713, 841 S.W.2d 589 (1992); *see Wicks v. State, supra.*

Reversed and remanded.

HART, ROBBINS, GLOVER, NEAL, and ROAF, JJ., agree.

GLADWIN, CRABTREE, and BAKER, JJ., dissent.

TERRY CRABTREE, Judge, dissenting. I dissent because this case is being reversed based on an argument that appears for the first time in appellant's reply brief.

The appellant in this case did not receive a trial, jury or otherwise, because the circuit court involuntarily dismissed appellant's appeal from district court upon his failure to attend a pretrial hearing. Appellant filed a motion to reconsider asserting that his appeal was wrongly dismissed based on the allegation that he had not received notice of the hearing. In his opening brief, appellant argues that he did not waive his right to a jury trial by failing to appear at the hearing because he had no notice of the hearing.

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jury trial was obviated by the circuit court's proper dismissal of his appeal for failure to appear pursuant to Ark. Code Ann. § 16-96-508. The appellant responded to the State's statutory argument in his reply brief, correctly noting that section 16-96-508 permits dismissal only for failure to appear at trial, not for failure to appear at a pretrial hearing. This, as we note in the body of our opinion, is a correct statement of the law pursuant to *Williams v. State,* 79 Ark.App. 216, 85 S.W.3d 561 (2002). In the context of the arguments as presented by the parties to this appeal, *Williams* is significant only because it negates the State's attempt to defend the denial of appellant's right to a jury trial on the basis of an incorrect reading of section 16-96-508.

Before it can be said that appellant was wrongfully deprived of a jury trial, we must first answer the fundamental question posed by appellant in his opening brief, which is whether the trial court erred in dismissing the appeal based on his claim of lack of notice. The majority concludes that the trial court did err, but for an entirely different reason. It holds that the trial court improperly dismissed the appeal based on our decision in *Williams v. State,* 79 Ark. App. 216, 85 S.W.3d 561 (2002), where we held that Ark. Code Ann. § 16-96-508 (1987) does not permit a trial court to dismiss for the failure to appear at a pretrial hearing. This argument was indeed advanced by appellant - in his reply brief. We should not be addressing this argument, much less reversing, as it has repeatedly been held that an argument cannot be raised for the first time in a reply brief. *Owens v. State,* 354 Ark. 644, 128 S.W.3d 445 (2003).

I dissent.

GLADWIN and BAKER, JJ., join.

Jose Enrique MENDIOLA *v.* STATE of Arkansas

CA CR 04-990 214 S.W.3d 271

Court of Appeals of Arkansas
Opinion delivered September 28, 2005

John Wesley Hall Jr., for appellant.

Mike Beebe, Arkansas Attorney General, by: *David J. Davies*, Assistant Attorney General, for appellee.

ROBERT J. GLADWIN, Judge. Appellant Jose Enrique Mendiola was convicted by a Pulaski County jury of three counts of aggravated robbery, one count of Class Y felony kidnapping, and two counts of Class B felony kidnapping. He was sentenced to a total of sixty-five years' incarceration in the Arkansas Department of Correction. On appeal, appellant argues that the trial court abused its discretion by allowing testimony concerning an alleged threat he made to an officer during a preliminary hearing. We affirm.

On or about April 5, 2003, Karl McCree, Raymond Smith, and Maurice Freeman went to a liquor store to deliver cocaine to appellant's brother. During the transaction, the men were confronted by appellant and others, and they were forced to hand over money, jewelry, and most of their clothing. They were beaten and then taken by force to Sweet Home, Arkansas, where McCree escaped and Smith and Freeman were later released. Investigator Lett was involved in the investigation of the incident and was called to testify in the matter by the State.

At a pretrial hearing, appellant looked toward Investigator Lett and put his fingers up as if to wipe his mouth. Appellant then made a "finger-gun motion" and put his thumb down in a shooting motion. Later during the same hearing, appellant mouthed the words "you're dead" to Investigator Lett. The trial

court allowed Investigator Lett to testify at appellant's trial as to the alleged threats. On appeal, appellant argues that the trial court erred by allowing the introduction of the evidence because it was not probative to the charges he faced and was highly prejudicial.

Trial courts have broad discretion in deciding evidentiary issues, and their decisions are not reversed absent an abuse of discretion. *Shields v. State*, 357 Ark. 283, 166 S.W.3d 28 (2004); *see also Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999) (specifically referring to the admissibility of evidence under Rules 403 and 404(b)). Under Rule 404(b) of the Arkansas Rules of Evidence, evidence of a prior bad act that is independently relevant to the main issue, rather than merely relevant to prove the defendant is a criminal, may be admissible. *Regalado v. State* 331 Ark. 326, 961 S.W.2d 739 (1998). The Arkansas Supreme Court has interpreted "independently relevant to the main issue" as relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal. *See Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998). The supreme court has stressed the requirement that there be a very high degree of similarity between the charged crime and the prior uncharged act. *Id.* In other terms, evidence offered under Rule 404(b) 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. *Id.*

Appellant maintains that Investigator Lett's testimony was inadmissible pursuant to Rule 404(b), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We will not reverse a trial court's ruling regarding the admission of evidence under Rule 404(b) absent an abuse of discretion. *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000); *see also Smith v. State*, 90 Ark. App. 261, 205 S.W.3d 173 (2005). Appellant argues that it was an abuse of discretion for the trial court to admit evidence that he made nonverbal threats to Investigator Lett at the pretrial hearing because the prior incident lacked the required degree of similarity to the alleged conduct that led to the offenses with which he was charged,

specifically, robbery and kidnapping. The charges against appellant stemmed from events that supposedly occurred months before the alleged threats took place. Appellant maintains that the introduction of Investigator Lett's testimony was not independently relevant to establish any of the allowed exceptions under Rule 404(b). Appellant asserts that nothing about the testimony in question tends to prove some material point, *i.e.*, the elements of one of the offenses charged, but instead is in an attempt to show that he is a "criminal."

Additionally, appellant notes that the trial court never gave a cautionary instruction as discussed in *Regalado*, *supra*. He maintains that even if the testimony was admissible under Rule 404(b), the jury was never apprised as to how it should be considered and that he should have received the benefit of such an explanation and instruction. We disagree. The supreme court did not hold that a limiting instruction was required in *Regalado*, rather that the failure to give such an instruction was not error in the absence of a request for one. Appellant has presented us with no evidence that he requested such an instruction, accordingly, he cannot argue that it was error for the trial court to permit the testimony without giving one.

The State argues that the testimony regarding appellant's nonverbal threats was relevant and probative to prove his consciousness of guilt with respect to the charges of aggravated robbery and kidnapping. They were not offered simply to show that he was a criminal, but rather to show his attempt to silence a key witness from testifying at trial. Efforts to conceal evidence demonstrate a consciousness of guilt and are therefore admissible. *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004); *see also Eliott v. State*, 342 Ark. 237, 27 S.W.3d 432 (2000) (holding that when evidence of a past crime reflects a consciousness of guilt, it is independently relevant and admissible under Rule 404(b)). The Eighth Circuit Court of Appeals has specifically held that evidence of death threats against witnesses or other parties cooperating with the government is generally admissible against a defendant to show consciousness of guilt with respect to the crimes charged. *United States v. Griffith*, 301 F.3d 880 (8th Cir. 2002).

Appellant also argues that even if Investigator Lett's testimony did qualify as an exception under Rule 404(b), it should have been excluded under Rule 403 of the Arkansas Rules of Evidence because its probative value was outweighed by the risk of unfair prejudice. *See Smith*, *supra*. He maintains that the testimony was highly prejudicial and that it outweighed any probative value

it may have had. He asserts that he was further prejudiced by the fact that the trial court failed to give a cautionary instruction.

Rule 403 states that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The State maintains that the probative value of the evidence was not substantially outweighed by unfair prejudice. The testimony was evidence of appellant's consciousness of guilt, and it was also critical from the standpoint of undermining his defense that he was an honest businessman who only "roughed up" the victims in order to protect his family and keep them from selling drugs to his handicapped brother.

Additionally, appellant fails to demonstrate how he was prejudiced by the admission of the testimony. When the evidence of his convictions is considered in the absence of Investigator Lett's testimony about the threats made at the pretrial hearing, there is still abundant evidence that he committed aggravated robbery and kidnapping. All three victims, McCree, Smith, and Freeman, testified that they were robbed at gunpoint and kidnapped at the direction of appellant. Investigator Lett corroborated McCree's testimony as to specific evidence associated with the offense that he discovered at the scene. Additional law enforcement officials further corroborated the victims' testimony, as did Ronald Bee, the rural resident who discovered McCree on his doorstep after he had escaped from appellant. Where evidence of guilt is overwhelming and the error slight, we can declare the error harmless and affirm. *Walker v. State*, 91 Ark. App. 300, 210 S.W.3d 157 (2005).

Affirmed.

PITTMAN, C. J., and GLOVER, J., agree.

Clara Faye O'DELL and Fred O'Dell, Husband and Wife, Julie O'Dell Wilbur, Jonathan O'Dell, and Joseph O'Dell *v.* David Lynn RICKETT and Susan Rickett Rigsby, Nee Bennett

CA 04-1285 214 S.W.3d 301

Court of Appeals of Arkansas
Opinion delivered September 28, 2005

Gary Vinson, for appellants.

Oscar E. Jones, for appellees.

ROBERT J. GLADWIN, Judge. On August 27, 2002, the Independence County Circuit Court entered a decree quieting title to a .356 acre of land in favor of appellants Clara Faye

O'Dell, Fred O'Dell, Julie O'Dell Wilber, Jonathan O'Dell, and Joseph O'Dell (hereafter referred to as "the O'Dells"). Appellees David Lynn Rickett and Susan Rickett Rigsby, nee Bennett[1] (hereafter referred to as "the Ricketts") appealed to this court, arguing that the trial court erred in finding that the O'Dells had acquired the land by adverse possession. In an opinion handed down on April 28, 2004, this court agreed with the Ricketts and accordingly reversed and remanded the case. The O'Dells then filed an amended and substituted complaint and petition for temporary restraining order on June 18, 2004, seeking reformation of the deed. In an order entered on September 22, 2004, the trial court ruled that the O'Dells' claim was barred by the doctrine of *res judicata*. The O'Dells now argue that the trial court erred in finding that *res judicata* barred them from pursuing their claim for reformation upon remand by this court. We affirm.

The O'Dells take issue with this court's remanding of their case because they contend that it is unclear what this court intended by reversing and remanding the case without specific instructions. The O'Dells suggest that this court must have intended that a new trial be held. The O'Dells cite the per curiam opinion in *Wilson v. Rodgers*, 250 Ark. 335, 468 S.W.2d 739 (1971), for the general rule that in equity cases, with all the record fully developed, we should finally decide the case here instead of remanding it for a new trial. Nothing in our mandate indicated that this court intended that a new trial be held. Because new trials are seldom directed on reversal of chancery (equity) decrees, the established procedure is to give special direction for new trials on remand when that is the appellate court's decision. *Witcher v. McGhee*, 86 Ark. App. 317, 184 S.W.3d 474 (2004). Our general remand was simply to permit the trial court to enter an order quieting and confirming title in the Ricketts in order to avoid any clouds on their title.

In the former opinion, this court determined that the O'Dells could not argue on appeal that the deed should have been reformed because it was neither pled nor argued to the trial court. We specifically declined to address the issue of reformation because the appellate court will not find a fact that was not found below as that would be an intrusion into the province of the trial court. *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998). Upon

[1] The parties to the former appeal were Jimmie Thompson Rickett and David Lynn Rickett.

remand, the O'Dells sought to amend their pleadings to assert a new cause of action for reformation of the deed, but the trial court would not allow the amendment. The O'Dells contend that, pursuant to Ark. R. Civ. P. 15, they should have been permitted to amend their pleadings. The trial court has broad discretion in allowing or denying amendment of the pleadings. *Trice v. Trice*, 91 Ark. App. 309, 210 S.W.3d 147 (2005). We cannot say that the trial court abused its discretion in disallowing the amendment based on its conclusion that *res judicata* applied to our earlier decision.

The purpose of the *res judicata* doctrine is to put an end to litigation by preventing a party who had one fair trial on a matter from relitigating the matter a second time. *Cox v. Keahey*, 84 Ark. App. 121, 133 S.W.3d 430 (2003). Relitigation is barred by *res judicata* when (1) the first suit resulted in a judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action that was litigated or could have been litigated but was not; and (5) both suits involve the same parties or their privies. *Daley v. City of Little Rock*, 36 Ark. App. 80, 818 S.W.2d 259 (1991). The test in determining whether *res judicata* applies is whether matters presented in a subsequent suit were necessarily within the issues of the former suit and might have been litigated therein. *Cox*, *supra*. When a case is based on the same events as the subject matter of the previous lawsuit, *res judicata* will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *Id.*

The O'Dells argue that *res judicata* does not apply because, when this court reversed and remanded the case, there was no final judgment. As this court explained earlier, our judgment was final as to the adverse-possession claim, and the case was remanded to the trial court for it to enter an order not inconsistent with our opinion. The issue of reformation could have been considered by the trial court had it permitted the O'Dells to amend their complaint. Instead, the trial court, in its discretion, essentially found that the Ricketts would be prejudiced by the amendment given that the O'Dells had a fair opportunity to litigate the reformation issue in the prior suit. Accordingly, the trial court applied the doctrine of *res judicata* to prevent the O'Dells' attempt to pursue a new cause of action where the first one failed. We cannot disagree with the trial court's resolution of this matter and therefore affirm.

Affirmed.

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

BAKER, J., dissents.

KAREN R. BAKER, Judge, dissenting. I respectfully dissent from the majority opinion because this court's previous reversal and remand did not provide specific instructions that would constitute a mandate or final adjudication on the merits; therefore, res judicata is inapplicable. In fact, the court seemed to invite exploration of the issue of reformation by the trial court upon remand by saying that whether reformation is warranted is "a question of fact for the trial court to determine."

Res judicata means that "a thing or matter has been definitely and finally settled and determined on its merits by the decision of a court of competent jurisdiction." *Hunt v. Perry*, 355 Ark. 303, 310, 138 S.W.3d 656, 659 (2003). Res judicata consists of "two facets, one being issue preclusion and the other claim preclusion." *Carwell Elevator Co. v. Leather*, 352 Ark. 381, 388, 101 S.W.3d 211, 216 (2003). *See also Coleman's Serv. Ctr., Inc. v. Fed. Deposit Ins. Corp.*, 55 Ark. App 275, 935 S.W.2d 289 (1996). The issue preclusion or collateral estoppel aspect of res judicata "bars the relitigation of issues of law or fact actually litigated in the first suit." *Cox v. Keahey*, 84 Ark. App. 121, 129, 133 S.W.3d 430, 434 (2003), citing *Van Curen v. Ark. Prof'l Bail Bondsman Licensing Bd.*, 79 Ark. App. 43, 84 S.W.3d 47 (2002). The issue must have been "actually litigated and determined by a valid and final judgment" for res judicata to apply. *Id.* at 129, 133 S.W.3d at 434. The elements of collateral estoppel are: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) the issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; (4) the determination must have been essential to the judgment. *Palmer v. Ark. Council on Econ. Educ.*, 344 Ark. 461, 40 S.W.3d 784 (2001); *Zinger v. Terrell*, 336 Ark. 423, 985 S.W.2d 737 (1999).

In *Dolphin v. Wilson*, 335 Ark. 113, 983 S.W.2d 113 (1998), the Arkansas Supreme Court also reversed a land dispute after finding the trial exceeded its authority and jurisdiction by allowing issues to be raised on remand that "went far beyond the mandate and was not an order which gave effect" to the opinion and remand. *Id.* at 122, 983 S.W.2d at 117. Key to this determination was the fact that the opinion and remand for further proceedings

gave specific instructions with a clear mandate that limited the trial court's authority. *Id.*

Although the Arkansas Supreme Court held in *Dolphin* that there was a clear opinion and mandate that the trial court exceeded, it stated that "had this court remanded the matter for further proceedings without specific instructions as opposed to requiring the entry of an order conforming to our opinion, our holding might well be different." *Id.*

This court's previous reversal and remand at issue here was exactly the sort of exception given in *Dolphin* in that it was issued without specific instructions and did not come close to finally resolving the matter. In fact, it concluded with the statement that determination of whether a mutual mistake occurred that warrants reformation is a question of fact for the trial court to determine. This would seem to lead to the common — sense conclusion that a new trial was contemplated that would result in a determination of rights in the property with finality. In absence of a clear mandate — and by itself seeming to direct the trial court to consider the issue of reformation of the deed — there stills remains a final determination of the rights or the parties to be made. Only after such final adjudication on the merits would res judicata become applicable.

In *Palmer v. Carder*, 239 Ark. 336, 389 S.W.2d 428 (1965), the Arkansas Supreme Court considered the issue of res judicata and found it inapplicable because no rights were determined upon a reverse and remand. The court stated that "we have said, on numerous occasions, that, when a judgment is reversed and remanded for a new trial, the case stands as if no action at all had been taken by the trial court." *Id.* at 338–339, 239 S.W.2d at 430.

The majority opinion also notes that trial courts have broad discretion in allowing or denying amendments to pleadings. But this discretion is tempered by the fact we have previously stated that "amendments to pleadings should be allowed in nearly all instances without special permission from the court, except where on motion of an opposing party the court determines that prejudice would result or that disposition of the cause would be unduly delayed." *Odaware v. Robertson Aerial-AG, Inc.*, 13 Ark.App. 285, 683 S.W.2d 624 (1985) Ark. R. Civ. P. 15(a). From the record it appears that the defense of res judicata was not raised by the appellees but rather by the trial court itself, sua sponte. Rule 8(c) of the Arkansas Rules of Civil Procedure requires that there are some

affirmative defenses which must be pled. Res judicata is such an affirmative defense. *Allen v. Wallis*, 279 Ark. 149, 650 S.W.2d 225 (1983); *Kendrick v. Bowden*, 211 Ark. 196, 199 S.W.2d 740 (1947). For a trial judge to raise an affirmative defense sua sponte that must be pled by a party seems to me to go beyond the definition of "broad discretion." Further, it does not appear that the trial court was attempting to exercise discretion by his ruling, but instead found that this court's prior opinion finally foreclosed the issue of reformation, something the majority concedes is not the case.

Accordingly, I would reverse.

James Benjamin WRIGHT *v.* STATE of Arkansas

CA CR 04-1036 214 S.W.3d 280

Court of Appeals of Arkansas
Opinion delivered September 28, 2005

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

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

JOHN B. ROBBINS, Judge. Appellant James Benjamin Wright was convicted in a bench trial of first-degree terroristic threatening, and was sentenced as a habitual offender to fifteen years in prison. Simultaneously, a revocation order was entered whereby Mr. Wright was sentenced to nine years in prison in connection with a prior guilty plea for first-degree terroristic threatening. The trial court ordered the two prison sentences to run concurrently.

Mr. Wright now appeals from each of the judgments. With respect to the conviction, Mr. Wright's counsel has filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j)(1) of the Rules of the Arkansas Supreme Court and Court of Appeals, on the grounds that the appeal is without merit. Mr. Wright's counsel has filed a merit appeal from the order of revocation, arguing that the trial court erred in revoking his suspended imposition of sentence because the State failed to introduce proof of his conditions as part of its case. We affirm the conviction and we reverse the revocation.

In this case, the trial on the first-degree terroristic threatening charges was conducted immediately prior to the revocation hearing. At the trial, Donna Wright testified that Mr. Wright is her husband, but that they are separated. Mrs. Wright stated that on the night of March 22, 2003, while Mr. Wright was under a protective order and was not to contact her, Mr. Wright came to her house and attempted to open the front door, but it was locked. Mr. Wright then cursed at Mrs. Wright, made a reference to her having company in the house, and threw a three-foot-tall ashtray through the front window. According to Mrs. Wright, Mr. Wright had been calling her on the phone and had threatened to burn her house down with her in it.

Mr. Wright's counsel asserts in his brief that any appeal from the first-degree terroristic threatening conviction would be without merit, noting that there were no adverse rulings from which to appeal. Mr. Wright was provided a copy of his counsel's brief and notified of his right to file a list of points for reversal within thirty days, but has failed to do so.

We agree that the appeal from Mr. Wright's conviction is meritless. As Mr. Wright's counsel points out, the only adverse ruling was the trial court's denial of his directed-verdict motion. However, any challenge to the sufficiency of the evidence is not preserved for appeal because the motion was not specific as required by Ark. R. Crim. P. 33(b). A general motion that merely

asserts that the State failed to prove its case is inadequate to preserve the issue for appeal. *Beavers v. State*, 345 Ark. 291, 46 S.W.3d 532 (2001). Mr. Wright's counsel further asserts that even if a sufficiency challenge had been preserved it would be without merit, and we agree. The testimony of Mrs. Wright amounted to substantial evidence to convict Mr. Wright of first-degree terroristic threatening, which is committed by a person if, "[w]ith the purpose of terrorizing another person, he threatens to cause death or serious physical injury or substantial property damage to another person." *See* Ark. Code Ann. § 5-13-301(a)(1)(A) (Repl. 1997).

Based on our review of the record and Mr. Wright's counsel's brief, we conclude that there has been full compliance with Rule 4-3(j)(1) and that the appeal from the conviction is without merit. Therefore, we affirm the conviction and grant Mr. Wright's counsel's motion to be relieved.

We now turn to Mr. Wright's appeal from the revocation order, which has been briefed and argued on the merits. The revocation proceedings were premised on a judgment filed on August 9, 2002, which entered a conviction against Mr. Wright for first-degree terroristic threatening, and contained the handwritten notation that he not have any contact with Mrs. Wright. At the revocation hearing the State established that Mr. Wright violated the no-contact provision during the March 23, 2002, incident, where he tried to enter Mrs. Wright's home and then threw an ashtray through her front window.

For reversal of the revocation, Mr. Wright contends that the proof was insufficient because the State failed to introduce into evidence the written conditions that he allegedly violated. Mr. Wright concedes that he failed to raise this argument below, but nonetheless asserts that no objection was necessary pursuant to *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001), where the supreme court held that defendants are not required to move for a directed verdict in revocation proceedings in order to preserve a challenge to the sufficiency of the evidence on appeal.

We find it unnecessary to address the argument being raised on appeal, and we reverse the revocation order sentencing Mr. Wright to nine years' imprisonment. This is because the underlying order entered on August 9, 2002, does not reflect that Mr. Wright was given any probation or a suspended imposition of sentence. Instead, it imposes a sentence of 108 days in prison with

credit for 108 days served. In both the State's revocation petition and Mr. Wright's brief to this court, it is represented that the August 9, 2002, order imposed a nine-year suspended imposition of sentence, less the 108 days served. However, the August 9, 2002, order contains no such provision.

In *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003), the supreme court held that a trial court does not have the authority to revoke a suspended sentence before the commencement of the period of suspension, and that in such instances the resulting sentence is void. In the case at bar, no suspended sentence ever commenced, and thus the order of revocation was unauthorized and the sentence void. Although Mr. Wright does not challenge the legality of his sentence on appeal, we review problems involving void or illegal sentences even if not raised on appeal and not objected to in the trial court. *See Harness v. State, supra.*

Mr. Wright's conviction for first-degree terroristic threatening and resulting fifteen-year prison term is affirmed, and we grant his counsel's motion to be relieved on the grounds that the appeal from the conviction is without merit. The unauthorized nine-year prison term is reversed and dismissed.

Affirmed in part; reversed and dismissed in part.

GRIFFEN and CRABTREE, JJ., agree.

Christopher Earl JOWERS *v.* Jamie Sue JOWERS

CA 05-220 214 S.W.3d 294

Court of Appeals of Arkansas
Opinion delivered September 28, 2005

Ray Bunch, for appellant.

The Newman Law Firm, by: *Sue Ann v.* Newman, for appellee.

DAVID M. GLOVER, Judge. Appellant, Christopher Jowers, and appellee, Jamie Jowers, were divorced on August 25, 2004. As part of their settlement agreement, the parties agreed that appellant would have custody of their minor child, a son, whose date of birth was January 14, 2001. They also agreed upon a visitation schedule for appellee, which allowed her to keep the child during the day, Monday through Friday. Finally, they agreed upon the amount of monthly child support that appellee would pay, which took into account the fact that appellee was providing daycare for the child. The agreement was approved by the court and incorporated into the divorce decree. On September 23, 2004, approximately one month after the divorce decree was entered, appellant filed a change of address notice with the circuit-court clerk. On September 26 or 27, 2004, appellant took the child and moved to Brownsville, Texas, but he did not notify appellee of the move until after he had relocated. On September 29, 2004, appellee filed a petition for contempt and for modification of custody. Appellant counterclaimed for modification

of visitation and support. Following a hearing, the trial court found appellant in contempt and ordered him to pay $1000 in attorney's fees. In addition, the trial court found that there had been a material change of circumstances and therefore changed custody of the child from appellant to appellee; the court also modified visitation, and set support at $70 per week.

Appellant raises two points of appeal, challenging the trial court's decision with respect to contempt and with respect to the change of custody. We affirm the trial court's finding of contempt. However, we conclude that the trial court erred in deciding the issue of custody without also addressing the relocation factors set forth in *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003). Therefore, we affirm in part and reverse and remand in part for the trial court to determine the custody issue in conjunction with the *Hollandsworth* relocation factors.

At the hearing in this case, appellee testified that she and appellant divorced on August 25, 2004, and that they had one son. She stated that according to her custody and visitation agreement with appellant, she was to have visitation with her son Monday through Friday of each week from 6 a.m. until 4:30 p.m., plus every other weekend and alternate holidays. She explained that she would not have allowed appellant to have custody of the child if she were not going to be able to see him virtually every day. She stated that the high level of visitation for her was at the heart of their agreement.

Appellee testified that appellant had lived in Arkansas for about two years before he moved to Texas; that he did not notify her that he was moving to Texas; that she found out he had moved when he did not show up with the child one Monday morning; that she called his place of employment only to find out that he no longer worked there; and that she went to his house and all of his "stuff" was gone. She stated that as a result of the move, she had not been able to carry on her daily visitation with the child and that it had also been difficult to speak with him on the telephone. She stated that it is about a twelve-hour drive between her house and appellant's house in Texas.

Appellee acknowledged that appellant called her on Thursday of the week she learned that he had moved and that she was able to meet him in Clinton, Oklahoma, to pick up the child and keep him for a week. She also testified that since that time, she has had the child every other weekend and that she and appellant meet in Oklahoma to make the exchange.

Appellee explained that she is a trim carpenter and that she now works from 8 a.m. until 4 p.m. She stated that prior to getting the job as a trim carpenter, she was basically providing daycare for her son. She said that she would not be able to do that now because of her job. She explained that her mother has a daycare in her home; that she lives with her mother; and that the child would stay with her mom if she were given custody.

Appellee testified that appellant was working late hours with his farm job in Texas and that he did not spend very much time with their son. She stated that if she had custody, she would only be gone from 8 a.m. to 4 p.m.

Appellant testified that he has lived in Brownsville, Texas, since the first of October with his parents and son. He explained that he moved to Texas because "we were getting slow at my job," Northwest Sheetmetal. He acknowledged that he told his employer a month in advance that he had two or three job openings in Texas. He said that he works a lot of hours and that he makes more money than he formerly did. He explained that he made about $250 or $280 a week at the sheetmetal job in Arkansas and that he made anywhere between $300 and $500 in Texas. He testified that he did not realize there was anything to stop him from moving to Texas. He said that all of his family were in Texas and that he "just wanted basically to see what was better for my son." He said that he did not know that he should have filed a petition asking the court to address the issue of relocation. He explained that he notified the court in writing of his change of address on September 23, 2004.

Appellant described the manner in which he and appellee had handled visitation since his move to Texas. He stated that appellee had visited with the child five different weekends and that they meet halfway for the exchange.

Appellant explained that his son stays at a daycare while he works and that since October 17, the child has been in day care from 8 a.m. until 5 p.m. He said that there "might be a day I don't see him because of working late." He explained that his hours are usually from 8:00 or 9:00 in the morning until 10:00 or 11:00 at night; that the hours change with the seasons; and that his normal work day would be from 8:00 a.m. until 8:00 p.m. He explained that the child's grandparents pick him up and keep him until appellant gets home.

Appellant testified that he did not move to Texas to prohibit visitation between appellee and their child; that he moved to get a

better job and to make more money; that his family was "down there"; that after the divorce, the only family he had in Arkansas was his grandpa; and that he had lived in Texas most of his life. He stated that "it was not [his] intention all along" to get custody of the child and move to Texas. He acknowledged that the divorce decree was file-marked August 25, 2004; that the change of address form he filed with the court was file-marked September 23, 2004; that he moved to Texas on September 26 or 27, 2004; and that he informed his employer "a month ahead of time" that it "wasn't for sure" but "it was possible" he would be moving to Texas. He also acknowledged that child custody and visitation were at the heart of his agreement with appellee. He explained that Brownsville, Texas, is a little over 650 miles from where appellee lives, and he testified, as did appellant, that the drive is about twelve hours.

Appellant stated that when he works until 11 p.m., either his aunt or grandparents pick up the child and take him to their house and that if his mom is not working that day, she picks up the child and takes him to her house.

Upon examination by the trial court, appellant testified that when he worked in Arkansas, his hours were from 7:00 or 7:30 a.m. until 4:00 p.m., Monday thru Friday; that he was not fired from that job; that he gave a month's notice before moving to Texas; that in Texas the previous week he had worked from 8:00 or 9:00 in the morning until 10:00 or 12:00 at night; that his work schedule fluctuates; and that he could work those hours seven days a week.

Appellant further explained that during harvest, which lasts a month and was going on at the time of the hearing, he works a lot of hours, but that before harvest he usually works an eight- or nine-hour day. He stated that planting season lasts about two months, depending upon the amount of acreage. He explained that to get $500 a week, he might work ten to twelve hours a day in a four-day week; and that a $300 week would involve eight to nine hours per day.

The court then ruled from the bench, expressing the belief that appellant "duped" appellee into going along with the custody plan, when he had no intention of ever complying with that agreement. The court found appellant to be in "willful contempt of court." The court noted that it had not been asked to set aside the decree on the basis of fraud,

> although it looks to me like that is exactly what happened. He made a deal he never intended to keep. He induced Mrs. Jowers to enter into this agreement with him on the promise of letting her see this child everyday. That was a lie at the time. I firmly believe from his testimony it was a lie. He never intended to go along with it.

The court also noted that appellant was now "spending maybe as many as ten hours a day, seven days a week away from the child during the busy season and at best spends more time away from the child than Mrs. Jowers would have to spend away from the child were the child permitted to live here." Finally, the court ruled:

> Basically, I guess what I am saying is that I do find a substantial change of circumstances, and I am changing custody of this child. Mrs. Jowers is going to have custody. Mr. Jowers will have visitation of six weeks in the summer, one week at Christmas, and I am going to give him one week every month that he can come to Arkansas and pick the child up and bring the child back. He can come up on the second Saturday and bring the child back the Sunday, a week from that Saturday of each month, but that will not supersede holidays. Holidays take precedence.
>
> You are in contempt of court, Mr. Jowers. You are lucky you are not going to jail. You can pay $1,000 attorney's fees. That is your sanction, and frankly I am not finding Mrs. Jowers in contempt for not paying the child support because she has had to spend all the money to get to see her child since he uprooted and took the child to Texas.

The Order of Modification provided in pertinent part:

> 3. That the Plaintiff is found to have willfully violated the previous Orders of this Court in not allowing the Defendant her Court ordered visitation. The Plaintiff is therefore found in Contempt of Court.
>
> 4. That the Court finds that there has been a material change in circumstances that warrants a change of custody. That the custody of the parties' minor child, Christopher James Jowers, born, January 14, 2001 is hereby changed to the Defendant, Jamie Sue Jowers, subject to the reasonable visitation rights of the Plaintiff. The Court further finds that it is in the best interest of Christopher James Jowers, that the Defendant be granted sole care, custody and control over him.

In cases involving child custody, 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. *Aswell v. Aswell*, 88 Ark. App. 115, 195 S.W.3d 365 (2004). 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. *Id.* 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. *Id.*

For his first point of appeal, appellant contends that the trial court erred in finding him in contempt of court. We disagree.

Following the hearing, the trial court found that appellant had willfully violated the court's previous orders by not allowing appellee her court-ordered visitation, and therefore found that appellant was in contempt of court. 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. *Aswell v. Aswell, supra; Gatlin v. Gatlin*, 306 Ark. 146, 811 S.W.2d 761 (1991).

Here, the trial court stated its clear belief that appellant "made a deal he never intended to keep," that he "induced Mrs. Jowers to enter into this agreement with him on the promise of letting her see this child everyday," that "it was a lie at the time," and that he "never intended to go along with it." We find no clear error in the trial court's findings on this point that appellant's conduct intentionally frustrated the ordered visitation, thereby constituting contempt.

For his remaining point of appeal, appellant contends that the trial court erred in ordering a change of custody. We agree.

The standard of appellate review governing custody modifications is well settled. *Dansby v. Dansby*, 87 Ark. App. 156, 189 S.W.3d 473 (2004). In child-custody cases, the primary consideration is the welfare and best interests of the child involved; all other considerations are secondary. *Id.* 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. *Id.* In cases involving child custody and related matters, we review the case *de novo*, but we will not reverse a trial judge's

findings in this regard unless they are clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* Because the question of whether the trial court's findings are clearly erroneous turns largely on the credibility of the witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest. *Id.*

In seeking a change of custody, appellee had the burden of proof. The party seeking modification of the child-custody order has the burden of showing a material change in circumstances. *Calhoun v. Calhoun*, 84 Ark. App. 158, 138 S.W.3d 689 (2003). In order for a trial court to change the custody of children, it must first determine that a material change in circumstances has transpired from the time of the divorce decree and, then, determine that a change in custody is in the best interest of the child. *Id.*

Moreover, in *Hollandsworth v. Knyzewski, supra,* our supreme court held that relocation alone is not a material change in circumstances and announced that there is a presumption in favor of relocation for custodial parents having primary custody. Our supreme court made it clear in *Hollandsworth* that the custodial parent no longer has the responsibility to prove a real advantage to herself or himself and to the children in relocating. Rather, the noncustodial parent has the burden to rebut the relocation presumption. The *Hollandsworth* court explained that the polestar in making a relocation determination is the best interests of the child, and that the court should take into consideration 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 children will relocate; (3) visitation and communication schedule for the noncustodial parent; (4) the effect of the move on the extended family relationships in the location in which the custodial parent and children will relocate, as well as Arkansas; (5) preference of the child, including the age, maturity, and the reasons given by the child as to his or her preference.

Here, the *Hollandsworth* factors were not addressed by the trial court, presumably because of the manner in which this case arose. That is, appellant had already moved to Texas, and the case was heard on appellee's motion to change custody and to find

appellant in contempt of court, and on appellant's counter-motion for modification of visitation and support. However, in light of the *Hollandsworth* presumption in favor of relocation and its holding that relocation alone is not a material change of circumstances, we find that the trial court erred in deciding the custody issue without also addressing the factors set forth in *Hollandsworth*. We therefore reverse and remand the custody portion of the trial court's decision in order for the court to decide the custody issue in conjunction with the *Hollandsworth* relocation factors.

Affirmed in part; reversed and remanded in part.

PITTMAN, C.J., and GLADWIN, J., agree.

Mo MORSY *v.* Marva Morsy DELONEY

CA 05-255 214 S.W.3d 285

Court of Appeals of Arkansas
Opinion delivered September 28, 2005

Robert M. Abney, P.A., for appellant.

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

LARRY D. VAUGHT, Judge. Mohammad "Mo" Morsy appeals from a judgment of the Pulaski County Circuit Court requiring him to pay $18,659.88 to his ex-wife, Marva Morsy Deloney, as reimbursement for tuition and education expenses for their minor son, A.M. Morsy argues on appeal that (1) Deloney waived her right to collect the funds through her inaction and failure to request payment, (2) Deloney should be estopped from collecting the funds, and (3) Deloney should be barred from raising the issue of past tuition and expenses by the compulsory counterclaim rule. We disagree on all points and affirm the judgment of the trial court.

Morsy and Deloney were divorced on January 29, 1997, in Craighead County. In the divorce decree, the parties were given joint custody of their minor son, A.M., age seven at the time, with primary custody given to Deloney. The decree required Morsy to pay child support, pay A.M.'s education expenses, including tuition and clothing, and maintain health insurance on A.M.

On October 13, 2000, Deloney petitioned the court to relocate the child to Pulaski County because she was planning to remarry and move. By agreed order dated July 16, 2001, Deloney was allowed to relocate her residence and take A.M. with her. The order referred to Morsy's obligations regarding child support and health insurance but did not mention education expenses. The order stated that the "decree of divorce in this matter shall be considered modified to the extent, and only to the extent, necessary to accommodate the matters set forth herein."

Morsy filed a petition for contempt on April 30, 2002, alleging that Deloney had not supplied him with information required by the last order of the court, specifically items such as A.M.'s school schedule, progress reports, and activities schedule. Additionally, Morsy relocated from Arkansas to Chicago and asked that the visitation schedule be modified. Deloney responded to

Morsy's petition and filed her own petition for contempt with regard to disagreements over visitation and outstanding medical expenses. An order was filed on November 13, 2002, settling these issues. No mention of education expenses was made.

Morsy filed another petition for contempt on March 23, 2004, alleging several violations of the divorce decree concerning A.M., including the fact that Deloney had taken A.M. out of private school and enrolled him in public school. Morsy argued that the move was not in the child's best interest. Deloney responded and filed her own petition for contempt. She asked that venue be changed from Craighead County to Pulaski County. Additionally, she asserted that Morsy had been negligent in paying A.M.'s education expenses since the move to Pulaski County. She asked that she be reimbursed for tuition and expenses. The case was transferred by agreed order, and the issues were heard in Pulaski County Circuit Court on October 11, 2004. In an order and judgment filed November 17, 2004, the trial court judge ruled in favor of Deloney and required Morsy to pay back tuition and education expenses in the amount of $18,659.88.

For his first point on appeal, Morsy argues that the trial court erred in finding that Deloney was not barred by estoppel from collecting funds for tuition and education expenses. We review equity cases de novo on the record, but we do not reverse a finding of fact by the trial court unless it is clearly erroneous. *Medlin v. Weiss*, 356 Ark. 588, 158 S.W.3d 140 (2004). A finding of fact is clearly erroneous when, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been committed. *Id.* at 592, 158 S.W.3d at 143. Enforcement of child-support judgments are treated the same as enforcement of other judgments, and a child-support judgment is subject to the equitable defenses that apply to all other judgments. *Office of Child Support Enforcement v. King*, 81 Ark. App. 190, 100 S.W.3d 95 (2003).

The elements of equitable estoppel are (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that the conduct be acted on or must act so that the party asserting estoppel had a right to believe the other party so intended; (3) the party asserting estoppel must be ignorant of the facts; and (4) the party asserting estoppel must rely on the other party's conduct to his detriment. *Chitwood v. Chitwood*, 92 Ark. App. 129, 211 S.W.3d 547 (2005).

Morsy argues that this case meets all the requirements of equitable estoppel. He bases his argument on the fact that the agreed order of July 16, 2001, did not reference the tuition and education expenses discussed in the divorce decree. He argues that he believed he was no longer required to pay A.M.'s education expenses after the 2001 agreed order and that Deloney knew this and failed to inform him otherwise. Morsy testified that he and Deloney orally agreed that Morsy would no longer be responsible for the education expenses. However, Deloney denied the existence of such an agreement and maintained that Morsy was always responsible for A.M.'s education expenses. When judging the trial court's findings in equity cases, we defer to the trial judge's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Hill v. Hill*, 84 Ark. App. 132, 134 S.W.3d 6 (2003). In the present case, there is no evidence other than Morsy's testimony to prove that there was an agreement to relinquish his duty to pay education expenses, and the trial judge was free to believe Deloney's version of events — that no such agreement was ever made. Therefore, Morsy could not meet the required elements of estoppel, and we are satisfied the trial court's ruling was not clearly erroneous.

Morsy's second point on appeal asserts that the trial court erred in finding that Deloney had not waived her right to collect funds for tuition and education expenses for her minor child. The standard of review is the same for waiver as it is for equitable estoppel — clearly erroneous. *Medlin*, 356 Ark. at 592, 158 S.W.3d at 143. Waiver is the voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that he shall forever be deprived of its benefits, and it may occur when one, with full knowledge of the material facts, does something that is inconsistent with the right or his intention to rely upon it. *Taylor v. Hamilton*, 90 Ark. App. 235, 205 S.W.3d 149 (2005). The relinquishment of the right must be intentional. *Moore v. Pulaski County Special Sch. Dist.*, 73 Ark. App. 366, 43 S.W.3d 204 (2001).

Morsy cites *Benn v. Benn*, 57 Ark. App. 190, 944 S.W.2d 555 (1997), for the proposition that waiver may be established where an ex-wife sits on her right to recover alimony arrearages for too long a period of time. However, Morsy fails to include that in *Benn* we affirmed the trial court's award of alimony

arrearages where the wife had not petitioned the court until her husband had failed to pay alimony for nine years. In the present case, Deloney testified that Morsy paid the education expenses until she moved to Pulaski County in late 2001. She first asked for the delinquent expenses to be paid in March 2004 after Morsy filed a petition with the court complaining that Deloney had moved the child from private to public school. We are satisfied that the trial court did not err in finding that Deloney did not waive her right to recover the unpaid education expenses because she waited for three years to assert her right.

Morsy argues in his final point on appeal that Deloney was barred by the compulsory-counterclaim provision of Rule 13 of the Arkansas Rules of Civil Procedure from recovering the education expenses because she did not raise the issue during court proceedings in 2002. We do not defer to a trial court's conclusion on a question of law; if the trial court erroneously applied the law and the appellant suffered prejudice as a result, we will reverse the trial court's erroneous ruling on the legal issue. *Hill*, 84 Ark. App. at 138, 134 S.W.3d at 9.

Rule 13(a) of the Arkansas Rules of Civil Procedure requires that a pleading shall state as a counterclaim any claim, which at the time of the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. The purpose for this rule is to require parties to present all existing claims simultaneously to the court or be forever barred, thus preventing a multiplicity of suits arising from one set of circumstances. *Linn v. Nations Bank*, 341 Ark. 57, 14 S.W.3d 500 (2000). Rule 7(a) of the Arkansas Rules of Civil Procedure defines "pleadings" as a complaint, an answer, a counterclaim, and a reply to a counterclaim. It states that "[n]o other pleadings shall be allowed." Rule 7(b) discusses motions and other papers, and states that "[a]n application to the court for an order shall be [made] by motion."

Our supreme court has held that the court granting a decree of divorce has continuing authority to revise or alter orders contained in such decree affecting the support, custody, and control of the minor children of the parties when there is proof showing a change in circumstances from those existing at the time of the original order. *Blackwood v. Floyd*, 342 Ark. 498, 29 S.W.3d 694 (2000).

Although Morsy attempts to characterize Deloney's right to recover education expenses as a counterclaim that should have been asserted after he filed his first petition for contempt in April 2002, we disagree. Morsy cites to our holding in *McJunkins v. Lemons*, 52 Ark. App. 1, 913 S.W.2d 306 (1996), to support his compulsory-counterclaim argument; however, we specifically declined to reach the compulsory-counterclaim issue in *McJunkins* due to abstract deficiencies. Therefore, any discussion of Rule 13 and its applicability to motions to enforce prior orders of the court in *McJunkins* is mere *obiter dictum* and has no precedential value.

When Morsy petitioned the court in April 2002 to order Deloney to comply with certain obligations under the divorce decree pertaining to A.M., Morsy was not filing a pleading and asserting a claim but rather filing a motion asking the court to enforce a previous order. Rule 13 does not apply, and Deloney was not required to respond with any and all complaints she had against Morsy. Therefore, when Deloney filed a counter-petition in May 2004 to enforce the decree and recover tuition and education expenses, she was not barred by the compulsory-counterclaim rule because she did not raise the education-expense issue in response to Morsy's first petition filed in April 2002.

Affirmed.

HART and NEAL, JJ., agree.

ARKANSAS DEPARTMENT of HUMAN SERVICES *v.*
SILOAM SPRINGS NURSING & REHABILITATION

CA 04-962 214 S.W.3d 275

Court of Appeals of Arkansas
Opinion delivered September 28, 2005

Richard N. Rosen, for appellant.

Kutak Rock LLP, by: *Debby Thetford Nye* and *Amy M. Wilbourn*, for appellee.

ANDREE LAYTON ROAF, Judge. This case involves the interpretation of a Medicaid reimbursement rule promul-

gated by the Arkansas Department of Human Services (DHS) in 2001. Under the rule, a long-term care facility/Medicaid provider would be reimbursed for its services based upon a number of cost factors, including the fair rental value of its facility. Appellee Siloam Springs Nursing and Rehabilitation (Siloam) asked DHS to interpret the rule so that Siloam's pre-2001 renovations were considered in determining its fair rental value. DHS declined to do so, and its interpretation was upheld by a DHS hearing officer. Siloam appealed to circuit court, where the agency ruling was reversed. DHS now appeals from the circuit court's order. We reverse the circuit court and remand with directions to reinstate the agency decision.

Before the new rule was promulgated, long-term care providers were reimbursed for Medicaid services by flat-rate payments. However, in 1999, the legislature directed DHS, in cooperation with the Arkansas Health Care Association (AHCA)[1] and other interested parties, to "develop a new cost-based nursing facility rate methodology." *See* Act 1537 of 1999, § 127(d). The Act required the new methodology to be submitted to the appropriate federal agency prior to January 1, 2001, so that it might be implemented by July 1, 2001. *Id.*

After the passage of Act 1537, DHS and AHCA worked together to develop the new system. According to Siloam, the most crucial aspect of this process was the calculation of each facility's fair rental value because profit was built into that component. An independent assessment of each facility's value was too expensive for DHS to undertake, and, according to one of Siloam's witnesses, DHS records in this regard were "not very good." Therefore, it was determined that AHCA would collect information about the facilities through surveys. AHCA's data analyst, Lynn Rodgers, sent the surveys to providers requesting the year of licensure; the number of beds; the addition of new beds and the year they were added; the value of any major improvements costing over $76,000.

Through the process of negotiation, the parties agreed that the starting point for determining fair rental value would be a per-bed value of $38,000, regardless of the actual age or value of

[1] A trade association for owners of long-term care facilities.

the bed.[2] They also agreed that an aging index or depreciation factor would be applied to each bed, reducing the bed's value by one percent for each year of its age, to a maximum of fifty percent. As an example, the value of a ten-year-old bed would be reduced by ten percent, *i.e.*, from $38,000 to $34,200.

In addition, AHCA and its representatives believed that DHS would adjust the aging index for facilities that had made major renovations in past years. This would mean that, in the case of two facilities of roughly the same age, the facility that had undergone major renovation would have a higher fair rental value than the facility that had not renovated. In light of AHCA's understanding, Lynn Rodgers continued to collect the facility surveys — which contained, *inter alia*, amounts spent on renovation — and passed them along to DHS program administrator Lynn Burton. Rodgers also developed several formulas and models to calculate the impact of major renovations on facility value. According to her and AHCA president Jim Cooper, these models and formulas were discussed and shared with DHS. Indeed, the record contains several pieces of correspondence that Rodgers sent to DHS in the fall of 2000, referencing the effect of major renovations on the aging index and containing formulas to be used in calculating that effect.

Lynn Burton of DHS agreed that she exchanged information with Lynn Rodgers, and she remembered at least some of the above mentioned correspondence. She also acknowledged that she received the surveys collected by AHCA. However, Burton testified that "we weren't going to use" the renovation information provided by AHCA and that, even in the fall of 2000, "I did not believe that major renovations were going to be used in calculating the aging index. As far as I remember, we were never going to be using historical renovations." Nevertheless, Burton did not tell Rodgers or Cooper that the renovation information would not be used or that it should not be sent to DHS.

In January 2001, DHS filed the new methodology with the federal government, and the system was implemented in the spring of 2001. It reflected the parties' agreement that the fair rental component would be based on a per-bed value of $38,000, as

[2] As explained by one of Siloam's witnesses, a bed's value is not simply its physical worth but includes the value of other furnishings and costs associated with it and attributable to it, such as dining areas, day rooms, etc.

reduced by an aging index of one-percent per year up to fifty percent. Section 6 of the reimbursement rule, which is at issue in this case, made the following statement with regard to the aging index:

> Age of provider beds for purposes of calculating the aging index were taken from surveys provided by [AHCA] as prepared by providers. The provider is responsible for the accuracy of the information provided. The provider may at any time be required to provide records validating this information. The aging index is subject to adjustment based upon review or audit.

Siloam's witnesses testified that they had no problem with Section 6 as written because it mentioned the surveys, and they therefore assumed that DHS would use the surveys' renovation data to adjust the aging index. As a result, they expressed surprise when, in the spring of 2001, DHS calculated reimbursement rates without considering past renovations.

Siloam, whose survey response reflected over $700,000 in renovations between 1999 and 2001, appealed the rate calculations to a DHS hearing officer. It argued that DHS should have interpreted Section 6 as requiring an adjustment to the aging index based on the renovation data in the survey and the parties' understandings throughout the negotiation process.[3] The hearing officer ruled against Siloam and concluded that the language in the new methodology was clear on its face and supported DHS's implementation. Siloam appealed to Pulaski County Circuit Court, where the judge reversed the agency decision and ordered DHS to adjust Siloam's rate to include "historic or past renovation data." DHS now appeals from that order.

Judicial review of DHS decisions is governed by the Administrative Procedures Act, Ark. Code Ann. §§ 25-15-201 to -218 (Repl. 2002 & Supp. 2005). Section 25-15-212(h) of the Act provides in pertinent part that a court may reverse an agency

[3] Siloam also argued at various times in the proceedings below and in its brief on appeal that Section 5 of the rule, which *did* take renovations into consideration, might somehow be applicable. However, during oral argument, Siloam acknowledged that Section 5 concerns prospective renovations only and not pre-2001 renovations. We therefore will not discuss Section 5 any further in this opinion.

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.

On appeal, it is not our role to conduct a *de novo* review of the circuit court proceeding; rather, our review is directed at the decision of the administrative agency. *See Groce v. Director, Ark. Dep't of Human Servs.*, 82 Ark. App. 447, 117 S.W.3d 618 (2003). When conducting our review, we keep in mind that the hearing officer is in the best position to determine the credibility of witnesses and decide the proper weight to give the evidence. *Id.* We also review the entire record and give the evidence its strongest probative force in favor of the agency's ruling. *Ark. Soil & Water Conserv. Comm'n v. City of Bentonville*, 351 Ark. 289, 92 S.W.3d 47 (2002). Finally, we recognize that 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. *Ark. Dep't of Human Servs. v. Schroder*, 353 Ark. 885, 122 S.W.3d 10 (2003).

DHS, as the appellant before this court, argues that the agency's decision was supported by substantial evidence; was not arbitrary, capricious, or characterized by an abuse of discretion; was not in violation of relevant statutory provisions or in excess of DHS's statutory authority. *See* Ark. Code Ann. § 25-15-212(h). However, because our review is directed to the agency's decision, *see Groce, supra*, our analysis on appeal will focus on the arguments made by Siloam, who seeks to reverse the agency. *See, e.g., Ark. Soil & Water Conserv. Comm'n, supra.* Siloam contends that DHS should have interpreted Section 6 to allow for adjustment of the aging index where a provider has made renovations to its facility.

We begin with the frequently-cited proposition that an agency's interpretation of its own rules is highly persuasive, although it is not binding on the courts. *Sparks Reg'l Med. Ctr. v. Ark. Dep't of Human Servs.*, 290 Ark. 367, 719 S.W.2d 434 (1986). While we may reject an agency's interpretation of its own rule if the interpretation is irreconcilably contrary to the plain meaning of the rule, *see generally Burlington Indus. v. Pickett*, 336 Ark. 515, 988 S.W.2d 3 (1999), an administrative agency's interpretation of its own rule will ordinarily be upheld unless it is clearly wrong. *See Ark. Prof'l Bail Bondsman Lic. Bd. v. Oudin*, 348 Ark. 48, 69 S.W.3d 855 (2002).

Words in an administrative rule or regulation are given their plain and ordinary meaning unless there is an ambiguity. *See Johnson v. Ark. Bd. of Exam'rs in Psychology*, 305 Ark. 451, 808 S.W.2d 766 (1991); *Rowell v. Austin*, 276 Ark. 445, 637 S.W.2d 531 (1982). Language is ambiguous if there is doubt or uncertainty as to its meaning and it is fairly susceptible to more than one reasonable interpretation. *See generally Anderson Gas & Propane, Inc. v. Westport Ins. Corp.*, 84 Ark. App. 310, 140 S.W.3d 504 (2004).

Section 6 of the new reimbursement rule states that the ages of provider beds for purposes of calculating the aging index "were taken from surveys provided by [AHCA] as prepared by providers." Siloam acknowledges that the new rule is correct as written and also states that the language in Section 6 is "clear and understandable," thus making no claim of ambiguity. Rather, Siloam asserts that the language in Section 6 is so clear that DHS should have interpreted it to include consideration of past renovation data. Siloam primarily bases this argument on the section's reference to the surveys, which contained the past renovation data, and on the parties' negotiations prior to the implementation of the rule.

We agree that the language of Section 6 is clear, though not in the manner that Siloam suggests. Section 6 makes no mention that a facility's past renovations will be taken into account for any purpose. Even Siloam's financial officer, Jerry Sams, noted that, while such language could be "inferred" in the rule, it was not expressed verbatim. Section 6 states that the age of provider beds was taken from the surveys. The record as abstracted contains at least one survey that lists the provider's beds and the year that the

beds were added to the facility. Thus, Section 6 is little more than an acknowledgment of the fact that DHS obtained the ages of provider beds from the surveys. Its plain language does not contain a renovation adjustment.

Moreover, the parties' negotiations did not require that the new rule be interpreted to include past renovations. Although AHCA provided DHS with information on past renovations and the testimony of Siloam's witnesses is replete with statements that they "assumed" or "anticipated" or "thought" that DHS would use the information, they also said that they did not know if all of the information they were providing would be used. More importantly, as we have previously stated, the rule as written simply does not contain language to the effect that the renovation data should be considered. Therefore, DHS did not act unreasonably in refusing to stretch Section 6's language to mean that *all* of the information on the surveys, including historic renovation data, *must be* used.

Nor does DHS's purported lack of cooperation in the negotiating process change the clear language of the rule. Although we note that DHS cooperated to some extent by negotiating the per-bed value figure of $38,000 and the one-percent aging index, we again look to the wording of the rule rather than the events leading up to its promulgation. The rule makes no express mention that past renovations will be a factor in determining a facility's initial fair rental value or calculating the aging index.

We are sympathetic in some respects to Siloam's arguments, particularly that fairness dictates that providers who have renovated their facilities should have a higher initial rental value that those who have not. However, we do not substitute our judgment for that of the agency. *Groce, supra.* Moreover, in light of the manner in which Siloam has chosen to frame the issues on appeal, *i.e.*, a challenge to the interpretation of the rule rather than the rule itself, we cannot say that DHS's interpretation of the rule was clearly wrong, given its plain language and the witness testimony at the administrative hearing. Thus, in accordance with the Administrative Procedures Act, we do not conclude that the agency's decision was unsupported by substantial evidence; was arbitrary, capricious, or characterized by an abuse of discretion; or

was in violation of relevant statutory provisions or in excess of its statutory authority.[4]

We therefore reverse the circuit court order and remand with directions to reinstate the agency decision. *See Ark. Dep't of Human Servs. v. Ark. Child Care Consultants, Inc.*, 318 Ark. 821, 889 S.W.2d 24 (1994).

Circuit court reversed and remanded; agency decision reinstated.

BIRD and BAKER, JJ., agree.

Billie J. GREENLEE *v.* MAZDA AMERICAN CREDIT

CA 04-984 214 S.W.3d 290

Court of Appeals of Arkansas
Opinion delivered September 28, 2005

[4] Siloam argued on appeal that the agency's findings of fact were not sufficient to allow review. *See* Ark. Code Ann. § 25-15-210(b)(2) (Repl. 2002). Because our review is directed to the plain language of the rule and the administrative officer concluded that the rule's language was clear, we see no need for further findings.

Hodson, Woods & Snively, by: *Michael Hodson*, for appellant.

Jack, Lyon & Jones, P.A., by: *John W. Fink*, for appellee.

ANDREE LAYTON ROAF, Judge. Billie J. Greenlee appeals from the Washington County Circuit Court's order granting appellee Mazda American Credit (Mazda) a deficiency judgment in connection with the repossession of her car. On appeal, Greenlee argues that the trial court erred in (1) determining that Mazda conducted a commercially reasonable sale; and (2) finding that Mazda's notice of sale was sufficient where evidence showed that the notice was not sent to her "last known address." Because we find that Mazda did not demonstrate that the sale was conducted in a commercially reasonable manner, we reverse.

On November 13, 2003, Mazda filed a complaint in the Washington County Circuit Court alleging that, on October 20, 2000, Greenlee[1] purchased a 1995 Chevrolet Tahoe; that the vehicle was financed through Mazda; that Greenlee subsequently defaulted on the payments; that the vehicle was sold at a commercially reasonable sale; and that a $6,069.37 deficiency was owed. Greenlee responded to the complaint on December 4, 2003, and denied the allegations that the vehicle had been sold at a commercially reasonable sale and that a $6,069.47 deficiency was owed.

The case was heard with the trial judge sitting as the finder of fact. At trial, Mazda submitted (1) the credit application completed by Greenlee; (2) the credit application completed by Robert Bailey; (3) the installment sales contract executed by Greenlee, Bailey, and Mazda; (4) the charge-off history for Greenlee; (5) notice of intent to sell the vehicle, addressed to Bailey; (6) notice of intent to sell the vehicle, addressed to Greenlee; (7) statement of the sale of the vehicle, addressed to Bailey; and (8) statement of the sale of the vehicle, addressed to Greenlee. These exhibits were admitted into evidence without objection.

Mazda put on testimony from one witness, Tim Tucker, a dealer account manager for Promise Financial Services, the company responsible for administering Mazda's credit program. Tucker testified that he was familiar with Mazda's books, records, and accounts. Other than his testimony that he recognized the

[1] The complaint also named Robert L. Bailey as a defendant; however, he is not a party to the instant appeal, and therefore, we will only refer to Bailey when relevant.

exhibits being offered into evidence, Tucker offered very little testimony on direct examination. He testified that the amount owed on the Greenlee contract was $11,809.76; that the proceeds of the sale were $6100; and that the remaining balance totaled $5709.76. He also testified that there were $343 in additional expenses for "reconditioning" and "selling." That was the extent of Tucker's testimony on direct examination.

On cross-examination, Tucker admitted that he lacked any personal knowledge regarding any activities surrounding the sale of the vehicle or the signing of the sales contract. He stated that he knew the sale was an "auction," and that exhibits five and six showed that the sale of the vehicle was a "private" sale. He, however, did not personally notify Greenlee of the sale, and could only state that the notice of intent to sell indicated that the vehicle would be sold at a private sale some time after ten days from the date of the notice.

Following this testimony, Mazda rested, and Greenlee moved for a directed verdict. In support of her motion, Greenlee first argued that notice of the sale should have been sent to her "last known address." Second, she argued that Mazda presented no testimony about the commercial reasonableness of the sale. The trial court denied the motion and entered a judgment for Mazda in the amount of $6,052.77. Greenlee brings this appeal.

For her first point on appeal, Greenlee argues that the trial court erred in finding that the sale was commercially reasonable as Ark. Code Ann. § 4-9-504(3) (Repl. 1991)[2] requires. Whether the sale of collateral was conducted in a commercially reasonable manner is essentially a factual question, and the trial court's findings of fact will not be reversed on appeal unless clearly against the preponderance of the evidence. *Beard v. Ford Motor Credit Co.*, 41 Ark. App. 174, 850 S.W.2d 23 (1993). In making that determination, this court gives due regard to the superior opportunity of the trial court to judge the credibility of the witnesses and the weight to be given their testimony. *Id.*

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[2] Greenlee entered into the installment-sale contract on October 20, 2000. At the time of the sale of the vehicle Ark. Code Ann. § 4-9-504(3) (Repl. 1991) was in effect. The Code was amended in 2001 by Act 1439 § 1 and went into effect on July 2001. The disposition of the collateral occurred in 2003, after the effective date of the Amendment. However, the language of the pre-2001 provision and the newly-acted provision are substantially the same.

Arkansas Code Annotated section 4-9-504(3) provides in relevant part:

> (1) A secured party after default may sell, lease, or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing.
>
> * * *
>
> (3) Disposition of the collateral may be by public or private proceeding and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable.

See also Eagle Bank and Trust Co. v. Dixon, 70 Ark. App. 146, 149, 15 S.W.3d 695, 697 (2000) (holding, "Every aspect of the disposition of collateral, including the method, time, manner, place, and terms must be commercially reasonable."). Once the collateral has been disposed of, the debtor remains liable for any deficiency. Ark. Code Ann. § 4-9-504; *Dixon, supra.* However, a creditor may be barred from seeking a deficiency judgment if the sale of the collateral was not commercially reasonable. *Dixon, supra.* The creditor bears the burden of proving that the sale proceeded in a commercially reasonable manner. *Id.*

In our survey of case law, it is apparent that those cases analyzing the commercial reasonableness of a sale of collateral contain specific testimony concerning the disposition of the collateral and factors affecting the disposition. For example, in *Dixon, supra,* the creditor's witness testified that she examined the collateral that was the subject of the deficiency on at least two separate occasions. According to her, the collateral included various kitchen equipment, which, she opined, was not in "the best condition," and some items were missing. *Id.* at 149, 15 S.W.3d at 697. During the trial, the witness stated that, based upon her experience, $22,500 was a fair price for the collateral. However, in her affidavit the witness had attested that the collateral was worth the value of the debt, approximately $40,000. The debtor, on the other hand, testified that, based upon his experience in the restaurant business, the collateral was worth $45,000 to $50,000.

In discussing the commercial reasonableness of the disposition of the collateral, the *Dixon* court noted, "It is well settled under Arkansas law that price alone is not dispositive of whether a

sale is commercially reasonable." *Id.* at 150, 15 S.W.3d at 698. To establish commercial unreasonableness, decidedly stronger proof is needed than an inadequate sale price. *Id.* However, a large discrepancy between the sale price and fair market value of the collateral signals the need for close scrutiny of the sale procedures. *Id.* In affirming the trial court's decision, the *Dixon* court concluded that the trial court had not based its decision merely on sales price, but acknowledged that it was required to consider time, method, and place of the sale as well as the price. *Id.*

The value of the collateral was also an issue in *Beard, supra,* where we held that the trial court's decision that the sale was commercially reasonable was not clearly against the preponderance of the evidence. *Id.* The *Beard* court noted that, while the sale of the car at issue may not have brought as high a price as the appellant would have hoped, there was testimony that the car had unusually high mileage for a one-year-old car. *Id.* The creditor's witness also testified that the car was sold at a "dealers-only auction" because in his experience he believed that such a sale would bring the highest possible price for the car. *Id.* Additionally, the car was sold promptly after it was repossessed. *Id.*

Similarly, in *Cheshire v. Walt Bennett Ford, Inc.*, 31 Ark. App. 90, 788 S.W.2d 490 (1990), a case challenging the commercial reasonableness of the sale of a truck, the creditor's general manager testified about the truck's repossession and resale. He testified that the truck had "excessive mileage" and was in "poor condition." *Id.* at 96, 788 S.W.2d at 493. Specifically, he testified that the truck had to be reconditioned by having dents fixed, the paint touched-up, the seats and upholstery repaired, a bed liner installed, and the battery and a tire replaced. *Id.* The truck was immediately placed on the appellee's used-car lot for retail sale; however, the truck had a diesel engine, which made it more difficult to resell than a gasoline engine. *Id.* The witness testified that the truck remained unsold for so long that it depreciated to a point where it had to be offered for wholesale. *Id.* Four bids were received, ranging from $1000 to $1500, and the appellee bid $1600. In the witness's opinion, the appellee's $1600 bid was fair and reasonable. The appellate court held that the trial court's ruling that the collateral was disposed of at a private, commercially reasonable sale was not clearly against the preponderance of the evidence.

We find that the trial court's decision in this case is clearly against the preponderance of the evidence because the appellee, although the issue was contested at trial, presented no

evidence to support a finding that the sale conducted was commercially reasonable. While our case precedent has mainly addressed the discrepancy between the value of the collateral and the subsequent sale price, this issue is not dispositive and is not the only issue that a trial court can consider when analyzing the commercial reasonableness of a sale. *Dixon, supra.* What is clear from our case law is that the trial court is required to consider evidence regarding the reasonableness of the method, time, manner, and place of the disposition of the collateral. *Id.* For example, this court has discussed a trial court's consideration of the (1) promptness of the sale, *see Cooper, supra*; (2) testimony regarding the discrepancy between the value of the collateral and the sales price, *see Dixon, supra*; (3) the condition of the property, *see Dixon, supra*; *Cheshire, supra*; *Beard, supra*; (4) the method of notification of the sale, *see Cheshire, supra*; and (5) the type of sale or disposition, *see Beard, supra*; *Cheshire, supra.* In the case at bar, no such evidence was presented. The only testimony that Mazda offered was Tucker's testimony that the remaining balance on the contract was $11,809.76; that the exhibits indicated that the vehicle was sold at a "private" sale for $6100; and that the remaining balance due after the sale was $5709.76. Tucker admitted that he had no personal knowledge of the activities surrounding the sale or disposition of the property. He did state that the documents reflected that the sale was by "auction" but that he had no other knowledge of the sale. Mazda submitted no evidence of the value of the vehicle, the condition of the vehicle, or the manner of the sale, other than the bare statement contained in a computer printout that the disposition had occurred at an "auction." Mazda did not submit evidence of how the sale was advertised or to whom it was advertised. Because Mazda had the burden of proving that the sale was commercially reasonable, *Dixon, supra*, and because we find that it did not meet that burden, the trial court's decision is clearly against the preponderance of the evidence, and we reverse. Consequently, Mazda is not entitled to the deficiency judgment. *AM Credit Corp. v. Riley*, 35 Ark. App. 168, 815 S.W.2d 392 (1991).

Because we are reversing this case on Greenlee's first point on appeal, we find it unnecessary to address her remaining points.

Reversed.

BIRD and BAKER, JJ., agree.

JONES BROTHERS, INC., and
Lumbermen's Underwriting Alliance *v.*
JOURNAGAN CONSTRUCTION COMPANY,
Builders' Association Outstates Insurance Plan/Benchmark
Insurance Company, Aggregate Transportation Specialist, L.L.C.,
Missouri Employers Mutual Insurance Company, Inc.,
Michael Whitlock, d/b/a/ Michael Whitlock Trucking
Company, and Leslie A. Keeter

CA 04-842 214 S.W.3d 870

Court of Appeals of Arkansas
Opinion delivered October 5, 2005

[redacted]

[redacted]

Baxter, Jensen, Young & Houston, by: *Terence C. Jensen*, for appellants.

Warner, Smith & Harris, P.L.C., by: *Wayne Harris*, for appellee Journagan Construction Company.

Davis, Wright, Clark, Butt & Carithers, P.L.C., by: *Constance G. Clark*, for appellee Aggregate Transportation Specialist, L.L.C.

Friday, Eldredge & Clark, by: *James C. Baker Jr.*, for appellee Missouri Employers' Mutual Insurance Company.

Dover Dixon Horne P.L.L.C., by: *Joseph H. Purvis*, for appellee Leslie A. Keeter.

JOSEPHINE LINKER HART, Judge. Appellee Leslie Keeter was injured in a near-fatal motor-vehicle accident[1] while working for Michael Whitlock Trucking Company (Whitlock Trucking), an uninsured subcontractor. On appeal, Jones Brothers, Inc. (Jones), and its insurer, Lumbermen's Underwriting Alliance, contend that the Arkansas Workers' Compensation Commission erred in ordering Jones to pay workers' compensation benefits to Keeter, because Jones was not, as found by the Commission, the "prime contractor" within the meaning of Ark. Code Ann. § 11-9-402(a) (Repl. 2002). On cross-appeal, Journagan Construction Company (Journagan) and its insurer, Builders' Association Outstates Insurance Plan/Benchmark Insurance Company, contend that the Commission erred in concluding that, in accordance with Ark. Code Ann. § 11-9-402(b), Jones has a lien against moneys due or to become due against its immediate subcontractor, Journagan. Also, as part of Jones's appeal, we consider whether the Commission should have awarded a lien against not only Journagan but also its insurer. Further, on cross-appeal, we consider whether the Commission properly found as moot the issue of whether Journagan's immediate subcontractor, Aggregate Transportation Specialist (Aggregate), possessed workers' compensation insurance. We affirm the Commission.

In determining whether Jones was the prime contractor, we must briefly state the facts showing the connections between the parties. The record contains a copy of an "Arkansas State Highway Commission Contract" in which Jones, as contractor, agreed to widen 4.5 miles of Highway 412 that were west of Harrison to four lanes. A map in the record shows that the widening was to be made to a portion of Highway 412 between Alpena and Bear Creek Springs. The record further includes a "Subcontract Agreement" between Jones, as contractor, and Journagan, as subcontractor, in which Journagan agreed to perform services related to the same highway project.

In a deposition, James Holt, a senior vice-president of Journagan, stated that his company entered into an oral agreement with Aggregate whereby Aggregate would provide trucking services to haul materials needed for the Highway 412 project. Michael Swearingen, the sole proprietor of Aggregate, in turn stated in his deposition that he provided trucking services to

[1] The Commission noted that Keeter's injuries included a severe closed-head injury and a fractured cervical spine at the C-5 level.

Journagan for delivery of materials related to the project. He further stated that either he or one of his employees was contacted by Michael Whitlock of Whitlock Trucking, and Aggregate hired Whitlock Trucking to provide trucks for the Highway 412 project. In their combined deposition, Michael Whitlock and Rochelle Whitlock presented testimony that they had been hired by Aggregate for the Highway 412 project, that Whitlock Trucking hired Keeter to drive a dump truck, and that Keeter was working on the Highway 412 project at the time of his accident. His accident, they said, occurred on Highway 412 between Alpena and Bear Creek Springs, closer to Bear Creek Springs, where a Journagan quarry and asphalt plant were located, when he was coming back from the job with an empty truck on his way to the plant. Keeter's wife, Becky Keeter, testified at the hearing that, before the accident, Keeter told her he was on his way to work on that project. And finally, Keeter testified at the hearing that, on the day of the accident, he was driving a dump truck for Whitlock Trucking on the Highway 412 project, where persons from Journagan were present.

The relevant statute for determining the liability for compensation for the employee of an uninsured subcontractor provides in part that "[w]here a subcontractor fails to secure compensation required by this chapter, the prime contractor shall be liable for compensation to the employees of the subcontractor." Ark. Code Ann. § 11-9-402(a).[2] In order to determine whether Jones was liable as the prime contractor, we must not only construe the meaning of "prime contractor" but also determine whether the Commission properly found that Keeter, as an employee of Whitlock Trucking, was performing services that arose from a subcontract between Whitlock Trucking and Aggregate, which in turn arose from a subcontract between Aggregate and Journagan, which in turn arose from a subcontract between Journagan and Jones, which arose from Jones's contract with the Arkansas State Highway Commission.

On appeal, we review the Commission's decision to see if it is supported by substantial evidence, viewing the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings. *See, e.g.*, *Riddell Flying Serv. v.*

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[2] In 2005, the Arkansas General Assembly added to the end of this sentence the language "unless there is an intermediate subcontractor who has workers' compensation coverage." Ark. Code Ann. § 11-9-402(a) (Supp. 2005).

Callahan, 90 Ark. App. 388, 206 S.W.3d 284 (2005). Giving due regard to our standard of review, we conclude that substantial evidence supported the Commission's finding that the necessary links existed between the work Keeter was performing and the Jones contract with the Arkansas State Highway Commission.

Next, we note that there is no statutory definition of "prime contractor" in our workers' compensation statutes, so we must construe the meaning of the term "prime contractor" and consider whether the Commission properly found that Jones was the prime contractor and thus liable for payment of compensation to Keeter, who was the employee of an uninsured subcontractor. It is well settled that the appellate court reviews issues of statutory construction de novo, as it is for the appellate court to decide what a statute means. *See, e.g., Aloha Pools & Spas, Inc. v. Employer's Ins. of Wausau*, 342 Ark. 398, 403, 39 S.W.3d 440, 443 (2000). In construing a statute, we give words their ordinary and usually accepted meanings, and if possible, we give meaning and effect to every word. *Id.* at 404, 39 S.W.3d at 443.

In *Nucor Holding Corp. v. Rinkines*, 326 Ark. 217, 931 S.W.2d 426 (1996), the Arkansas Supreme Court considered the issue of how to define the term "prime contractor." In its analysis, the court relied on *Bailey v. Simmons*, 6 Ark. App. 193, 639 S.W.2d 526 (1982), where we observed that, in order for there to be a subcontractor relationship, the person sought to be charged as prime contractor must have been contractually obligated to a third party for the work being done at the time of the injury. *Nucor*, 326 Ark. at 223, 931 S.W.2d at 430. Also, the *Nucor* court noted that we defined a subcontractor as a person who agrees to perform part of a contract for a person who has already agreed to perform the contract for a third party. *Id.* The *Nucor* court concluded that the status of prime contractor presupposes work to be done for a third party. *Id.*

Whitlock Trucking — who lacked workers' compensation insurance — was Aggregate's subcontractor, Aggregate was Journagan's subcontractor, and Journagan was Jones's subcontractor. All subcontractors were performing services that arose from the contract between Jones and a third party, the Arkansas State Highway Commission. Thus, because Jones is the only contractor with an obligation to a third party, we are convinced that Jones was the sole "prime contractor." Moreover, defining "prime contrac-

tor" in this manner is in keeping with how the term is generally conceived, as it is defined as "[o]ne who contracts for the completion of an entire project, including purchasing all materials, hiring and paying subcontractors, and coordinating all the work." BLACK'S LAW DICTIONARY 351 (8th ed. 2004). We hold that the Commission properly concluded that Jones was the prime contractor and, consequently, was liable for payment of workers' compensation to Keeter.

The Commission further found that, in accordance with Ark. Code Ann. § 11-9-402, Jones "shall be entitled to a lien against moneys due or to become due" to Journagan, that Journagan was entitled to a lien against Aggregate, and that Aggregate was entitled to a lien against Whitlock Trucking. Journagan and its insurer assert in their respective briefs that Jones was not entitled to a lien against Journagan. Arguably, the Commission's ruling on this issue was premature, as Jones has not yet made a claim against Journagan, Journagan's insurer, or any other party. Nevertheless, we will consider the propriety of the Commission's ruling, recognizing that the Commission has concluded that Jones is entitled to a lien against Journagan.

The relevant statutory language provides that "[a]ny contractor or the contractor's insurance carrier who shall become liable for the payment of compensation on account of injury to or death of an employee of his or her subcontractor may recover from the subcontractor the amount of the compensation paid or for which liability is incurred." Ark. Code Ann. § 11-9-402(b)(1). Further, the statute provides that "[t]he claim for the recovery shall constitute a lien against any moneys due or to become due to the subcontractor from the prime contractor." Ark. Code Ann. § 11-9-402(b)(2). We acknowledge that (b)(1) refers to an injury to "an employee of his or her subcontractor" when describing against whom a contractor may recover. But we note that (b)(1) grants this right of recovery to a "contractor," indicating that either a prime contractor or a subcontractor can make claims against its immediate subcontractor. It follows then that a prime contractor, who is ultimately liable, can make claims against its immediate subcontractor, even though the injured employee is not the immediate subcontractor's employee. Consequently, we construe the Commission's finding to mean that Jones may recover against Journagan.

In their appeal, Jones and its insurer also ask that the Commission's decision be modified to include a claim not only against Journagan, but also Journagan's insurer. We observe that this amendment to the Commission's decision is unnecessary, as a statute already addresses Jones's request by providing that "[a]ny requirements by the commission or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer." Ark. Code Ann. § 11-9-405(b)(3) (Repl. 2002). Thus, Jones and its insurer may seek recovery of the amount of the compensation paid or for which liability is incurred not only from Journagan but also from Journagan's insurer.

Finally, in their cross-appeal, Journagan and its insurer argue that the Commission erred in concluding that the issue of whether Aggregate had workers' compensation insurance was moot. Specifically, they contend that they may proceed against not only Aggregate but also its insurer, Missouri Employers' Mutual Insurance Company. In essence, the Commission did not make any findings of fact on the issue. We conclude, however, that for this court or the Commission to make findings of fact on the issue would be premature until Jones makes a claim and recovers from Journagan and Journagan has sought recovery from Aggregate. *See generally Ins. Co. of N. Am. v. Ferrell*, 234 Ark. 581, 353 S.W.2d 353 (1962) (deeming subrogation claim premature where person claiming subrogation had not had his own liability determined). Nothing herein will prejudice the rights of the parties to future subrogation claims.

Affirmed.

NEAL and VAUGHT, JJ., agree.

NESTE POLYESTER, INC. *v.* Frank BURNETT, *et al.*

CA 04-1186 214 S.W.3d 882

Court of Appeals of Arkansas
Opinion delivered October 5, 2005

Wright, Lindsey & Jennings LLP, by: *Troy A. Price*, for appellant.

Garvin, Agee, Carlton & Mashburn, L.L.P., by: *John Mashburn* and *Alan Agee*; and *Jones & Harper*, by: *Robert L. Jones III*, for appellees.

OLLY NEAL, Judge. This appeal is from a jury verdict awarding appellees Frank Burnett and Dennis Joslin Company 2000, Inc.,[1] damages in the sum of $2,500,000 for breach of warranty on a defective product used to seal boats. Appellant Neste Polyester, Inc., raises four points concerning Viper's amendment of the complaint to conform to the proof, the trial court's striking of its affirmative defenses, the trial court's failure to submit the case to the jury on interrogatories, and the trial court's failure to award a new trial. Finding no error, we affirm.

[1] The original plaintiff was Viper Boats, Inc. Viper's board of directors adopted a resolution calling for the execution of an assignment granting Burnett and Dennis Joslin Company 2000, Inc., all of Viper's right, title, and interest in the lawsuit. Thereupon, Burnett and Dennis Joslin Company 2000, Inc., were substituted as the real parties in interest. For convenience and clarity, we will refer to appellees as Viper.

Viper is a manufacturer of fiberglass recreational boats. Neste manufactures the clear coat Viper used to protect the finish of its boats. From June 1994 until April 1999, Viper purchased all of its clear coat from Neste. In April 1999, Neste informed Viper that all of its clear coat purchased since April 1998 was defective. Viper had manufactured 784 boats using the defective product and, by May 1999, had received twenty-seven complaints. Neste paid for the replacement of these twenty-seven boats. Viper thereafter determined that the only way to remedy the remaining defective boats was to replace them. Neste refused to pay for the replacement of the remaining boats.

On October 23, 2000, Viper filed suit against Neste alleging breach of express and implied warranties, negligence, breach of contract, and fraud.[2] Viper alleged that Neste was liable for the replacement of all 784 boats and that its damages could exceed $10,000,000. In both the complaint and first amended complaint, Viper alleged that the problems with the clear coat threatened to destroy its business reputation and goodwill. Neste denied the allegations.[3]

At a November 25, 2003, pre-trial conference, Viper's attorney disclosed its expert economist, Robert "Jay" Marsh, and announced that Viper was pursing a new approach to damages. That approach was to seek damages for its loss of business and loss of future profits. Neste's then-attorney, Alfred Angulo, recognized that this announcement changed Viper's theory of the case and placed Neste on notice that Viper was seeking damages for the loss of its entire business. Angulo did not object to this change in theories, nor did he move for a continuance.

Following the November conference, a scheduling order was entered providing that Viper was to amend its discovery responses so as to provide the substance of Marsh's opinion by February 5, 2004. Neste was to disclose its expert, together with the substance of its expert's testimony by March 8, 2004. Neste disclosed its expert, Richard Schwartz, after the deadline in the scheduling order and did not provide Schwartz's report. The

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[2] Suit was originally filed in Baxter County, Viper's principal place of business, and later transferred to Sebastian County, Neste's principal place of business.

[3] Neste also filed a third-party complaint against the manufacturers of one of the components of its clear coat. This third-party complaint was later voluntarily dismissed by Neste.

scheduling order also provided that all exhibits and witness lists were to be exchanged by March 16, 2004. All motions, except for motions *in limine*, were to be filed by May 2, 2004, with all motions *in limine* filed by May 25, 2004.

Viper moved for partial summary judgment as to liability. After Neste failed to respond to the motion, an order was entered granting Viper summary judgment as to the issue of liability. The issue of damages was to be tried.

Later, Viper timely moved for summary judgment on the issue of damages, alleging that, as a result of the problems with Neste's clear coat, Viper's business declined until Viper ceased operations in 2003. The motion was supported by Marsh's affidavit and report, stating that he had calculated Viper's economic loss at $6,452,259. This motion was denied.

After the motion for summary judgment as to damages was denied, Neste filed a timely motion *in limine* seeking to prevent Marsh from testifying at trial because Marsh had no personal knowledge of the matter and because he was addressing a measure of damages that Neste alleged was improper and inapplicable. In an accompanying brief, Neste argued that the proper measure of damages was the difference in the fair market value of the business before and after the event. The court denied the motion.

At trial, Neste also made an oral motion seeking to limit Viper to the damages mentioned in its complaint and amended complaint, arguing that the lost profits discussed were not specifically pled by Viper. The trial court reserved ruling on the issue of the type of damages upon which it was going to instruct the jury and noted that Neste could object to evidence on the different types of damages.

In addition, during trial, Neste filed an answer to Viper's new claim for special damages, asserting that Viper had not pled the issue of special damages for lost profits, as required by Ark. R. Civ. P. 9(g). The answer also asserted other defenses such as release, limitation of damages pursuant to a clause in the invoices, improper party plaintiff, and failure to state a claim upon which relief can be granted. Viper moved to strike the answer as untimely. The trial court ordered the answer stricken.

Neste sought to have the jury return a verdict on special interrogatories while Viper sought a general verdict. Neste's proffered instructions were as follows:

3. Do you find that the defective gel clearcoat sold by Neste was the proximate cause of the demise of Viper Boats, Inc.? ____ YES ____ NO

4. Do you find the plaintiff is entitled to recover from the defendant lost profits that may have been suffered by Viper Boats, Inc.? ____ YES ____ NO

5. What amount of past lost profits, if any, do you determine the defendant should pay to the plaintiff because of the demise of Viper Boats, Inc.? $ _____

6. What amount of future lost profits, if any, do you determine the defendant should pay to the plaintiff because of the demise of Viper Boats, Inc.? $ _____

The trial court decided without explanation to submit the case to the jury on a general verdict form. The trial court also instructed the jury that it should consider two elements of damage: the amount of lost profit, or economic loss, to Viper from any decline in sales and the cessation of its business; and the amount of loss in value of Viper's business assets due to its cessation of business.

The jury returned a general verdict in favor of Viper and awarded damages of $2,500,000. Judgment was entered on the jury's verdict on June 16, 2004. Neste timely filed a motion for judgment notwithstanding the verdict or a new trial, alleging that Viper failed to present legally sufficient evidence to support the damage award or to show a causal link between Neste's actions and Viper's lost profits or demise of its business. Although the motion for judgment notwithstanding the verdict was deemed denied as of July 30, 2004, the trial court entered an order denying the motion on August 4, 2004. This appeal followed.

Neste raises four issues on appeal: (1) that the trial court erred in not requiring Viper to comply with Ark. R. Civ. P. 9(g) and in permitting Viper to present evidence concerning special damages that had not been raised in the pleadings; (2) that the trial court erred in granting Viper's motion to amend the pleadings to conform to the proof and in striking Neste's answer to the claim for special damages because the issue of special damages had not been raised by amendment to the complaint; (3) that the trial court erred in overruling Neste's objection to the general verdict form and refusing Neste's requested verdict on special interrogatories;

(4) that the trial court cumulatively erred by refusing to grant Neste a new trial based on the error in instructing the jury, the jury's error in assessing the amount of recovery, and the irregularity resulting from Viper's change in theories without amendment to the complaint.

In its first point, Neste argues that the trial court erred in permitting evidence to be presented concerning Viper's lost profits because lost profits are special damages which Ark. R. Civ. P. 9(g) requires to be specifically pled and Viper did not comply with that requirement. We disagree.

The parties dispute whether Viper's lost profits were or were not special damages. However, we need not answer the questions of whether lost profits are special damages or whether Viper's complaint was sufficient to plead special damages because, assuming that lost profits are special damages, we hold that the parties tried the issue without objection and, thus, the complaint was properly amended to conform to the proof so as to allege special damages. The purpose of requiring special damages to be specifically pled is to avoid surprise at trial. *Arkansas La. Gas Co. v. McGaughey Bros., Inc.*, 250 Ark. 1083, 468 S.W.2d 754 (1971); *Arkansas State Highway Comm'n v. Dixon*, 247 Ark. 130, 444 S.W.2d 571 (1969). However, if there is no surprise to the defendant, evidence relating to the special damages may be introduced. *McGaughey Bros., supra.*

We hold that Viper substantially complied with Rule 9(g) because the pleadings were amended to conform to the proof by presenting Marsh's summary-judgment affidavit and trial testimony. In *Harrington v. City of Greenbrier*, 262 Ark. 773, 561 S.W.2d 302 (1978), the supreme court assumed, without having to decide, that a plaintiff could assert a new cause of action in his summary-judgment affidavit, without amending his complaint. *See Bonds v. Littrell*, 247 Ark. 577, 446 S.W.2d 672 (1969); *National Sec. Fire & Cas. Co. v. Shaver*, 14 Ark. App. 217, 686 S.W.2d 808 (1985); *Miller v. Hardwick*, 267 Ark. 841, 591 S.W.2d 659 (Ark. App. 1980) (all holding that, while information disclosed during discovery is not a pleading or a defense to a pleading, such information may give rise to amendments to pleadings).

Neste failed to object to Marsh's testimony at any time on the basis that Viper had failed to specifically plead its lost profits. Neste's response to Viper's summary-judgment motion on damages did not indicate that the lost-profits issue was not properly

pled. When Neste sought to prohibit Marsh's trial testimony through a motion *in limine*, its motion and supporting brief did not raise the issue of the lost profits not being properly pled. Instead, it merely questioned Marsh's qualifications. It was not until Neste's oral motion at trial seeking to limit Viper to the damages mentioned in its complaint and amended complaint that the issue of lost profits not being specifically pled by Viper was raised. However, the trial court allowed Marsh to testify and noted that Neste could object to evidence on the different types of damages. The result of the trial court's ruling was to require Neste to make a specific objection to Marsh's testimony at trial. *See Casteel v. State Farm Mut. Auto. Ins. Co.*, 66 Ark. App. 220, 989 S.W.2d 547 (1999).

At trial, Neste objected when Marsh was tendered as an expert witness on the basis that he lacked the qualifications to testify as to any issue in the case. The trial court overruled the objection and qualified Marsh as an expert. Later, as Marsh was about to give his opinion on Viper's lost profits, Neste objected on the basis of "the same objection we made before the court before as to the appropriateness of this testimony and the measure of damages." The trial court overruled the objection, and Marsh proceed to give his opinion as to Viper's lost profits. The objection that was raised went to Marsh's qualifications as an expert and the appropriate measure of damages, *i.e.*, whether the measure of damages is the difference in fair market value, not that the lost profits had not been specifically pled. Therefore, without the objection now being urged on appeal, the trial court could have, under Ark. R. Civ. P. 15(b), properly considered the pleadings as amended to conform to the proof. Moreover, there is no claim of surprise by Neste. In fact, Neste conceded at oral argument that it could not claim surprise, based on Angulo's statements at the November 2003 pre-trial conference. Permitting the introduction of proof on an issue not raised in the pleadings constitutes an implied consent to trial on that issue. *Ison Props., LLC v. Wood*, 85 Ark. App. 443, 156 S.W.3d 742 (2004). We will not reverse a trial court's decision regarding the amendment of pleadings to conform to the evidence in the absence of a manifest abuse of discretion. *Id.* Here, we cannot say that the trial court abused its discretion in this regard. Therefore, we affirm on this point.

Neste next argues that it was prejudiced because the trial court refused to allow it to submit its affirmative defenses to

Viper's evidence concerning lost profits. As noted above, Viper disclosed that it was seeking lost profits at a November 2003 pretrial hearing. Neste did not object or seek a continuance at that time. Rather, Neste waited until May 6, 2004, to move for a continuance and did not file its affirmative defenses until the day of trial. Any prejudice to Neste comes from its own failure to comply with the trial court's scheduling order and deadlines and not from any failure by Viper to properly plead that it was seeking lost profits. A trial court's decision regarding the striking of a pleading will not be reversed in the absence of an abuse of discretion. *Ison Props., supra.* We cannot say that the trial court abused its discretion by striking Neste's affirmative defenses first raised on the morning of trial.

The third issue is whether the trial court erred in rejecting Neste's request to submit the verdict on interrogatories to the jury. It is within the trial court's discretion whether to submit a case to the jury on a general verdict or on interrogatories. Ark. R. Civ. P. 49(a); *Hough v. Continental Leasing Corp.*, 275 Ark. 340, 630 S.W.2d 19 (1982). The complaining party should show how the trial court abused its discretion in failing to submit the proposed interrogatories. *National Sec. Fire & Cas. Co. v. Williams*, 16 Ark. App. 182, 698 S.W.2d 811 (1985). The form of the special verdicts submitted to the jury is also within the trial court's discretion. *See* Ark. R. Civ. P. 49(b).

The trial court did not abuse its discretion in rejecting Neste's proffered special interrogatories. "The essential purpose to be served by interrogatories is to test the correctness of a general verdict by eliciting from the jury its assessment of the determinative issues presented by a given controversy in the context of evidence presented at trial." *Cincinnati Riverfront Coliseum, Inc. v. McNulty Co.*, 504 N.E.2d 415, 418 (Ohio 1986); *see also Argo v. Blackshear*, 242 Ark. 817, 416 S.W.2d 314 (1967); David Newbern and John Watkins, *Arkansas Civil Practice and Procedure* § 25-3 (3d ed. 2002). Neste's proposed interrogatories did not address ultimate or determinative issues. The relevant ultimate or determinative issue is the amount of lost profits Viper suffered due to the defective clear coat. Neste, in effect, sought to have the jury "itemize" those damages according to arbitrary dates. Such itemizations are not determinative and would not test the ultimate verdict in this case regarding the appropriateness of an award of lost

profits. *UZ Engineered Prods. Co. v. Midwest Motor Supply Co., Inc.*, 770 N.E.2d 1068 (Ohio App. 2001). Also, the interrogatories submitted omitted some of the elements of damage claimed by Viper. Like jury instructions, special interrogatories should accurately reflect the evidence and the damages claimed. *McDaniel Bros. Const. Co. v. Mid-State Const. Co.*, 252 Ark. 1223, 482 S.W.2d 825 (1972); *see also Pineview Farms, Inc. v. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989); *Property Owners Improvement Dist. v. Williford*, 40 Ark. App. 172, 843 S.W.2d 862 (1992).

■ The final issue raised by Neste is that it should be awarded a new trial because of the cumulative errors alleged in the first three points. We do not reach the merits of this cumulative-error argument, as Neste failed to make a cumulative-error objection below. The supreme court has previously held that an appellant asserting a cumulative-error argument must show that there were individual objections to the alleged errors *and* that the cumulative-error objection was made to the trial court and a ruling was obtained. *Southern Farm Bureau Cas. Ins. Co. v. Daggett*, 354 Ark. 112, 118 S.W.3d 525 (2003); *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998).

Affirmed.

VAUGHT, J., agrees.

HART, J., concurs.

JOSEPHINE LINKER HART, Judge, concurring. I agree that this case must be affirmed, but write separately because I respectfully disagree with the majority's analysis concerning Neste Polyester's argument that the trial court erred in admitting evidence concerning Viper's lost profits theory for recovery of damages because lost profits are "special damages," and Viper failed to comply with Rule 9(g) of the Arkansas Rules of Civil Procedure that its damage theory be specifically pled. I cannot agree that Viper's pleadings "substantially complied" with Rule 9(g), or that this point was somehow barred because he failed to object to Viper's expert testifying about lost profits. Neste's argument fails simply because it has long been settled law that the purpose of requiring special damages to be pled is to prevent surprise, and where no surprise is pleaded and no time requested to prepare to meet the issue, there is no error. *Arkansas Louisiana Gas Co. v. McGaughey Bros., Inc.*, 250 Ark. 1083, 468

S.W.2d 754 (1971). At oral arguments, Neste stated unequivocally that it was not surprised by Viper's damage theory; therefore, there is no reversible error.

I concur.

Rebecca CHANDLER *v.*
ARKANSAS APPRAISERS LICENSING
and CERTIFICATION BOARD

CA 04-1193 214 S.W.3d 861

Court of Appeals of Arkansas
Opinion delivered October 5, 2005

Dodds, Kidd & Ryan, by: *Stephanie Chamberlin*, for appellant.

Mike Beebe, Arkansas Attorney General, by: *Warren T. Readnour*, Assistant Attorney General, for appellee.

TERRY CRABTREE, Judge. Appellant Rebecca Chandler, a certified residential appraiser, appeals from an order of the Pulaski County Circuit Court affirming an order by the appellee Appraisers Licensing & Certification Board. The Board suspended Chandler's license for six months, to be followed by a six-month probationary period. The Board also ordered Chandler to pay a civil penalty of $2,000 and complete two remedial courses and examinations. We reverse and remand without reaching the merits of this appeal because the Board's decision does not contain sufficient findings of fact to allow for proper judicial review.

The Board's findings can be summarized as follows: (1) Chandler is a licensed residential appraiser; (2) Chandler conducted appraisals for Guaranty Lending, Inc. (Guaranty) on six specific properties between October 2000 and April 2001; (3) the Board received a letter from the Arkansas Securities Department referencing four of the appraisal reports resulting from the Securities Department's investigation into Guaranty, together with a letter to the Securities Department from another appraiser, Tom Ferstl; (4) the Securities Department indicated that the FBI was requesting the Board to delay its investigation, the FBI authorized the Board to continue its investigation in May 2002 and provided the Board with additional information, and Chandler was notified of the complaint in a letter dated May 31, 2002; (5) the Board received a complaint concerning the appraisal of one of the specified properties. The Board then summarily concluded that Chandler had violated certain rules contained in the Uniform Standards of Professional Appraisal Practice (Standards), but it did not state how Chandler may have violated those rules.

The Administrative Procedures Act requires that a "final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." Ark. Code Ann. § 25-15-210(b)(2) (Repl. 2002). This court has described a "finding of fact" as:

> [A] simple straightforward statement of what happened. A statement of what the Board finds has happened; not a statement that a witness, or witnesses, testified thus and so. . . . [W]hen the reader is a reviewing court the statement must contain all specific facts relevant to the contested issue or issues so that the court may determine whether the Board has resolved those issues in conformity with the law.

Nesterenko v. Arkansas Bd. of Chiropractic Exam'rs, 76 Ark. App. 561, 566, 69 S.W.3d 459, 461 (2002). Here, the Board does not set out the facts supporting its conclusion that Chandler violated the Standards. The Board's findings are more of a procedural history rather than what Chandler did to warrant professional discipline.

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. The cause is remanded to the agency so that a finding can be made on that issue. *Hays v. Batesville Mfg. Co.*, 251 Ark. 659, 473 S.W.2d 926 (1971); *Reddick v. Scott*, 217 Ark. 38, 228 S.W.2d 1008 (1950); *Alcoholic Beverage Control Bd. v. Hicks*, 19 Ark. App. 212, 718 S.W.2d 488 (1986); *Lawrence v. Everett*, 9 Ark. App. 138, 653 S.W.2d 140 (1983).

Accordingly, we reverse and remand this cause to the circuit court, with directions to remand it to the Board to make findings of fact supporting its decision.

Reversed and Remanded.

ROBBINS and GRIFFEN, JJ., agree.

Lovella R. THOMAS *v.* STATE of Arkansas

CA CR 04-644 214 S.W.3d 863

Court of Appeals of Arkansas
Opinion delivered October 5, 2005

B. Kevin Holland, for appellant.

Mike Beebe, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Lovella Thomas was convicted in a jury trial of Abuse of an Adult, a Class B felony, and was sentenced to twenty years' imprisonment and assessed a $1500 fine. On appeal, Thomas challenges the sufficiency of the evidence supporting her conviction and asserts that (1) the evidence is insufficient to show that the victim was an endangered or impaired adult; (2) the evidence does not show that she purposely abused the victim; and (3) the evidence does not show that her conduct caused serious physical injury or substantial risk of death. We affirm.

On February 7, 2003, paramedics were called to Thomas's home. There they found the victim, Andrew Kaelin, a seventy-seven-year-old man, lying on a mattress in an unheated room. Kaelin's clothes were wet with urine, and he was barely responsive. Michael Deately, one of the responding paramedics, testified that Kaelin attempted to respond and make hand gestures but that the only word Kaelin could manage was "cold." After one of the paramedics commented about how cold it was in Kaelin's room, Thomas brought a space heater from the living room into Kaelin's room. The paramedics were unable to find a pulse in Kaelin's wrist, arm, or neck, and he was transported to the hospital. The paramedics described Kaelin as "very dehydrated," "almost emaciated," "thin," and "pale." Except for the fact that Kaelin was trying to speak, he did not appear to be alive.

When he arrived at the hospital, Pamela Rice, a registered nurse, treated Kaelin. She noted that Kaelin had cuts on both of his hands and pressure ulcers on his body. The pressure ulcers were at stages two and three of a possible four. She, too, noticed that Kaelin's clothes were wet; that his body temperature was only

eighty-four degrees, which amounted to hypothermia; and that Kaelin was unable to talk. She opined that Kaelin's condition probably occurred gradually, and based on his condition, Rice contacted Adult Protective Services. Steve McDonald, another of Kaelin's treating nurses, testified regarding Kaelin's condition. His testimony established that Kaelin was in critical condition, was malnourished, had low blood pressure, with an irregular heartbeat, and had a low body temperature. Kaelin was also in renal failure and was diagnosed with hypothyroidism. McDonald testified that the skin breakdowns and lesions about Kaelin's body would have taken a considerable amount of time to develop — perhaps several weeks, and that it would take a period of months to become as malnourished as Kaelin was upon entering the hospital.

Cindy Sorrells, an employee with Adult Protective Services (APS) with the Arkansas Department of Health testified that APS took custody of Kaelin on March 4, 2003. She spoke with Thomas regarding Kaelin's condition, and Thomas stated that Kaelin had gotten sick the day before the paramedics were called but that he was up walking about before that. Thomas explained that she was Kaelin's caregiver; that she paid his bills and expenses with his $648 monthly social security check; and that she was unaware of the decubitis. Thomas told Sorrells that Kaelin had urinated and defecated on himself shortly before paramedics were called; that she bathed him in warm water; however, Thomas was unable to explain to Sorrells how she was able to heat the water when there was no gas or heat in the house. Later, another witness explained that they had heated the water in an electric crockpot. Sorrells stated that Kaelin died approximately one month after being taken into custody.

Dr. William Sturner performed the autopsy on Kaelin's body and concluded that the cause of death was bilateral bronchial pneumonia due to a subdural hematoma. He attributed the subdural hematoma to blunt trauma to the left side of the head. The injury appeared to be several weeks to perhaps months in age. Sturner stated that Kaelin also had several other conditions which contributed to, accelerated, or aggravated his death. He listed decubitus pressure sores, purpuric hermorrhages, statis post-hypothermia, and arteriosclerotic cardiovascular disease. He also opined that these conditions, depending on the underlying circumstances, would take from weeks to months to develop.

Following Sturner's testimony, the State elicited testimony from six witnesses who all testified extensively about the abuse

Thomas inflicted upon Kaelin. These witnesses' testimony established that Thomas repeatedly hit Kaelin in the face, head, back, and body; pushed him down; and withheld food from him. Some of the witnesses testified that they recalled seeing Kaelin with black eyes and busted lips. They also testified that Thomas verbally abused Kaelin and forced him to stay in his bedroom for hours. One of the witness told of how Thomas forbade Kaelin to leave his room even to use the bathroom and that she placed a bucket in his room so that he could relieve himself. That witness also told of how Thomas and another woman sat Kaelin in front of the door in the middle of winter, placed a fan on him, and poured buckets of water on him. Despite the testimony that Thomas physically and verbally abused Kaelin, some of the State's witnesses testified that Kaelin was mobile, and that he would walk around the house asking for food and cigarettes. One of the witnesses testified that Kaelin could bathe and dress himself and that he could fix his own plate at mealtimes.

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

> Your Honor — Just a moment — Your Honor, first of all, we would challenging [sic] the charging of Ms. Kaelin under the information as she is charged. It reads that she did purposely abuse, neglect or exploit Andrew Kaelin and she is charged with a B felony.
>
> A B Felony under this statute does not require that she neglect or exploit. Therefore, we would ask that this be at least reduced to a D Felony which more matches the elements of the statute. Neglect is not required; exploitation is not required; exploitation is not required. She is not properly charged.
>
> In addition to that, the elements that have been left off of the B Felony are "*endangered or impaired adult.*" That is required for a B Felony. So we would move to quash these charges, or in the alternative have this reduced to a D Felony and ask for a directed verdict of acquittal on the B Felony.

(Emphasis added.) The trial judge then made the following comments:

> There is some concern that the Court has. The statute reads, "In order to be an endangered adult it means an adult 18 years of age or older who is found to be in a situation or condition which poses

> an eminent risk of death or serious bodily harm to that person and who demonstrates a lack of capacity to comprehend the nature and consequences of remaining in that situation or condition." What says the State?

The State responded that the statute requires that the abused adult be endangered or impaired, and that the question of whether or not Kaelin was endangered or impaired was a fact question that should be left up to the jury. Thomas in turn stated that there was no testimony that Kaelin could not care for himself and pointed to the testimony showing that Kaelin had his own room, bathed himself, and prepared his own plate at mealtimes. The trial court denied the motion for directed verdict, stating that he would revisit the issue at the close of the defense's case. Thomas also moved for directed verdict on the lesser-included offense. This motion also attacked the State's proof supporting the endangered-or-impaired-adult element of the offense. Counsel again asserted that there was no testimony establishing that Thomas was an endangered or impaired adult.

The defense presented six witnesses, including Thomas. These witnesses in essence countered the testimony of the State's witnesses. They testified that Kaelin was in fair condition and healthy before his hospitalization. One of the witnesses testified that Kaelin would go outside regularly, feed and water the dogs, and pick pecans. That witness also testified that Kaelin would fight with other members of the household. Another witness testified that she lived on the same street as Thomas; that Kaelin looked fine when he wasn't beaten up; that Kaelin got around on his own; and that she would see him out in the yard, raking leaves and walking about.

Thomas testified regarding Kaelin's ability to care for himself and his daily activities. She stated that Kaelin was active and wanted to be independent. She said that he rode a bike and played with the dog and her children. Thomas admitted, however, that Kaelin had a bike accident in January; that he had a rod placed in one of his legs; and that she had told the investigating officer that the reason she picked up Kaelin's social security check was because he was unable to get around due to the rod in his leg and his age. Thomas also told the officer that Kaelin was a danger to himself and that he had set his own pants on fire on more than one occasion by standing too close to the gas heater. She also admitted that Kaelin ate dog food and scraps from the garbage and that he would find old cigarette butts to chew on. She denied abusing

Kaelin, locking him in his room, withholding food from him, or forcing him to use a bucket to relieve himself.

At the close of the defense's case, counsel for Thomas made the following renewed motion for directed verdict:

> Your Honor, Defendant would have Motion for Directed Verdict, again citing that on the B felony charge requires that a person purposely abuse an engendered or impaired adult causing serious physical injury or substantial risk of death. There is conflicting testimony about the abuse, Judge, but the endangered or impaired adult portion of that statute is defined in the definition section. We've previously discussed those definitions and I don't believe that the State has met its burden as to those two elements. There has been testimony by both the defense witnesses and the State's witnesses that Mr. Kaelin was mobile up until the time he became sick, and I believe that Mr. Sturner, one of the last questions I asked him was it possible that he could have been injured and remain mobile and then fell ill, and he said that was a possibility, so I don't think the State has met its burden and we would ask for a Directed Verdict of Acquittal at this point on the B Felony charge.

The State again argued that the issue of whether Kaelin was endangered or impaired was a fact question for the jury and pointed to testimony showing that Kaelin was seventy-seven years old, never left the home, ate dog food and scraps, and could not defend himself. The trial court agreed that the issue was a fact question for the jury and denied the motion. Thomas brings this appeal.

[redacted] A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Lowry v. State*, 90 Ark. App. 333, 205 S.W.3d 830 (2005). On appeal from the denial of a motion for directed verdict, the sufficiency of the evidence is tested to determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Circumstantial evidence may provide the basis for support of the appellant's conviction, but it must be consistent with the appellant's guilt and inconsistent with any other reasonable conclusion. *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004). Substantial evidence is that evidence which is of sufficient force and character to compel a conclusion one way or the other beyond suspicion or conjecture. *Lowery, supra.* This court considers only the evidence supporting the guilty

verdict, and the evidence is viewed in the light most favorable to the State. *Id.* Determinations of credibility are left to the jury. *Nelson, supra.*

In this appeal, Thomas challenges the sufficiency of the evidence and raises three sub-arguments. They are: (1) the evidence is insufficient to show that the victim was an endangered or impaired adult; (2) the evidence does not show that she purposely abused the victim; and (3) the evidence does not show that her conduct caused serious physical injury or substantial risk of death. Only the first of these three arguments is preserved for appellate review.

Arkansas Rules of Criminal Procedure 33.1(a) and (c) (2005) govern the procedure for challenging the sufficiency of the evidence at a jury trial and provides in pertinent part:

> (a) In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. *The motion for directed verdict shall state the specific grounds therefor.*
>
> * * *
>
> (c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. *A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. . . .*

(Emphasis added.)

At trial, Thomas challenged only the State's proof regarding the endangered-or-impaired-adult element of the statute in her motion requesting directed verdict on the felony charge or reduction to a lesser offense. Thomas did not assert, as she now does on appeal, that the State failed to show that she purposely abused Kaelin or that the State failed to prove that her conduct caused serious physical injury or substantial risk of death. It is well-settled that this court will not consider arguments raised for the first time on appeal, and that a party is bound on appeal by the nature and scope of the objections and arguments presented at trial. *Simmons v. State*, 90 Ark. App. 273, 205 S.W.3d 194 (2005);

Houston v. State, 82 Ark. App. 556, 120 S.W.3d 115 (2003). Consequently, we do not address Thomas's second and third sub-arguments.

We conclude that, despite the State's contentions to the contrary, Thomas's argument that substantial evidence does not support the jury's finding that Kaelin was an "endangered or impaired adult" is preserved for our review. Arkansas Code Annotated section 5-28-103 (Repl. 1997) provides in relevant part:

> (a) It shall be unlawful for any person or caregiver to abuse, neglect, or exploit any person subject to protection under the provisions of this chapter.
>
> (b)(1) Any person or caregiver who purposely abuses an endangered or impaired adult in violation of the provisions of this chapter, if the abuse causes serious physical injury or substantial risk of death, shall be guilty of a class B felony and shall be punished as provided by the law.
>
> (2) Any person or caregiver who purposely abuses an endangered or impaired adult in violation of the provisions of this chapter, if such abuse causes physical injury, shall be guilty of a Class D felony and shall be punished as provided by law.

"Endangered adult" means an adult eighteen years old or older who is found to be in a situation or condition which poses an imminent risk of death or serious bodily harm to that person and who demonstrates a lack of capacity to comprehend the nature and consequences of remaining in that situation or condition. Ark. Code Ann. § 5-28-101(1)(A) (Repl. 1997). An "impaired adult" is an adult eighteen years old or older who suffers from mental or physical disease or defect and as a consequence thereof is unable to protect himself from abuse, neglect, or exploitation. Ark. Code Ann. § 5-28-101(11) (Repl. 1997). A "caregiver" means a related or unrelated person, owner, agent, high managerial agent of a public or private organization, or a public or private organization that has the responsibility for the protection, care or custody of an endangered or impaired adult as a result of assuming the responsibility *voluntarily*, by contract, through employment, or by order of the court. Ark. Code Ann. § 5-28-101(3) (Repl. 1997). (Emphasis added.)

Accordingly, the State needed to present evidence that (1) Kaelin was older than eighteen; (2) that he was in a situation

that posed imminent risk of serious injury or death; and (3) that he lacked capacity to comprehend the nature and consequences or remaining in that situation, or (1) that Kaelin was older than eighteen years of age; (2) that he suffered from mental or physical defect; and (3) as a consequence thereof that he was unable to protect himself. We have found no cases discussing the elements of the offense at issue, and the State either does not comprehend the substance of Thomas's argument or has chosen not to respond to it, and has simply narrated all of the facts regarding the abuse suffered by Kaelin as a basis for affirmance on this point. In this regard, we conclude that logic and the requirement of strict construction of criminal statutes dictate that the abuse itself or the conditions which resulted from the abuse cannot substitute for proof of the victim's statutorily-required status as either an endangered adult or impaired adult. Thus, the condition that Kaelin was found to be in at the time of his hospitalization, although dire indeed, along with the description of his various injuries and the cause of his death do not constitute proof of either alternative status of an "endangered" or "impaired" adult. Moreover, although it is undisputed that Kaelin was seventy-seven years old at the time of these events, Kaelin's age alone is insufficient evidence of the vulnerable status required for commission of the offense.

Nonetheless, there was other evidence of Kaelin's status presented to the jury. There was testimony from Thomas that Kaelin had broken his leg and hip in a bicycle accident, walked with a cane, and was unable to attend to his financial affairs. Thomas told officers that she took care of Kaelin's banking because of his age and his inability to get around, although she stated at trial that this was not correct. Thomas also told officers that Kaelin was a danger to himself and would often set his pants on fire. At trial, she testified that Kaelin "caught his pants on fire a "bunch" by standing too close to the gas heaters. She also admitted that Kaelin ate dog food and that he "liked it." Moreover, the medical witnesses testified that Kaelin's injuries and condition took a considerable period of time to develop. We, therefore, conclude that there was sufficient evidence from which the jury could have found that Kaelin was an endangered or impaired adult, or both; that he suffered from a physical or mental defect, or both, and that as a consequence was unable to protect himself from the repeated abuse that he was subjected to or to remove himself from Thomas's

care and control, a situation in which he was quite literally placed at risk of serious injury and which persisted over a considerable period of time.

Affirmed.

BAKER, J., agrees.

BIRD, J., concurs.

SAM BIRD, Judge, concurring. I agree that this case should be affirmed, but I would address only the question of sufficiency of the evidence. Because the evidence is sufficient to support the conviction, I do not think it necessary to address the issue of whether the abuse or conditions resulting from the abuse can constitute proof of the victim's status as an endangered or impaired adult.

Thus, I concur.

Roxie E. BOYETTE, a single person, and James W. Boyette, a single person *v.* Ray F. VOGELPOHL and Teresa M. Vogelpohl, husband and wife

CA 04-1153 214 S.W.3d 874

Court of Appeals of Arkansas
Opinion delivered October 5, 2005

[Rehearing denied November 9, 2006.*]

* GLADWIN and GRIFFEN, JJ., would grant rehearing.

Hartsfield, Almand & Denison, PLLC, by: *Larry James Hartsfield*, for appellant.

Barbara P. Bonds, for appellee.

ANDREE LAYTON ROAF, Judge. Appellants Roxie E. Boyette and James M. Boyette appeal from the trial court's denial of their complaint seeking the establishment of a boundary line by acquiescence, or in the alternative by adverse possession, and the court's granting of the appellees Ray F. Vogelpohl and Teresa M. Vogelpohl's counterclaim to quiet tile. We agree that the trial court erred in quieting title to the disputed property in appellees, and reverse and remand.

Roxie Boyette and James Boyette own property on Highway 10 in Perryville, Arkansas (the Boyette property). Roxie owns the northern section of the property and James owns the southern section of the property. The Vogelpohls own the property situated on the west side of the Boyettes' parcels. At one time all of the property was owned by James Boyette's grandfather. Roxie and her now-deceased husband and James both acquired deeds to their respective parcels in 1994. The Vogelpohls acquired a deed to their property from F.C. Grass Farms Partnership in 1994.

The Boyette property and the Vogelpohl property were divided by a barbed-wire fence that ran the length of the property from north to south. The fence had been constructed at a time when both the west and east tracts were owned by the Boyette family. In July 2000, Troy Laha conducted a survey of the property line between the Boyette and Vogelpohl properties for Roxie Boyette and determined that the true boundary line sits east of the barbed-wire fence line. In 2002, the Vogelpohls began erecting a new fence in accordance with the surveyed boundary line. The Boyettes filed a complaint asserting that the old fence line represented the boundary by acquiescence or, in the alternative, that they had acquired title to the disputed property by adverse possession; the Vogelpohls counterclaimed and requested that the trial court quiet title to the disputed property in them.

At trial, Laha stated that he first observed the barbed-wire fence in April 1998; that it appeared that the fence had been in its present location for a number of years; and that the fence appeared to be virtually undisturbed for a long period of time. Laha also testified, "All indications are, on the ground, is that it [the barbed-wire fence] is being used as a boundary line between the two property owners. The Vogelpohls on the west were occupying up to the fence and the Boyettes on the east side were occupying up to the fence. If I remember correctly, both of them was cutting the grass up to the hedges as close as they could."

Roxie testified that she has lived on the Boyette property since 1965, and has been familiar with the Boyette property since 1960. From her earliest recollection, there has been a fence line running north and south separating the Boyette property from the property to the west, and it has always served as the boundary line between the two properties. The fence also served to keep out their neighbor's livestock and to control their own cattle. Roxie further stated that her family had been mowing the property up to the fence line since 1965, and that, before the Vogelpohls constructed their new fence, it was their custom to mow up to the old fence line. Roxie stated that she has used and claimed the property up to the fence line for "all of these years."

James Boyette testified that he was fifty-seven years old, and that at all times there has been a barbed-wire fence running from the north to the south end of the Boyette property. He stated that the function of the fence was to keep cattle off of their property, but "everybody's always recognized [the fence line] as the boundary line between the two properties." He also said that the owners of the property to the west of their property have claimed ownership of the land up to the old fence line.

Ray Vogelpohl testified that he purchased the property to the west of the Boyette property from F.C. Grass Farms. Before his purchase in 1994, the property had been vacant for a number of years. He admitted that, when he purchased the property, he did not have it surveyed, but that he relied on a survey that had been performed in 1981 that did not show any fences on the property. Vogelpohl testified that the Boyettes' deed also did not reflect the existence of any fences on the property. Vogelpohl stated that he had no reason to believe that the Boyettes were claiming anything other than the property that was described in their deeds; that there was no mention of a fence in their property description; that there is no reference to a fence in his property description; and that the Boyettes never told him that there were claiming anything other than the property that was actually described in their deeds.

Vogelpohl stated that after purchasing the property, he and his wife began to repair the property and restore it to a livable condition. He stated, "We'd maintain what we could on our side to keep the horse in. We're not concerned about the other side until we could at least get to place a proper fence there, which we did in 2002." He testified the weeds on both sides of the fence had grown up six to seven feet tall.

When asked to describe what action he had taken between 1994 and 2002 to indicate his exercise of dominion and control over the property in dispute, Vogelpohl responded that he was relying on the documents that Roxie had filed. He also stated that, because the north end of the fence was quite overgrown, he had the hedgerow taken down both sides of the north end of the fence and painted both sides. He maintained that he did not accept the fence line as the property line; that he painted and maintained the fence; and that he paid taxes on his property.

The trial court entered an order dismissing the Boyettes' complaint with prejudice and granting the Vogelpohls' counterclaim. In the order the trial court found in pertinent part:

> The existence of a fence between adjoining landowners is not sufficient to create a boundary line by acquiescence, there must be mutual recognition of the fence as a dividing line.
>
> As the fence was erected during the period of time when one common owner owned all of the parties' respective real property, the fence could not have been erected as a dividing line.
>
> It is clear from the testimony and evidence presented that there was no mutual recognition of the fence as a dividing line between the parties to this action.
>
> There was no testimony or evidence presented concerning any mutual recognition between the plaintiffs and the defendants' predecessor(s) in interest.
>
> Any occupation of the disputed strip was subordinate to that of the holder of the legal title.

Although boundary line cases are reviewed *de novo* on appeal, we will affirm a trial court's finding of fact with regard to the location of a boundary line unless the finding is clearly erroneous. *Hedger Bros. Cement & Materials, Inc. v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000). A finding is clearly erroneous when, although there is evidence to support it, we are left, after considering all of the evidence, with the definite and firm conviction that a mistake has been committed. *Id.* Whether a boundary line by acquiescence exists is to be determined upon the evidence in each individual case. *Id.*

The facts in this case are similar to those in *Summer v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993), in which the appellant appealed from the trial court's decision that an old fence line did

not constitute a boundary by acquiescence, nor did appellant gain title to the property by adverse possession. In *Summer*, the appellant's father had purchased forty acres of land in 1943. In 1954, he deeded the east thirty acres to appellant's grandfather, and in 1970, he deeded the remaining ten acres to appellant. In 1970, the grandfather deeded his thirty acres to a person outside the family, who subsequently deeded fifteen of these thirty acres to appellees. Appellees then shared a common north-south boundary with appellant's ten-acre tract. During all relevant times, a fence divided appellant's land from appellees', and the fence had been in existence for at least forty years. Both parties used their property up to the fence line, and both appellee and appellant maintained the fence. When appellees' 1991 survey reflected that the fence was approximately forty feet off the actual property line, they began construction of a new fence and filed for injunctive relief. Appellant responded that the old fence line was the long-established boundary line by acquiescence, and also contended that he had acquired title by adverse possession.

On appeal, this court reversed, holding that the trial court's finding that the old fence line had not become the boundary line by acquiescence was clearly erroneous. We stated that boundaries are frequently found to exist at locations other than those shown by an accurate survey of the premises in question and may be affected by principles of acquiescence and adverse possession. A fence, by acquiescence, may become the accepted boundary even though contrary to the survey line. The general rule is that, when adjoining landowners silently acquiesce for many years in the location of a fence as the visible evidence of the division line and thus apparently consent to that line, the fence line becomes the boundary by acquiescence. *Id.* (quoting *Tull v. Ashcraft*, 231 Ark. 928, 929-30, 333 S.W.2d 490 (1960)). The court also quoted from *Kittler v. Phillips*, 246 Ark. 233, 236, 437 S.W.2d 455, 456 (1969):

> The appellant ably argues that to establish a boundary line by acquiescence there must be a mutual or expressed agreement of the dividing line. However, in [a previous case] we said: It may be conceded, as claimed by appellant, that there never was any express agreement to treat the fence as the dividing line between the two parcels of land. Such an agreement, however, may be inferred by the action of the parties.

Moreover, it is well established that whenever property owners tacitly accept a fence line or other monument as the visible evidence of their

dividing line for a long period of time and thus apparently consent to that line, the line becomes the boundary line by acquiescence. *Summers, supra.* The property owners and their grantees are then precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one, although it may be on the survey line. *Id.*

Here, the Boyette fence has been in existence for more than forty years. The trial court found that, because the fence had been erected when the first Boyette owner owned all of the property in question, the fence line could not be considered a boundary line by acquiescence. However, the Boyettes testified that the Vogelpohls' parcel had been deeded outside the family sometime in the 1950s. The trial court's finding is contrary to the *Summers* holding and is clearly erroneous. Although not expressly stated in the *Summers* opinion, the fence in question was also in existence at a time when Summers owned all of the property. It is of no consequence that the fence line was not originally erected to serve as a boundary line. It is the conduct of the parties that is important when reviewing a boundary line by acquiescence case. In this case, both parties used their respective properties up to the fence line, and the Vogelpohls made no claim to the disputed property until 2002, when they began building a new fence, eight years after they acquired their property. In fact, Ray Vogelpohl stated that he had relied on an old survey until Laha performed the new survey in 2002. Although Vogelpohl testified that because he repaired the fence on the northern end of the property and painted both sides, he never acquiesced to the fence line as the boundary line; however, his conduct shows otherwise. Vogelpohl never used any of the property east of the fence line, and admitted that he took care of the weeds on his property and the Boyettes took care of the weeds on their property, but that the middle was overgrown. Laha and James Boyette testified that the parties had mowed their respective properties up to the fence line. Accordingly, we find that the parties' conduct shows that the Vogelpohls silently acquiesced in the fence line as the boundary line and that the Vogelpohls did nothing until 2002, which was eight years after they took possession of the property.

The trial court also found that there was not mutual recognition of the fence line as the boundary line. In *Fish v. Bush,* 253 Ark. 27, 484 S.W.2d 525 (1972), the supreme court stated that, in order to have a boundary line by acquiescence, the

adjoining land owners must recognize the fence as the boundary line, and there must be mutual recognition. The trial court found that there was no mutual recognition in this case. This finding is also clearly erroneous. Vogelpohl argues that he did not recognize the fence line as the boundary line and that he did not assent to the fence line as the boundary line because he relied on a previous survey. Again, the Vogelpohls never expressly asserted claim to any of the property east of the fence until 2002. The Boyettes used and mowed the property on the east side of the fence line, and the Vogelpohls only used up to the fence line on the west side. Mutual recognition is not an expressed agreement, and in fact, an expressed agreement is not required when the parties silently acquiesce. *See Summer, supra.*

The trial court also found that the mere existence of a fence between two adjoining parcels of land does not in and of itself sufficiently demonstrate a boundary line by acquiescence. *See Carney v. Barnes*, 235 Ark. 887, 363 S.W.2d 417 (1963) (mere fence not sufficient, must show mutual recognition). While this is a correct statement of the law, the evidence shows not merely a fence, but reflects mutual recognition and silent acquiescence.

We also conclude that the Boyettes established a claim of adverse possession to the disputed property. In order to establish a claim for adverse possession, a party must prove that he had possessed the property in question continuously for more than seven years and that the possession was visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the true owner. *McWilliams v. Schmidt*, 76 Ark. App. 173, 61 S.W.3d 898 (2001). The Vogelpohls contend that the Boyettes' claim of adverse possession fails because they have not complied with Ark. Code Ann. § 18-11-106, in that they failed to present proof that they paid *ad valorem* taxes. *See Schrader v. Schrader,* 81 Ark. App. 343, 101 S.W.3d 873 (2003). However, the statutory requirements for adverse possession were amended in 1995, requiring the party seeking adverse possession to show color of title and payment of taxes in addition to all of the elements necessary under existing adverse possession. *Id.* In *Schrader,* the court held that if the claimant's action accrues before 1995, the effective year of the amendment, then requirement of payment of taxes is not necessary. *Id.* In this case, the Boyettes have openly and continuously used and occupied the property on the east side of the fence line since the 1960s, thus their adverse possession claim would have

accrued well before 1995.For the reasons stated above, we find that the Boyettes also established a claim for adverse possession.

Reversed and remanded for entry of an order quieting title in the disputed property to the Boyettes.

GLOVER, NEAL, and BAKER, JJ., agree.

GLADWIN and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. The majority has reached a result in this case that violates the standard of review in boundary-dispute cases. This court reviews such cases *de novo* on the record; however, it is not to reverse unless the circuit court's findings of fact are clearly erroneous. *Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004). In other words, this court is not to reverse a circuit court's findings on a boundary-dispute case unless it "is left with a definite and firm conviction that a mistake has been committed." *Carson v. County of Drew*, 354 Ark. 621, 625, 128 S.W.3d 423, 425 (2003). We do not decide these cases as if we are the triers of fact. Yet, this is precisely how the majority has reasoned its way to reverse the trial court.

Through acquiescence, a fence may become the accepted boundary line between two parties even though it is contrary to the surveyed boundary line. *Robertson v. Lees, supra*; *Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993). The mere existence of a fence, without evidence of mutual recognition, cannot sustain a finding of a boundary by acquiescence. *Warren v. Collier*, 262 Ark. 656, 559 S.W.2d 297 (1978); *Robertson v. Lees, supra*. Silent acquiescence is sufficient, as the boundary line is usually inferred from the parties' conduct over so many years. *Warren v. Collier, supra*; *Hicks v. Newton*, 255 Ark. 867, 503 S.W.2d 472 (1974). A boundary by acquiescence may be established without the necessity of a prior dispute or adverse use up to the line. *Rabjohn v. Ashcraft*, 252 Ark. 565, 480 S.W.2d 138 (1972); *Lammey v. Eckel*, 62 Ark. App. 208, 970 S.W.2d 307 (1998).

For a party to prove that a boundary line has been established by acquiescence, that party must show that both parties at least tacitly accepted the non-surveyed line as the true boundary line. The mere subjective belief that a fence is the boundary line is insufficient to establish a boundary between two properties. *Webb v. Curtis*, 235 Ark. 599, 361 S.W.2d 87 (1962).

Plainly, the Boyettes merely assumed that the old fence line was the boundary line because both parties maintained their

property up to the fence. The Boyettes' allegedly longstanding recognition of the old fence as the established boundary line is undercut by the fact that they did not designate the fence as the boundary line in the 1994 quitclaim deeds. Further, Ray Vogelpohl testified that he never recognized the old fence as the boundary line and that the surveys he relied upon did not reflect any fences on the property. Because our standard of review requires this court to be deferential to the circuit court's determinations of credibility and weight to be accorded testimony, *see Carson v. County of Drew*, *supra*, there is no valid evidentiary reason for the majority to hold that the circuit court erred.

The majority has also over-relied on *Summers v. Dietsch*, *supra*. The following excerpt represents that court's rationale for reversing the lower court's finding that a boundary had not been established:

> In this case, it is undisputed that the fence had been in existence at the same location for over forty years. During at least the twenty-one years of appellant's ownership, neither appellees nor their predecessors ever objected to appellant's use of all of the property west of the fence. Rather, the owners of each tract of land used the property on their respective sides of the fence, up to the fence line. The evidence indicates that both appellant and appellees helped maintain the fence. Although appellee Dietsch testified that he thought as early as 1980 that the fence was on his property, he also testified that he did nothing about it until commencing this action in 1991. By their actions, the parties and their predecessors have accepted the fence as the existing and physical boundary line for at least twenty years without question or objection. Appellees' actions belie their contentions to the contrary.

Id. at 56, 849 S.W.2d at 5-6.

At least three facts distinguish *Summers* from the present case. First, the appellee in *Summers* acknowledged that the fence was recognized as the boundary. Vogelpohl testified, in contrast, that he never recognized the fence as the boundary. Second, the appellee in *Summers* testified that he thought as early as eleven years prior to the litigation that the fence was on his property. The surveys in the instant case do not show the fence as a boundary line or that the fence was even on the property. The majority seems to believe that Vogelpohl's reliance on the old survey supports a finding that he acquiesced to the fence as a boundary; however, Vogelpohl testified that the survey showed no fences on the

property and that he had no reason to believe that the Boyettes were claiming anything other than what was in their deeds. Finally, both parties in *Summers* helped maintain the fence. Such evidence is absent here. In fact, Vogelpohl did nothing to the fence until he noted that it was not on the surveyed boundary line. He then removed the fence.

The majority's interpretation of the evidence in this case is also internally inconsistent. The majority states that the evidence in this case "reflects mutual recognition and silent acquiescence." Recognition and acquiescence are two different things: the former requires express acceptance, while the latter requires merely tacit acceptance. *See Black's Law Dictionary* 25, 1299 (8th ed. 2004) (defining "acquiescence" as "A person's tacit or passive acceptance" and "recognition" as "The formal admission that a person, entity, or thing has a particular status"). For the majority's interpretation of the evidence to be correct, the Vogelpohls would have had to do some act recognizing the old fence as the boundary line while passively agreeing to the fence as the boundary line. In a proper standard of review, this court cannot hold that either, much less both, existed.

In re-weighing the evidence and holding that appellants did establish a boundary line by acquiescence, the majority has effectively declared the deeds useless. A deed that indicates the true boundary lines is rendered meaningless if a party can change those boundaries by merely assuming that another line must be the boundary. Every relevant document in this case established or referred to the surveyed line as the boundary line. Yet, with apparent disdain for that body of proof, the majority has reached its decision.

I also disagree with the majority concerning the adverse-possession argument. First, the majority opinion essentially makes the argument for the Boyettes. Much of the Boyettes' original and reply briefs are devoted to the boundary-by-acquiescence issue. In their main brief, they merely state the elements of adverse possession. In reply, they only respond to the Vogelpohls' assertion that the requirements of Ark. Code Ann. § 18-11-106 (Repl. 2003) (requiring the payment of taxes) were applicable. The Boyettes' failure to develop this point should have been reason enough to affirm on their adverse-possession theory. *See Johnson v. Encompass Ins. Co.*, 355 Ark. 1, 130 S.W.3d 553 (2003). Instead, the majority opinion erroneously concludes that the circuit court should have ruled in the Boyettes' favor on this point.

When considering an adverse-possession claim, a court presumes that possession of land by someone other than the true owner is *subservient* to that of the true owner. *See Fulkerson v. Van Buren*, 60 Ark. App. 257, 961 S.W.2d 780 (1998). Further, it is well-settled that a person does not lose title to land simply by placing a fence within his boundary; such a loss occurs only if his neighbor takes possession of the strip and holds it for the requisite number of years. *Brown Paper Mill Co., Inc. v. Warnix*, 222 Ark. 417, 259 S.W.2d 495 (1953); *Avington v. Newborn*, 271 Ark. 648, 609 S.W.2d 678 (Ark. App. 1980). The majority should not hold that this presumption was overcome simply because appellants maintained the lawn on their side of the fence, especially in light of evidence that no previous survey or deed (particularly the 1994 quitclaim deeds drafted by Roxie Boyette) showed that the land belonged to the Boyettes.

Finally, I am troubled by the fact that the majority found reason to reverse on both theories. Cases involving a boundary by acquiescence involve the peaceful possession of lands up to the acquiesced boundary. *Council v. Clark*, 246 Ark. 1110, 441 S.W.2d 472 (1969); *Avington v. Newborn, supra.* Acquiescence requires *mutual* recognition of a boundary line. *Rabjohn v. Ashcraft, supra.* In other words, parties on both sides of the acquiesced boundary must accept the line as the true boundary between the parties. Meanwhile, adverse possession requires *hostile* possession of property with the intent to hold that property in derogation of the rights of the true owner. *Bonds v. Carter*, 348 Ark. 591, 75 S.W.2d 192 (2002). While hostile ownership does not require conscious feelings of ill will or enmity toward one's neighbor, *Walker v. Hubbard*, 31 Ark. App. 43, 787 S.W.2d 251 (1990), it does require possession of land that the neighbor claims as his own.

Boundary by acquiescence and adverse possession are two alternate, yet competing (if not mutually exclusive), theories. By holding that both existed in this case, the majority has stated that the Boyettes claimed land to which the Vogelpohls had recognized no claim while simultaneously claiming land to which the Vogelpohls had made a claim. The inconsistency in the logic is apparent, and the dual holdings make no sense. I suspect that law students and law professors in real property classes will find these holdings amusing, but I cannot understand how this decision will make sense to lawyers who must counsel litigants.

For the reasons stated herein, I must respectfully dissent. I am authorized to state that Judge GLADWIN joins in this dissent.

NATIONWIDE MUTUAL INSURANCE COMPANY *v.*
Roxanne CUMBIE

CA 05-353 215 S.W.3d 694

Court of Appeals of Arkansas
Opinion delivered October 12, 2005

[redacted]

[redacted]

Laser Law Firm, by: *Kevin Staten* and *Brian A. Brown*, for appellant.

Lovell & Nalley, by: *John Doyle Nalley*, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The appellee, Roxanne Cumbie, was injured in a motor vehicle accident on December 30, 2001. She was not at fault. She settled with the tortfeasor's insurance carrier for his policy limits of $25,000 and then made demand upon appellant Nationwide for the policy limits under her own underinsured motorist policy. Nationwide evaluated the claim and offered to settle the underinsured motorist claim for $10,000. Appellee rejected this offer and filed suit on October 28, 2002, seeking the policy limits of $50,000 plus a statutory twelve percent penalty, prejudgment interest, and attorney's fees. Shortly before the scheduled trial date, Nationwide agreed to tender its policy limits and allow the court to determine its liability for the penalty, prejudgment interest, and attorney's fees. The court found Nationwide liable for all of these, and this appeal followed.

Nationwide first argues that the trial court erred in awarding the statutory twelve percent penalty because a "material change of circumstances" occurred after the lawsuit was filed in that appellee

required additional surgery and incurred substantial additional medical bills. Arkansas Code Annotated § 23-79-208(a)(1) (Repl. 2004) provides that:

> In all cases in which loss occurs and the cargo, property, marine, casualty, fidelity, surety, cyclone, tornado, life, accident and health, medical, hospital, or surgical benefit insurance company and fraternal benefit society or farmers' mutual aid association or company liable therefor shall fail to pay the losses within the time specified in the policy after demand is made, the person, firm, corporation, or association shall be liable to pay the holder of the policy or his or her assigns, in addition to the amount of the loss, twelve percent (12%) damages upon the amount of the loss, together with all reasonable attorney's fees for the prosecution and collection of the loss.

The allowance of the statutory penalty and attorney's fees when an insurer, after demand, fails to pay for an insured loss within the time specified in the policy is punitive in nature and is directed against the unwarranted delaying tactics of insurers. *Shepherd v. State Auto Property & Casualty Insurance Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993). With regard to the reference in § 23-79-208(a) to an insurance company's failure to pay losses "within the time specified in the policy," where an agreement does not specify a time period in which action is to be taken, the losses must be paid within a reasonable time. *McHalffey v. Nationwide Mutual Insurance Co.*, 76 Ark. App. 235, 61 S.W.3d 231 (2001).

Attorney's fees and penalty attach if the insured is required to file suit, even though judgment is confessed before trial. *Silvey Cos. v. Riley*, 318 Ark. 788, 888 S.W.2d 636 (1994). The appellant in *Silvey Cos. v. Riley* argued that there was an exception to the above-stated rule when it was reasonably necessary for the insurance company to continue to investigate the loss even after payment is due under terms of the policy. This argument was based on *Clark v. New York Life Insurance Co.*, 245 Ark. 763, 434 S.W.2d 611 (1968), where the supreme court held that the statutory language regarding an insurer's failure to pay losses within the time specified in the policy contemplates that the insurer shall have a reasonable time to make necessary investigation in reference to the loss and the circumstances thereof after demand. Although the *Silvey Cos.* court did not decide the issue because the appellant in that case failed to show a reasonable need for further investigation, and although the holding in *Clark* was based on the slightly different language of the predecessor to the present twelve percent

penalty statute, Ark. Stat. Ann. § 66-3238 (Repl. 1966), we think that the language and purpose of the two penalty statutes are so nearly identical that Ark. Code Ann. § 23-79-208(a)(1) likewise contemplates that the insurer shall have a reasonable time to make necessary investigation in reference to the loss and the circumstances thereof after demand.

The question, then, is whether the trial court could reasonably have found that Nationwide had a reasonable opportunity to investigate the loss. We think that it clearly could. The record shows that Nationwide refused to fully examine the medical records made available to it by appellee's authorization because it did not want to go to the expense of paying for copies, insisting instead that appellee provide it with all relevant documents. However, the statute requiring insurers to offer underinsured motorist coverage to their insureds clearly contemplates that the insurer will make an independent investigation of an underinsured motorist claim based on authorizations and releases provided by the insured.[1]

Nor do we agree with Nationwide's argument that it had no reason to know the value of the claim until appellee actually underwent surgery and incurred the additional medical expenses. The purpose of underinsured motorist coverage in this state is to supplement benefits recovered from a tortfeasor's liability carrier so to provide compensation to the extent of the injury, subject to the policy limit. *Shepherd v. State Auto Property & Casualty Insurance Co., supra.* As an underinsured motorist carrier, Nationwide's contractual duty, subject to its policy limit, was based on the liability of the tortfeasor to its insured under Arkansas law, and

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[1] Ark. Code Ann. § 23-89-209(c) provides, in part:

If a tentative agreement to settle for the liability limits of the owner or operator of the other vehicle has been reached between the insured and the owner or operator, written notice may be given by the insured injured party to his or her underinsured motorist coverage insurer by certified mail, return receipt requested. The written notice shall include:

(1) Written documentation of pecuniary losses incurred, including copies of all medical bills;

(2) Written authorization or a court order authorizing the underinsured motorist insurer to obtain medical reports from all employers and medical providers; and

(3) Written confirmation from the tortfeasor's liability insurer as to the amount of the alleged tortfeasor's liability limits and the terms of the tentative settlement. . . .

probable future medical expenses have been a recognized element of damages in negligence actions for many decades. *See, e.g., Arkansas Power & Light Co. v. Heyligers,* 188 Ark. 815, 67 S.W.2d 1021 (1934). Furthermore, Nationwide's good faith in its investigation and evaluation of the extent of appellee's claim was called into question by unrefuted evidence that, even after learning of appellee's additional surgery and medical expenses, Nationwide did not tender its policy limits but instead continued to negotiate a settlement for a lesser amount. A trial court's decision on whether to award attorney's fees, a twelve-percent penalty, and interest due to an insurer's failure to timely pay benefits will not be reversed on appeal unless the trial court's decision is clearly erroneous. *American Underwriters Insurance Co. v. Turner,* 57 Ark. App. 169, 944 S.W.2d 129 (1997). On this record, we cannot say that the trial court could not reasonably have found that Nationwide could have determined, within a reasonable time after appellee's demand under her underinsured motorist policy, that appellee would likely require further medical treatment sufficient to warrant payment of the policy limits.

Nationwide next argues that the award of prejudgment interest was inappropriate. The general test for awarding prejudgment interest is whether a method exists for fixing an exact value on the cause of action at the time of the occurrence of the event which gives rise to the cause of action. If such a method exists, prejudgment interest should be allowed. *Home Mutual Fire Insurance Co. v. Jones,* 63 Ark. App. 221, 977 S.W.2d 12 (1998). We hold that the twelve percent penalty award was warranted. Here, Nationwide's potential liability was limited by the policy limit of $50,000 so that, in the context of this case, the question regarding the appropriateness of prejudgment interest is whether Nationwide should have known at the time demand was made that it was liable for its policy limits. *See Shepherd v. State Auto Property & Casualty Insurance Co., supra.* Given our holding that the trial court could reasonably have found that Nationwide should have known that it was liable for the policy limits within a reasonable time after demand for payment was made on May 29, 2002, we cannot say that the trial court clearly erred in awarding prejudgment interest for a period beginning in June 2004.

Affirmed.

BIRD and NEAL, JJ., agree.

William C. MOORE *v.* STATE of Arkansas

CA CR 05-159 215 S.W.3d 688

Court of Appeals of Arkansas
Opinion delivered October 12, 2005

Mac Golden PLLC, by: *Mac Golden*, for appellant.

Mike Beebe, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant William C. Moore was convicted by a jury of aggravated robbery and sentenced to twenty years in prison with five suspended. On appeal, his sole argument is that he was denied an impartial jury because the trial court denied his *Batson* challenge to the State's peremptory strike of a juror.

Mr. Moore is white, and during voir dire the State exercised a strike against a black venire person. The following exchange subsequently occurred:

> DEFENSE COUNSEL: Your Honor, Ms. Tillman is African-American and we would object to her being struck — we would object to her being struck. She is African-American.
>
> THE COURT: The defendant is not African-American.
>
> DEFENSE COUNSEL: I understand. My understanding is that a public right also of the defendant — he is entitled

to an unbiased trial from an unbiased jury, whatever his race is, so we would object to her being struck. We would inquire why the State wishes she be struck.

THE COURT: What does the State have to say?

PROSECUTOR: This is absurd. In every criminal case I've been involved in — the defense objects to this? It's absurd.

DEFENSE COUNSEL: We would make the same —

PROSECUTOR: I haven't struck any others. Personally, it's offensive.

DEFENSE COUNSEL: Your Honor, there is no personal intent intended in this case. I've known Mr. Shue for a number of years. I believe he is a very fair-minded person, but we nevertheless would make that objection. No personal offense intended.

THE COURT: First, I don't think it's applicable; it is not an African-American defendant. Secondly, I would point out there has already been at least one juror seated. Mr. Willis, who is African-American, that was seated without objection.

PROSECUTOR: We also have Ms. Wofford who was just seated, Your Honor. There's two African-Americans.[1]

THE COURT: And Ms. Wofford who has been seated. That makes two, so I don't think the State is required to set out a basis when the defendant is not African-American.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the State from striking a venire

[1] The prosecutor's reference to the seating of Ms. Wofford as the second African American juror is a mistake, because Ms. Wofford was struck by Mr. Moore's counsel moments before this exchange took place. Nevertheless, it is evident that at least one African-American juror was seated prior to this peremptory challenge.

person as a result of racially discriminatory intent. In *Mackintrush v. State*, 334 Ark. 390, 397, 978 S.W.2d 293, 296 (1998), our supreme court outlined the proper steps for the trial court to follow when a *Batson* claim is made:

> (1) the opponent of a peremptory challenge must make a *prima facie* case of racial discrimination; (2) the proponent of the strike must come forward with a race-neutral explanation; and (3) the trial court must decide whether the opponent has proven purposeful racial discrimination.

As for the first-step analysis, the *Mackintrush* court stated:

> The strike's opponent must present facts, at this initial step, to raise an inference of purposeful discrimination. According to the *Batson* decision, that is done by showing (1) that the strike's opponent is a member of an identifiable racial group, (2) that the strike is part of a jury-selection process or pattern designed to discriminate, and (3) that the strike was used to exclude jurors because of their race. In deciding whether a *prima facie* case has been made, the trial court should consider all relevant circumstances. S-hould the trial court determine that a *prima facie* case has been made, the inquiry proceeds to Step Two. However, if the determination by the trial court is to the contrary, that ends the inquiry.

Id. at 398, 978 S.W.2d at 296.

For reversal of the trial court's action in this case, Mr. Moore argues that the trial court erred as a matter of law in ruling that he could not make a *Batson* challenge to a black juror because he himself was not black. Mr. Moore contends that the trial court was required to go through the three-step *Batson* process, and that its failure to do so constituted reversible error. Mr. Moore notes that in *Holder v. State*, 354 Ark. 364, 124 S.W.3d 439 (2003), the supreme court held that a *Batson* error is not subject to harmless-error analysis.

Mr. Moore is indeed correct in asserting that a defendant has the right to object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and excluded jurors share the same race. This was the holding in *Powers v. Ohio*, 499 U.S. 400 (1991), where the Supreme Court stated that although a defendant has no right to a jury composed in whole or part of persons of his own race, he does have the right to be tried

by a jury whose members are selected by nondiscriminatory criteria. The *Powers* court further stated that the Equal Protection Clause prohibits the State from using peremptory challenges to exclude otherwise qualified and unbiased jurors solely by reason of race, and that racial discrimination in jury selection casts doubt on the integrity of the judicial process, and places the fairness of the proceedings in doubt. Thus, it is clear that in the instant case Mr. Moore did have the constitutional right to bring a *Batson* challenge against the State's peremptory strike of Ms. Tillman, and the trial court erred in stating otherwise.

Notwithstanding the trial court's misunderstanding of the law, we nonetheless cannot conclude that any error was committed in permitting the State to strike Ms. Tillman. This is because Mr. Moore failed to make a *prima facie* case of racial discrimination. The prosecution's use of a peremptory challenge to remove the only black prospective juror *may* establish a *prima facie* case. *Cooper v. State*, 324 Ark. 135, 919 S.W.2d 205 (1996). However, one peremptory strike of a minority prospective juror, with no additional facts or context in which it can be evaluated, is not sufficient. *Id.*

When Mr. Moore made his *Batson* objection, he inquired as to why the State wished to strike the juror. However, because Mr. Moore offered no additional argument or facts outside of the strike itself, no *prima facie* case was made and therefore the State was not required to come forward with a race-neutral explanation. Clearly the State did not use a peremptory strike against the only black prospective juror because, as the trial court pointed out, there had already been at least one black juror seated without objection.

In *Jackson v. State*, 330 Ark. 126, 129, 954 S.W.2d 894, 895 (1997), the supreme court reviewed a *Batson* challenge and announced:

> The first of the three-step analysis above requires us to determine whether Jackson proved a prima facie case of discrimination which may be established by (1) showing that the totality of the relevant facts give rise to an inference of discriminatory purpose, (2) demonstrating total or seriously disproportional exclusion of blacks from the jury, or (3) showing a pattern of strikes, questions or statements by a prosecuting attorney during voir dire.

In affirming Mr. Jackson's conviction, the supreme court reasoned:

> In the present case, Jackson made no effort to show a disproportionate exclusion of blacks from the jury, nor did he show a pattern of strikes evidencing a discriminatory purpose. In fact, two black males were seated on the jury, and as this court has previously stated, the best answer the State can have to a charge of discrimination is to point to a jury which has black members. In this respect, we also note that, while the State was entitled to ten peremptory challenges, it used only six. Additionally, Jackson presented no evidence that the prosecutor made any racial statements or asked any racial questions. In sum, Jackson failed to show a prima facie case.

Id. at 129-130, 954 S.W.2d at 895 (citations omitted).

As in *Jackson v. State, supra*, the appellant in the instant case failed to present any factors to carry his burden of making a *prima facie* case of discrimination. While the trial court was wrong in asserting that Mr. Moore could not make a *Batson* challenge because he did not share the same race as the struck juror, the result reached by the trial court was correct given that it is not even arguable that Mr. Moore made, or even attempted to make, a *prima facie* case as required by *Batson v. Kentucky, supra.* We will affirm the trial court if it reaches the right result for the wrong reason. *See Hagen v. State*, 315 Ark. 20, 864 S.W.2d 856 (1993); *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997); *Pyles v. State*, 55 Ark. App. 201, 935 S.W.2d 570 (1996).

In reaching our decision we emphasize that we are in no way holding that the existence of one black juror on the jury gives the State any right to strike another black venire person for a racially motivated reason. Rather, we simply hold that there was no evidence of any racial motivation in this case, and this fact was in part demonstrated by the State's failure to strike the prior African-American juror or jurors.

Affirmed.

HART, VAUGHT, and CRABTREE, JJ., agree.

GRIFFEN and NEAL, JJ., dissent.

WENDELL GRIFFEN, Judge, dissenting. The sole issue is whether the trial court properly overruled a white defendant's objection to the exclusion of a black juror during *voir dire*

without applying the procedure for analyzing race-based juror challenges that is mandated by *Batson v. Kentucky*, 476 U.S. 79 (1986), and *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998). I agree with the majority that the trial court erred in determining that a white defendant is not entitled to exercise a *Batson* challenge where the State uses a peremptory challenge to strike a black juror. *Powers v. Ohio*, 499 U.S. 400 (1991).

However, I would reverse the trial court's refusal to address the merits of the defendant's *Batson* objection. The mere fact that a black juror had already been seated did not disqualify the defendant from making a subsequent *Batson* objection. The majority opinion now compounds the trial court's error because the presence of a minority member on a jury, while significant, is not dispositive of the question of whether discrimination has occurred. *Heard v. State*, 322 Ark. 553, 910 S.W.2d 663 (1995). Further, the majority's reliance on *Jackson v. State*, 326 Ark. 126, 954 S.W.2d 894 (1997), implies that a defendant must present a *pattern* of discriminatory strikes in order to establish a *prima face* case under *Batson*. However, a defendant may also establish a *prima facie* case *under Batson* by showing a *process* designed to discriminate. *MacKintrush, supra*. To affirm here is to hold that no *Batson* analysis is required where a single black juror has been seated; essentially, the majority opinion advances the position that subsequent exclusion of any black member of the venire would be *prima facie* nondiscriminatory, that is would *never* be due to discriminatory intent. That position is absurd on its face. The majority's position also directly violates case law stating that exclusion of a single juror based on race violates equal protection. *Holder v. State*, 354 Ark. 364, 124 S.W.3d. 439 (2003).

Clearly, the trial court was mistaken in thinking that two black jurors had been seated. In fact, only one had been seated. In any event, the fact that one black person had already been seated did not prevent any *remaining* member of the venire from being excluded for racially discriminatory reasons. Moreover, it has long been understood, at least until now, that the *Batson* inquiry also serves to protect the *excluded juror and* the integrity of the judicial system. In recognizing this extended protection, the *Batson* court stated:

> Racial discrimination in selection of jurors harms not only the accused. . . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to

> touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

476 U.S. at 87-88.

The majority relies on *Cooper v. State*, 324 Ark. 135, 919 S.W.2d 205 (1996), for the unremarkable proposition that a single peremptory strike of a minority prospective juror, with no additional facts or context in which it can be evaluated, is not sufficient to establish a *prima facie* case under *Batson*. Further, the Arkansas Supreme Court has affirmed a trial court's finding that a defendant failed to make a *prima facie* case of discrimination under *Batson* where the State's sole peremptory challenge was exercised to excuse a black juror, and where the very next juror seated, who was black, was accepted by the State at a time when the State had peremptory challenges remaining. *Heard v. State, supra.* Plainly, *Cooper* and *Heard* are distinguishable because in neither of those cases was there any indication that the trial court was misinformed as to the number of black jurors seated, nor did the supreme court make the initial *Batson* determination after the trial court failed to do so.

Although the majority recognizes that a *Batson* error is not subject to harmless-error analysis, *Holder v. State, supra*, it proceeds to conduct, what, in essence, is a harmless-error analysis by accepting the State's argument that we may affirm because the trial court reached the right result for the wrong reason. I do not understand how we can conclude that the trial court reached the right result where it a) reasoned incorrectly and b) refused to rule on the *Batson* challenge because of its basic mistake. In effect, the majority has performed a *de novo review* and accepted an argument not made at trial by the *Batson* opponent, and now concludes, for the first time, that the *Batson* proponent failed to be persuasive.

Clearly, the majority here has done what the *trial judge* in *Cooper, supra*, and *Heard, supra*, did: it has examined the facts in the case and made an initial *Batson* ruling. The majority states that "because Mr. Moore offered no additional argument or facts outside of the strike itself, no *prima facie* case was made." The majority further states that "the result reached by the trial court was correct given that it is not even arguable that Mr. Moore made or even attempted to make, a *prima facie* case" of discrimination under *Batson*. Yet, the majority cites to no authority that allows us to perform a *de novo* review and make the initial *Batson* determi-

nation for the first time on appeal where the trial court erroneously declared that the defendant had no right to assert a *Batson* objection in the first instance.

Perhaps the trial court's comments could be affirmable as a determination regarding the defendant's *prima facie* case if the record showed that the court recognized that a *Batson* challenge had been asserted and actually ruled on the merits of that challenge. However, the trial court believed that the *Batson* analysis was not applicable at all, insofar as the challenged venireperson was concerned. The record plainly shows that the trial judge struck a black venireperson, upon a peremptory challenge by the State, because the trial judge believed the defendant could not assert any *Batson* challenge. Thus, there is no justification for affirming as if the trial court made a ruling on the *Batson* challenge.

In the face of undeniable history of race discrimination in jury selection that *Batson* purports to address, it is disquieting that the judicial process is now being used, under the guise of appellate review, to sanction what the sanctioning judges acknowledge as judicial error. I refuse to validate the wrongful consequence of the trial court's error. Accordingly, I would reverse this case and remand for a new trial. I am authorized to state that Judge Neal joins in this opinion.

ARCHER-DANIELS-MIDLAND COMPANY *v.* BEADLES ENTERPRISES, INC.

CA 04-1070 215 S.W.3d 675

Court of Appeals of Arkansas
Opinion delivered October 12, 2005

[Rehearing denied November 30, 2005.]

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

Moore, Serio, Bishop & Helms, by: *Robert G. Serio*, for appellee.

WENDELL L. GRIFFEN, Judge. Appellee Beadles, Incorporated (Beadles) is a hog-finishing operation owned by Wayne Beadles, Sr., and Wayne Beadles, Jr. This operation takes young hogs, feeds them until they attain a certain weight, and then sells them to slaughterhouses. Beadles makes its own hog feed, part of which contains soybean meal that it purchased from appellant Archer-Daniels-Midland Company (ADM).[1] Beadles sued ADM claiming that ADM's failure to inform Beadles that ADM had sold it soybean meal that might have contained ball clay that was contaminated with dioxin[2] caused a purchaser to reject a shipment of Beadles's hogs and that while the rejected hogs were stored at a receiving center, they contracted salmonella group B, which they later spread to Beadles's facility after the refused hogs were returned, and which caused the death of 2600 of Beadles's hogs over the next few years. Following a bench trial, the circuit judge found that ADM was liable for fraud due to its failure to inform Beadles of the alleged dioxin contamination. We reverse and dismiss because either a crucial element of Beadles's fraud claim — the reason the shipment of hogs was rejected — was proven based solely on inadmissible hearsay or else no proof was given to establish that element of Beadles's claim.

I. Background Facts

In April and May of 1997, Beadles purchased two shipments of allegedly contaminated soybean meal from ADM. Thereafter, on July 21, 1997, Beadles sold and attempted to ship 126 hogs to an Iowa purchaser, IBP. These hogs had been fed with the allegedly contaminated feed. IBP halted the shipment in Missouri and Beadles's hogs were stored temporarily at a receiving center. During this time, three hogs were slaughtered and tested for dioxin; the test results were negative. In addition, another hog

[1] ADM is the successor company for Quincy Soybean Company, which sold the allegedly contaminated soybean meal to ADM.

[2] According to Beadles's complaint, ball clay is an anti-caking agent that is sometimes added to soybean meal. Dioxin is a toxic substance that is found in the environment and is unavoidable at background levels. The levels at which dioxin would adversely affect humans has not been identified. However, as noted herein, the issue in this case is not whether ADM actually sold Beadles dioxin-contaminated soybean meal.

died (cause unknown). Beadles then shipped the remaining 122 hogs back to its farm.

Beadles's hogs are kept in an "old barn" and a "new barn," which are approximately fifty yards apart. Beadles returned the 122 hogs to the new barn, from which they originated. When the hogs returned, they were extremely stressed and laid in an open-flush gutter system to cool themselves. This system washed feces and dirt from the IBP hogs. Other hogs in the new barn that were penned down slope came into contact with that feces and dirt. The IBP hogs were ultimately reshipped and sold to IBP at a reduced price because they lost weight. The hogs that were penned down slope from the IBP hogs began dying approximately two or three weeks thereafter. Beadles sued, claiming that while being stored at the receiving station, the IBP shipment became infected with salmonella group B, which somehow spread to Beadles's other hogs when the IBP shipment was returned and caused an increased death rate in its hog operation through 2001.

A bench trial was held on October 29-30, 2003.[3] The trial court made numerous findings of fact, including the following:

1. ADM knew prior to July 21, 1997, and no later than July 7, 1997, that the federal government was concerned that the soybean meal ADM sold in April and May of that year was contaminated.

2. ADM had a special relationship with Beadles based on their past dealings, and based on its knowledge that the soybean meal it sold to Beadles would be fed to hogs and then placed into the food chain for ultimate human consumption.

3. ADM had a duty to disclose to Beadles that the soybean meal it sold to Beadles was alleged to have been contaminated with dioxin, and that Beadles would not have purchased the soybean meal from ADM had it been so informed.

4. The hogs Beadles attempted to sell to IBP were rejected because of the alleged dioxin contamination.

5. Soon after the IBP hogs were shipped, the hogs in the new barn began to have symptoms of salmonella and other diseases;

[3] ADM removed this case to federal court, but the case was remanded to the Arkansas circuit court because the petition for removal was untimely.

necropsy reports for some hogs indicated as the cause of death salmonella group B, a new strain of salmonella not detected as a cause of death in Beadles's hogs prior to July 21, 1997.

6. The increase in Beadles's annual hog-death loss from 1997 through 2001 was "the result of diseases transmitted from hogs that were returned from the July 21, 1997 shipment infecting other hogs in the facility and infecting the facility itself."

7. ADM's failure to disclose the alleged dioxin contamination resulted in total damage to Beadles in the amount of $309,371.58.

II. Analysis

We reverse and dismiss because the trial court improperly admitted hearsay evidence regarding IBP's reason for rejecting the hog shipment, and, absent such evidence, Beadle's claim fails because no other proof demonstrated why IBP rejected the shipment. The trial court determined that ADM was liable for fraud in failing to inform Beadles that its soybean meal was possibly contaminated. A plaintiff suing for fraud must establish the following: 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) an intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance. *Tyson Foods, Inc. v. Davis*, 347 Ark. 566, 66 S.W.3d 568 (2002). Thus, Beadles was required to prove, *inter alia*, that IBP rejected the hog shipment because it believed that ADM had sold Beadles possibly contaminated soybean meal, and that this rejection caused Beadles's damages. Yet, because Beadles did not depose anyone from IBP or call anyone from IBP to testify, no direct evidence on that specific issue was obtained from IBP. Instead, Beadles, to its detriment, relied on various hearsay documents to prove its claim.

The first item of hearsay evidence at issue is Exhibit Z, a memo to Beadles dated January 15, 1998, from Larry Bertrand, IBP's Area Procurement Supervisor. In that memo, Bertrand stated that IBP stopped the shipment of hogs "based on an official notification that Beadles Enterprises may have received feed for their hogs that contained contaminated ball clay." In addition,

Wayne Sr. testified that his son, Wayne Jr., told him about a telephone conversation with someone at IBP, who informed him (Wayne Jr.) that the shipment was being rejected for the same reason. Over ADM's further hearsay objections, Wayne Jr. also testified as to the substance of his telephone conversation with the IBP representative.

ADM raised hearsay objections to both the admission of Exhibit Z and the testimony regarding the substance of the telephone conversation. The court admitted the evidence for the limited purpose of explaining the subsequent action taken by Beadles but not for the purpose of establishing the truth of what was stated in the memo or in the telephone conversation. We hold that reversal is warranted because the evidence was either inadmissible hearsay, or if it was not, then because Beadles's claim lacks proof of an essential element: why IBP rejected the shipment of hogs.

Hearsay is an out-of-court statement made by someone other than the declarant that is offered to prove the truth of the matter asserted. Ark. R. Evid. 801(c). Evidence that is otherwise classified as hearsay may nonetheless be admitted for purposes other than to show the truth of the matter being asserted, such as to show a course of conduct or the basis for an action. *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993). We will not reverse a trial court's ruling regarding the exclusion of hearsay evidence absent an abuse of discretion. *Id.* We hold that the trial court abused its discretion in this case in admitting Exhibit Z and the testimony regarding Wayne Jr.'s telephone conversation.

The hearsay statement here, whether in the form of the memo or the testimony, was that IBP rejected the hogs because of the allegation that Beadles had received contaminated soybean meal. The following colloquy illustrates the hearsay error committed by the trial court. After the trial court allowed Wayne Sr. to confirm the accuracy of a report from the federal government through his own personal knowledge, Beadles then moved to introduce Exhibit Z, the IBP memo, as follows:

> BEADLES'S COUNSEL: Your Honor, again we would seek to introduce Plaintiff's Exhibit Z, the memo from IBP to Wayne Beadles. *And Mr. Beadles, through his own knowledge, confirmed those statements to be accurate, and that is exactly what happened to his hogs.*

ADM'S COUNSEL: I'll just renew my prior objection, Your Honor. The document is hearsay, and there's not been adequate foundation that Mr. Beadles has personal knowledge of statements that are contained in the documents.

BEADLES'S COUNSEL: Your Honor, I just got through, *he just got through saying they were absolutely accurate and that, in fact, is exactly what happened.*

COURT: *I think that's what he testified to,* let it be received.

(Emphasis added.)

Thus, Beadles sought to confirm that "exactly what happened to [Beadles's] hogs" was what was stated in the IBP memo and the trial court allowed it to do that, clearly demonstrating that the "truth of the matter" asserted by the evidence was not whether the soybean meal was in fact contaminated, but rather, that the allegation that the shipped hogs had been fed allegedly contaminated feed was the reason that IBP rejected the shipment. Beadles agrees that it was the *assertion* of contamination itself that caused its animals to be unmerchantable. If the shipment had not been rejected for that reason, then offering evidence of Beadles's subsequent course of conduct in returning the hogs made no sense. In other words, neither the memo nor the testimony could have been probative *unless* admitted to prove why IBP rejected the shipment.

Similarly, the trial court erred in admitting Exhibit BB, a list labeled "Soybean Meal Consignees." Wayne Sr. testified that this list was faxed to him after IBP informed him that Beadles was on a list of purchasers who had bought possibly contaminated feed. ADM objected on the ground of hearsay and lack of foundation because the list contained no information regarding contaminated soybean meal; it merely listed buyers, their addresses, and what appeared to be an amount of soybean meal purchased. The trial court admitted the document for the purpose of explaining why Beadles could not sell his hogs but not for the truth of the matter as to whether Beadles had purchased contaminated soybean meal.

Like Exhibit Z and the testimony regarding Wayne Jr.'s telephone conversation, the only way that the list could have been probative was to prove why IBP rejected the shipment. If the list was not admitted to show that IBP rejected the shipment *because Beadles's name was on the list,* then the list was not probative to establish why Beadles could not sell their hogs.

However, reversal is warranted even if the testimony was admitted for a reason other than to establish why IBP rejected the shipment. No one from IBP testified; thus the *only* evidence that IBP rejected the shipment due to its belief that Beadles's hogs had been fed contaminated soybean meal was the memo, the testimony regarding the phone call, and the list of ADM's purchasers. Once this evidence is excluded there is no other evidence to explain why IBP believed that Beadles had fed its hogs allegedly contaminated feed.

Beadles first asserts that the evidence was admissible as reputation evidence, pursuant to Ark. R. Evid. 803(20), which provides an exception to the hearsay rule for reputation of events of general history important to the community or state or nation. It maintains that the memo and testimony regarding the telephone conversation was admissible as proof of ADM's reputation for selling allegedly contaminated soybean meal.

However, evidence that would otherwise be hearsay is admissible pursuant to the hearsay exception contained within Rule 803 because such evidence is considered to have sufficient indicia of reliability or trustworthiness. *See Ward v. State*, 298 Ark. 448, 770 S.W.2d 109 (1989). The unsupported testimony of two interested parties and the confirmation of the contents of a hearsay memo by one of those parties, which itself was based on double-hearsay (Wayne Sr.'s statements regarding Wayne Jr.'s hearsay statements about the IBP call) hardly constitutes the type of necessary reliability or trustworthiness required to qualify as a hearsay exception under Rule 803(20).

Additionally, Beadles urges that because Wayne Sr. testified that he could confirm the accuracy of the statements contained in Exhibit Z with his own knowledge, the testimony was properly admitted under Ark. R. Evid. 701, which allows lay persons to offer opinions or inferences if they are rationally based on the perception of the witness. However, Beadles offers no persuasive authority that inadmissible hearsay under Rule 803 constitutes an otherwise admissible opinion or inference under Rule 701.

Beadles lastly points to other documents admitted for the purpose of proving when ADM learned of the allegation that its soybean meal had been contaminated. Clearly, these documents do not prove what *IBP* knew, when it knew it, or why it rejected the shipment of hogs.

Accordingly, if this evidence was admitted merely to show Beadles's reasons for its action or course of conduct — why it was unable to sell its hogs and why it returned the hogs to the farm — then *no other evidence* was offered to prove an essential element of Beadles claim against ADM: that the hogs contracted salmonella group B at the receiving station, where they were stored because IBP rejected the shipment based on its belief that ADM sold Beadles soybean meal that may have been contaminated. It is reversible error for a trial court to admit hearsay evidence when it is the only proof of an essential element of a claim. *Eichelberger v. State*, 323 Ark. 551, 916 S.W.2d 109 (1996); *Taylor v. Samuels*, 238 Ark. 70, 378 S.W.2d 200 (1964). As such, the trial court improperly admitted the memo and the testimony regarding Wayne Jr.'s telephone call.

Finally, we do not remand for retrial based on simple failure of proof because once the erroneous evidence is excluded, Beadles's claim is devoid of proof of an essential element. *McAdams v. Ellington*, 333 Ark. 362, 970 S.W.2d 203 (1998) (affirming dismissal of a fraud claim where the plaintiff failed to allege facts to satisfy all of the elements of fraud). When the record affirmatively shows that there can be no recovery on remand, we dismiss. *Womack v. First State Bank of Calico Rock*, 21 Ark. App. 33, 728 S.W.2d 194 (1987). Therefore, we reverse and dismiss the judgment and award ADM costs expended for prosecuting the appeal. Because we reverse and dismiss based on the improper admission of the hearsay testimony, we do not address ADM's remaining arguments.

Reversed and dismissed.

VAUGHT and ROAF, JJ., agree.

Joe CLARK, Rex Martin and William Glass *v.*
James CASEBIER

CA 05-92 215 S.W.3d 684

Court of Appeals of Arkansas
Opinion delivered October 12, 2005

Armstrong Allen, PLLC, by: *Charles A. Banks* and *Jeff R. Priebe*, for appellants.

Cahoon & Smith, by: *David W. Cahoon*, for appellee.

LARRY D. VAUGHT, Judge. Appellants Joe Clark, Rex Martin, and William Glass appeal the order of the Poinsett County Circuit Court that quieted title to disputed property in favor of appellee James Casebier following a bench trial. Appellants argue on appeal that the trial court erred in finding (1) that there had been an agreement by acquiescence that the irrigation ditch represented the boundary line between the two properties and (2) that the north side of the irrigation ditch was the boundary line between the properties. We disagree and affirm.

In December 2002, appellants purchased a tract of land from Karen and John Hutchison that had been previously owned by the Kennedy family. Prior to purchasing the land, appellants' bank required a survey of the property. This survey revealed an irrigation ditch running east to west at the southern end of appellants' property about sixty feet from the surveyed boundary line. The property located between the irrigation ditch and the actual southern boundary line of appellants' property is the area in dispute. Until the survey was completed, appellants had not been shown any property corners or boundaries on the property.

Butch Hime, the surveyor appellants hired, testified that he did not find all the markers for the property corners establishing appellants' property boundaries. Instead, he used a proportionate survey technique to establish the corners. The boundary lines were different than the original government survey showed, but this did not cause Hime concern.

Appellee owned the tract of land south of appellants' property and testified that he used the irrigation ditch to provide water for his crops. He had several pieces of irrigation equipment, including a permanent relift pump, on the disputed property. Appellee had purchased his property from Orville Thomas in March 1986. Orville Thomas testified that his family had owned the land since the 1950s but that he had been familiar with the property since the 1920s. Thomas testified that he helped his father dig the irrigation ditch sometime in the 1960s. He asserted that they had attempted to locate the boundary line, and using monuments from a previous survey, they dug the irrigation ditch on his father's property. Thomas testified that at the time it was dug, the ditch "wasn't very wide." He declared that the ditch was eight or nine feet wide when the water was its highest but that it was not that wide when it was dug. Rather, the ditch had washed out some

over time. Thomas stated that the purpose of the ditch was to bring water from the river for irrigation of crops and that it had always been used for that purpose. When appellee purchased the land, an older model relift pump was located near the ditch, and appellee replaced it with a newer model. Thereafter, appellee placed an underground pipe in the ground connected to the relift pump to make taking water from the ditch easier. This pump and pipe became permanent fixtures on the property. Appellee also testified that compared to the first time he was on the property was in 1971 or 1972, the ditch looked the same in the present day as it did then.

Both Thomas and appellee testified that until appellants complained, no adjoining landowner had raised any objection to Thomas's or appellee's use of the irrigation ditch and the disputed property. Appellee testified that it was his understanding that his property line was the irrigation ditch. He stated that he used the property up to the irrigation ditch as his own and used the irrigation ditch to water his crops. He stated that he removed silt from the irrigation ditch in 1986 or 1987, he hired the Kennedys to remove silt from in it in 1989, and he removed the silt himself again in 1992 and 1998. He stated that the Kennedys were working under contract for him when they removed the silt and that they did not object to his working on the irrigation ditch.

After the survey was completed and the land purchased, appellants asked appellee to remove the relift pump from the disputed property. Appellee refused, and appellants filed suit. Following a bench trial, the judge found that based on the prior conduct of the landowners, a boundary by acquiescence existed and that the northern edge of the irrigation ditch was the boundary line between the properties.

For their first point on appeal, appellants argue that the trial court erred in finding that there was an agreement by acquiescence to make the irrigation ditch the boundary line between the properties. Whenever adjoining landowners tacitly accept a fence line or other monument as the visible evidence of their dividing line and apparently consent to that line, it becomes a boundary by acquiescence. *Hedger Bros. Cement & Materials, Inc. v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000). A boundary line by acquiescence is inferred from the landowners' conduct over many years so as to imply the existence of an agreement about the location of the boundary line. *Id.* at 222, 10 S.W.3d at 928. The

location of a boundary line is a question of fact. *Id.*, 10 S.W.3d at 928. Although equity cases are reviewed de novo on appeal, we will affirm a trial court's finding of fact with regard to the location of a boundary line unless the finding is clearly erroneous. *Id.*, 10 S.W.3d at 928. A finding is clearly erroneous when, although there is evidence to support it, we are left — after considering all of the evidence — with the definite and firm conviction that a mistake has been committed. *Id.*, 10 S.W.3d at 928. Whether a boundary line by acquiescence exists is to be determined upon the evidence in each individual case. *Id.* at 222–23, 10 S.W.3d at 928. In reviewing a trial court's findings of fact, we give due deference to the trial judge's superior position to determine credibility of the witnesses and the weight to be accorded to their testimony. *Riddick v. Streett*, 313 Ark. 706, 858 S.W.2d 62 (1993).

It is also settled law that a boundary line by acquiescence may well exist without the necessity of a prior dispute. *Walker v. Walker*, 8 Ark. App. 297, 651 S.W.2d 116 (1983). Nor is there any requirement of adverse usage up to a boundary fence to establish a boundary by acquiescence. *Id.* at 298, 651 S.W.2d at 117. Instead, whenever adjoining landowners tacitly accept a fence line or other monument as the visible evidence of their dividing line and thus apparently consent to that line, it becomes the boundary by acquiescence. *Id.* at 298–99, 651 S.W.2d at 117. When the adjoining owners occupy their respective premises up to the line they mutually recognize and acquiesce in as the boundary for a long period of time, they and their grantees are precluded from claiming that the boundary thus recognized and acquiesced in is not the true one, although it may not be. *Id.* at 299, 651 S.W.2d at 117.

There is ample evidence to support the trial court's findings and conclusions in this case. Since the irrigation ditch was dug in the 1960s, the owners of the southern tract of land have used the disputed property and the irrigation ditch as their own. Orville Thomas testified that when his father dug the ditch, it was with the purpose of doing so on the property line. Thomas, as well as Casebier, testified that no one ever objected to their use of the disputed land. Additionally, Thomas and Casebier were the only people to ever maintain the ditch. The one time the Kennedys removed silt from the ditch was at Thomas's direction. Appellants

offered no testimony to contest appellee's evidence that the previous owners of the land had acquiesced in the irrigation ditch being the boundary.

Appellants argue that our recent opinion in *Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004), supports their proposition that the trial court erred in finding a boundary by acquiescence. There we stated that our supreme court has held that the mere existence of a physical boundary, without evidence of mutual recognition, cannot sustain a finding of such a boundary as the property line. *Id.* Additionally, we noted that the intention of the parties, not the physical boundary itself, is what controls when determining whether a boundary line exists through acquiescence. *Id.* However, in *Robertson* we affirmed the trial judge's finding that no boundary by acquiescence existed because the appellant had not produced any evidence that the fence at issue had been intended to be the boundary line. Rather, the appellant attempted to rely on silence from the appellee and his predecessors in title. We specifically noted that the appellee had not been silent on the matter but had asked for persons not to mow the disputed tract and gave permission for a clothesline to be built.

This case is distinguishable from *Robertson* because we have evidence of the parties' intent — Orville Thomas's testimony — and we have silence from appellants' predecessors in title — no objection was ever made to Thomas or Casebier regarding their use of the irrigation ditch as the boundary line. The trial judge could have correctly found that it had been the previous landowners' intent that the irrigation ditch serve as the boundary line. We cannot say the trial judge clearly erred on this point.

Appellants' second point on appeal is that the trial court erred in finding that the north line of the irrigation ditch represented the boundary line between the properties. A boundary by acquiescence is usually represented by a fence, a turnrow, a lane, a ditch, or some other monument tacitly accepted as visible evidence of a dividing line. *See Palmer v. Nelson*, 235 Ark. 702, 361 S.W.2d 641 (1962). A boundary by acquiescence has been affirmed when the parties tacitly agreed on a line running between two marks, such as concrete stobs, in *Disney v. Kendrick*, 249 Ark. 248, 458 S.W.2d 731 (1970), and trees in *Ward v. Adams*, 66 Ark. App. 208, 989 S.W.2d 950 (1999). However, Arkansas law does not support the establishment of a boundary by acquiescence along an invisible line between two large land forms, such as levees, that are

not truly capable of being used as accurate markers of a boundary. *Stump*, 69 Ark. App. at 223, 10 S.W.3d at 928–29. Appellants cite to *Stump* and *Lammey v. Eckel*, 62 Ark. App. 208, 970 S.W.2d 307 (1998), to argue that the trial court erred in concluding that the northern edge of the irrigation ditch established the boundary line because that boundary line is not "definite." However, in both *Stump* and *Lammey*, the purported boundary lines were either invisible lines where no physical object separated the property or marked by uncertain physical objects such as stumps, bushes, and trees. That is not the case here. Rather, the irrigation ditch is a definite, physical separator. It creates a definitive physical boundary between the properties. Although the irrigation ditch does not reach the entire length of the boundary between properties, it covers the vast majority of it, with the ditch ending less than one hundred feet from the eastern edge of the properties. Additionally, although appellants argue the ditch widened over time, the testimony presented at trial does not show any appreciable amount of expansion. Appellants cite no authority to support a finding that such an inconsiderable amount of expansion would establish indefiniteness. Based on our prior precedent, we are satisfied that the trial court did not clearly err in using the northernmost edge of the irrigation ditch as the boundary marker.

Affirmed.

GRIFFEN and ROAF, JJ., agree.

Robert Lee OWENS *v.* STATE of Arkansas

CA CR 05-161 215 S.W.3d 681

Court of Appeals of Arkansas
Opinion delivered October 12, 2005

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

Mike Beebe, Att'y Gen., by: *Valerie L. Kelly*, Ass't Att'y Gen., Law Student Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar of Arkansas, under supervision of *Darnisa Johnson*, Deputy Att'y Gen. for appellee.

KAREN R. BAKER, Judge. Appellant was convicted in a jury trial of possession of a weapon by an incarcerated person in violation of Ark. Code Ann. § 5-73-131 (Repl. 1997). He was sentenced to five years in the Arkansas Department of Correction. On appeal, appellant asserts that the trial court erred in denying his motion for a directed verdict because he lacked the requisite culpable mental state. We find no error by the trial court and affirm.

While incarcerated at the Pulaski County Jail, appellant was searched by a Pulaski County sheriff's deputy and found to have an improvised weapon hidden in his sock. An officer testified at trial that the weapon — a "shank" in prison parlance — was made of wire with a cloth handle and had a very sharp point. The officer further testified that the appellant said he possessed the weapon because he was "tired of the brutality, and he had to do what he had to do, because he was tired of being moved for no reason at all." The appellant moved for a directed verdict, claiming there was a lack of evidence to show that the weapon was intended to be used for the infliction of serious physical injury. The motion was denied and the appellant was subsequently found guilty.

When a defendant makes a challenge to the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the State. *Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000); *Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999); *Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998); *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998). It is well settled that a motion for a directed verdict is a challenge to the sufficiency of the evidence. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002); *Smith v. State*, 346 Ark. 48, 55 S.W.3d 251 (2001) (citing *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995)). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Smith, supra*. Substantial evidence is evidence forceful enough to

compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* Only evidence supporting the verdict will be considered. *Id.*

Appellant was charged with possession of a weapon by incarcerated persons in violation of Ark. Code Ann. § 5-73-131, which provides in relevant part:

> (a) A person commits the offense of possession or use of weapons by incarcerated persons if, without approval of custodial authority, he uses, possesses, makes, repairs, sells, or otherwise deals in any weapon, including, but not limited to, any bomb, firearm, knife, or other implement for the infliction of serious physical injury or death and which serves no common lawful purpose, while incarcerated in the Department of Correction, the Department of Community Punishment, or a county or municipal jail or detention facility.

The substance of this appeal is that there is an additional statutory element requiring the State to offer proof that a weapon seized from a prisoner was intended to be used in an offensive manner. We find this argument without merit.

The primary rule of statutory construction is to give effect to the intent of the legislature, construing the Statue as it reads, and giving the language its ordinary and commonly accepted meaning. *Short v. State*, 349 Ark. 492, 79 S.W.3d 313 (2002). Yet when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no reason to resort to the rules of statutory interpretation. *Id.*

Here, there is clearly no additional element of intent required or intended by the statute. The phrase in question — "or other implement for the infliction of serious physical injury or death and which serves no common lawful purpose" — is plainly intended to include the wide variety of objects that can be fashioned into dangerous weapons in an incarcerated setting without attempting to set them forth in an exhaustive list. Ark. Code Ann. § 5-73-131(a). A length of sharpened wire with a cloth handle is obviously a weapon that could potentially cause serious physical injury and is the sort of object intended by the catch-all phrase.

Both the appellant and the appellee agree that, although there is no specified culpable mental state, § 5-73-131 does not create a strict liability offense. This is correct. A defendant

charged with the crime can theoretically offer as a defense that his possession of the weapon was with the approval of the custodial authority or that it had an alternative common law purpose. Knowing possession, however, is plainly all that is necessary to violate § 5-73-131; and if a criminal statute does not indicate a culpable mental state, culpability is established if the person acts purposely, knowingly, or recklessly. Ark. Code Ann. 5-2-203(b) (Repl. 1997).

There was substantial evidence before the jury that a prohibited weapon was found hidden on the appellant's person, and an officer testified that the appellant said he was prepared to use the weapon to "do what he had to do" in response to the "brutality" and "being moved for no reason at all." The context of these remarks could have been viewed by the jury as indicating that the use was to be directed at the prison guards and thus offensive in nature. Yet, whether the appellant's intended use of the weapon was offensive or defensive in nature is irrelevant because possession is criminalized by the statute if the weapon was possessed purposely or knowingly. The State is not required to show how the appellant used or intended to use the weapon.

The jury had the opportunity to hear the testimony of the officer regarding the purpose of the weapon and determine the harm it could potentially cause. It is within the province of the jury to weigh the evidence and assess the credibility of witnesses. *Williams v. State*, 338 Ark. 178, 992 S.W.2d 89 (1999). We hold that there was substantial evidence from which the jury could have found that the object found on the appellant was a weapon for the infliction of serious physical injury or death, which he possessed purposely or knowingly in violation of Ark. Code Ann. § 5-73-131. Accordingly, we affirm.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.

[redacted]