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Michael Wayne DURDEN *v.* STATE of Arkansas

CA CR 05-191 216 S.W.3d 145

Court of Appeals of Arkansas
Opinion delivered October 26, 2005

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

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

JOHN B. ROBBINS, Judge. Appellant Michael Wayne Durden was convicted in a jury trial of residential burglary, robbery, theft of property, and second-degree battery. He was sentenced to a total of thirty-two years in prison. Mr. Durden appeals, and his sole argument for reversal is that the trial court erred in overruling his objection to comments made by the prosecutor during the State's

closing argument. Mr. Durden argues now, as he did below, that the prosecutor improperly shifted the burden of proof by commenting on Mr. Durden's failure to call a witness to corroborate his testimony. We affirm.

The victim in this case was Jim Heichel. Mr. Heichel testified that he rents an apartment in Little Rock from Helen Schaeffer. Ms. Schaeffer asked Mr. Heichel to do her a favor and let Michael Shane Ward live with him for a while in exchange for a reduction in rent. Mr. Heichel agreed, and not long after that Ms. Schaeffer went to Mr. Heichel's apartment one morning and found Mr. Ward and his friend, Mr. Durden, drunk in the apartment. According to Ms. Schaeffer, she advised both men to leave and never come back.

Mr. Heichel testified that later that evening, Mr. Durden returned to his apartment requesting a bag of clothes that he had left in the closet. Mr. Heichel complied with the request, and after Mr. Durden stayed at the apartment for a while, Mr. Heichel advised him to leave and Mr. Durden left with the clothes.

According to Mr. Heichel, Mr. Durden kept returning to the apartment and was apparently gaining access through a window. On one of these occasions, Mr. Heichel awoke from his sleep and found Mr. Durden trying to disconnect his VCR from his television. Mr. Heichel was able to get Mr. Durden to leave, but he returned again. On this final occasion Mr. Durden told Mr. Heichel that he was going to kill him, and repeatedly struck him with a frying pan while holding him to the floor. Mr. Durden asked for money, and Mr. Heichel gave him thirty dollars. According to Mr. Heichel, the handle broke from the frying pan, whereupon he was able to get up and hit Mr. Durden a time or two. While Mr. Heichel was pounding on the wall to alert his neighbor for help, Mr. Durden exited through the window.

Mr. Heichel did not call the police, explaining that he did not have a telephone. On the following morning, Ms. Schaeffer came by the apartment and found Mr. Heichel bleeding from a head wound. She called the police and an ambulance, but Mr. Heichel did not go to hospital, citing the fact that he had insufficient health insurance. Ms. Schaeffer testified that Mr. Heichel's "head had just been laid open," that he had bruises on his shoulders and arms, and that the walls were bloody with a nearby pan lying on the ground with a broken handle.

Mr. Durden testified on his own behalf, and gave a markedly different version of the events. He acknowledged that he was at Mr. Heichel's apartment on the night at issue. However, he denied breaking into the apartment or starting any altercation.

According to Mr. Durden, he was at the apartment drinking beer with Mr. Heichel and Mr. Heichel's live-in girlfriend, Angela. Mr. Heichel gave him thirty dollars and asked him to go buy some more beer and a rock of cocaine. Mr. Durden complied, and when he returned Mr. Heichel and Angela were in the bedroom. When they emerged, Angela started taking her clothes off. Mr. Durden stated that, at that time, Mr. Heichel gave him a "crazy look" and told him to leave. Then Angela said, "You ain't got to go nowhere, I pay rent here too."

Mr. Durden testified that Mr. Heichel proceeded to attack him with a frying pan and that they struggled before Mr. Heichel fell and hit his head on a table, causing a gash in his forehead. Mr. Durden stated that Mr. Heichel then threw a glass ashtray at him, and that after it missed and hit the door, he threw it back and struck Mr. Heichel in the head. After that, Angela got between the two men, and Mr. Durden exited the apartment. When he tried to return to get his cigarettes, Mr. Heichel slammed the door on his hand. Mr. Durden testified that during the episode he was acting in self-defense.

On cross-examination, Mr. Durden denied ever seeing Ms. Schaeffer or being told to leave the apartment earlier that day. Mr. Durden acknowledged that he knows Mr. Ward, although Mr. Ward was not present during the altercation. Mr. Durden stated that Mr. Ward would be able to verify that Mr. Heichel had a live-in girlfriend, but that at the time of trial he did not know Mr. Ward's whereabouts.

On rebuttal, Mr. Heichel stated that at the time of the events he did not have a live-in girlfriend. Ms. Schaeffer corroborated that fact, stating that she used to go to Mr. Heichel's apartment every day and that, "He's never had a live-in girlfriend."

The assignment of error raised by Mr. Durden in this appeal occurred during the prosecutor's closing argument during the guilt phase of the trial. The following exchange occurred:

> PROSECUTING ATTORNEY (to the jury): All right. So, also, you have heard Helen Schaeffer testify that she was at James Heichel's house usually at one point every

day. There was no live-in girlfriend. You heard her say he can't have overnight guests, he can't have people living there without her knowing about it. She obviously monitors the property, she's over there a lot.

Now, you've heard about this Michael Shane Ward that the defendant has said could verify everything that he has told you all. Where is he?

DEFENSE COUNSEL: Objection, Your Honor. May we approach?

THE COURT: Yes, Ma'am.

DEFENSE COUNSEL (at the Bench): Your Honor, I believe that the State is improperly trying to shift the burden of proof upon us by comments about a failure to call a witness.

THE COURT: Response?

PROSECUTING ATTORNEY: No, Your Honor.

THE COURT: Any questions, Counsel?

DEFENSE COUNSEL: I would ask for an admonishment to the jury.

THE COURT: Counsel, that will be denied. If you raise an issue, the State can comment on your failure to prove it, and that's the way that according to her, is that you raised the issue that someone else was there, and the State can comment on the fact that that person is not here to testify. You may proceed.

PROSECUTING ATTORNEY: Thank you, Your Honor.

Mr. Durden contends that the prosecutor's reference to his failure to call a witness was improper, and that the trial court erred in failing to give an admonition to the jury as requested by his counsel. Citing *Cook v. State*, 316 Ark. 384, 872 S.W.2d 72 (1994), Mr. Durden maintains that a prosecutor's comment on a defendant's failure to call a witness is an effort by the State to shift the

burden of proof to the defendant. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Supreme Court held that the Due Process Clause of the Fifth and Fourteenth Amendments require the prosecutor to prove the defendant's guilt beyond a reasonable doubt. Because the prosecutor in this case shifted the State's burden, Mr. Durden contends that his constitutional rights have been violated.

In further support of his argument, Mr. Durden cites *State v. Brewer*, 505 A.2d 774 (Me. 1985). In that case the appellant was convicted of DWI, and in his testimony he did not deny being intoxicated but instead asserted that Andrew Pratt had been driving the vehicle when they were involved in an accident while appellant was a passenger. Neither party called Mr. Pratt as a witness, and in closing argument the prosecutor asked the trial court as trier of fact to draw an inference adverse to the appellant based on appellant's failure to call Mr. Pratt. In convicting the appellant, the trial court relied in part on the fact that appellant failed to call his best alibi witness who might have cleared him of the charge. However, the Supreme Judicial Court of Maine reversed, and reasoned:

> To allow the missing-witness inference in a criminal case is particularly inappropriate since it distorts the allocation of the burden of proving the defendant's guilt. The defendant is not obligated to present evidence on his own behalf. The inference may have the effect of requiring the defendant to produce evidence to rebut the inference. If he fails to do so, the missing-witness inference allows the state to create "evidence" from the defendant's failure to produce evidence. Such a result is impermissible.
>
> . . . .
>
> We hold, therefore, that in a criminal case the failure of a party to call a witness does not permit the opposing party to argue, or the factfinder to draw, any inference as to whether the witness's testimony would be favorable or unfavorable to either party.

State v. Brewer, 505 A.2d at 777 (citation omitted).

We acknowledge that there is a split of authority on this issue and that the Maine Supreme Judicial Court's decision in *State v. Brewer, supra*, is in agreement with Mr. Durden's argument on appeal. However, the Arkansas Supreme Court has held otherwise, and we are bound to follow the decisions of our supreme court. *See Scott v. State*, 69 Ark. App. 121, 10 S.W.3d 476 (2000).

Appellant argues that the supreme court held in *Cook v. State, supra,* that a comment on a witness's failure to testify is an attempt by the prosecutor to shift the burden of proof. In that case the supreme court stated that such an inference was not a comment about the accused's failure to testify, and that, "*At most,* it was an attempt to shift the burden of proof, and we cannot say that the trial court erred in determining that the instruction remedied that wrong." *Id.* at 387, 872 S.W.2d at 74 (emphasis ours). The instruction was as follows:

> Ladies and gentlemen of the jury, the defendant is not required to prove his innocence. He's not required to subpoena any particular individual for any reason. He does not have to do any of that. And I want to read for emphasis an instruction I've already given.
>
> There is a presumption of the defendant's innocence in a criminal prosecution. In this case Thomas Cook is presumed to be innocent. That presumption of innocence attends and protects him throughout the trial and should continue and prevail in your minds until you are convinced of his guilt beyond a reasonable doubt.

Id. at 386, 872 S.W.2d at 73. Note that in the present case the jury was instructed that closing arguments of counsel are not evidence, that the State must prove its case beyond a reasonable doubt, and that Mr. Durden is presumed to be innocent and is not required to prove his innocence.

Subsequent to its decision in *Cook v. State, supra,* our supreme court handed down *Bullock v. State,* 317 Ark. 204, 876 S.W.2d 579 (1994). In that case the appellant was charged with aggravated robbery and gave an alibi in support of his defense of mistaken identity. During closing argument, the prosecutor stated: "Mr. Bullock tells you that he was over at Dot Doe's house moving. He said he got a check. They don't have that check here today." Mr. Bullock moved for a mistrial based on the fact that the prosecutor referred to evidence the defense was not required to prove. The motion was denied by the trial court, and in affirming the supreme court reasoned:

> The trial court did not abuse its discretion in denying appellant's request for a mistrial. The prosecutor's remarks were not a comment on appellant's failure to testify or to produce evidence, but an attempt to reiterate the attack on the credibility of appellant's

> testimony. *See Cook*, 316 Ark. 384, 872 S.W.2d 72. Such a review of the evidence is not prohibited given that appellant took the stand and offered the alibi testimony. Appellant cannot testify on his own behalf and then expect the Fifth Amendment to prohibit the state from questioning the credibility of his testimony or from calling the lack of credibility to the jury's attention during closing argument.
>
> At most, the prosecutor's comments were a mischaracterization of the evidence. No objection was made on that basis, nor was any request for an admonition made. The trial court, however, *sua sponte*, instructed the jury that the prosecutor's comments were not to be considered evidence. Such an admonition was appropriate in this particular case and removed any possible prejudice. Moreover, immediately after the trial court's admonition, the prosecutor told the jury that appellant was not required to prove his innocence and that it was their job to assess his credibility. The trial court did not err in this case.

Bullock v. State, 317 Ark. at 206, 876 S.W.2d at 580-81.

Similarly, in *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998), the supreme court affirmed where the appellant testified he was not there when the crimes occurred and named several alibi witnesses, and then the prosecutor commented during closing on the witnesses' failure to take the stand. The supreme court held that there was no error in the trial court's failure to declare a mistrial, and announced:

> This case is no different from *Bullock v. State, supra*, or *Cook v. State, supra*, in that it was the actions of defense counsel and Noel himself that put his credibility in issue. It was a fair inference to be argued to the jury that the failure of Noel to call any alibi witness to the stand undermined his credibility. Any prejudice resulting from the prosecutor's allusion to absent testimony could have been easily cured by an admonishment, which defense counsel did not request. *Cook v. State, supra.*

Id. at 89, 960 S.W.2d at 444.

The position of the Arkansas Supreme Court is consistent with the holdings of federal circuit courts. In *United States v. Gomez-Olivas*, 897 F.2d 500 (10th Cir. 1990), the federal appeals court held that as long as evidence can be solicited other than from the mouth of the accused, it is proper to comment on the failure of

the defense to produce it. The court further held that the prosecutor's argument about the appellant's failure to produce exculpatory documents to corroborate his testimony did not shift the burden of proof in light of the trial court's subsequent instructions to the jury that arguments of lawyers are not evidence, that the burden of proof is with the government, and that the defendant has no burden to prove innocence, to call witnesses, or to produce any evidence. *Id.* Similarly, the Second Circuit Court of Appeals has stated, "It is established that the government may comment on a defendant's failure to call witnesses to support his factual theories." *United States v. Bautista*, 23 F.3d 726 (2nd Cir. 1994) (citations omitted). And the Eighth Circuit Court of Appeals has recently stated that, in general, the government may comment on the failure of the defense, as opposed to the defendant, to counter or explain the evidence unless the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. *United States v. Gardner*, 396 F.3d 987 (8th Cir. 2005).

In *Bullock v. State*, *supra*, the Arkansas Supreme Court stated that the trial court has broad discretion to control closing argument and, having observed the argument firsthand, is in a better position than the appellate court to determine the possibility of prejudice. Given the relevant holdings of our supreme court, there was no abuse of discretion in the trial court's permitting the prosecutor to comment on Mr. Ward's failure to give corroborating testimony, as this amounted to a permissible attack on Mr. Durden's credibility. To the extent that the prosecutor's comments could be construed by the jury to be a shifting of the burden of proof, any prejudice in this regard was cured by the instructions given to the jury. *See Cook v. State*, *supra*.

Affirmed.

GLADWIN and BAKER, JJ., agree.

ARKANSAS DEPARTMENT of CORRECTION SEX OFFENDER SCREENING & RISK ASSESSMENT *v.* Robert J. CLAYBAUGH Jr.

CA 05-427 216 S.W.3d 134

Court of Appeals of Arkansas
Opinion delivered October 26, 2005

Mike Beebe, Arkansas Attorney General, by: *Eric F. Walker*, Assistant Attorney General, and *Amy L. Ford*, Assistant Attorney General, for appellant.

Ronald W. Metcalf, for appellee.

SAM BIRD, Judge. This case involves the risk level assigned to appellee Robert J. Claybaugh Jr. under the Sex Offender Registration Act of 1997, which was enacted by the General Assembly for the express purpose of protecting the public from sex offenders and assisting law enforcement in so protecting the public safety. Ark. Code Ann. § 12-12-902 (Repl. 2003); *Kellar v. Fayetteville Police Dep't*, 339 Ark. 274, 5 S.W.3d 402 (1999). The Act specifies that individuals convicted of particular sex offenses must register with the

State as sex offenders and must submit to an assessment of the risk that they pose to the public. Ark. Code Ann. § 12-12-917 (Spec. Supp. 2003-2004).[1]

Appellant Sex Offender Screening and Risk Assessment (SOSRA), a unit of the Sex Offender Assessment Committee (Committee), brings this appeal from the Sebastian County Circuit Court's order of January 3, 2005, which reduced the risk assessment that the Committee had assigned to Claybaugh from Level 3 to Level 1. SOSRA contends that the Committee's decision was supported by substantial evidence, was not based upon unlawful procedure, and was not arbitrary and capricious. We do not agree. The decision of the Committee is reversed, and the decision of the trial court is affirmed.

On June 3, 2002, Claybaugh pled no contest to the charge of second-degree violation of a minor, based upon allegations that he rubbed his fourteen-or-fifteen-year-old daughter with a vibrator on her vagina on top of her clothing while she was sleeping. He was found guilty, was sentenced to seventy-two months in the Arkansas Department of Correction, and was incarcerated. He was released on parole, and on September 17, 2003, he presented himself to the Sex Offender Assessment Committee for sex-offender risk assessment.

Guidelines and procedures for public disclosure of information about sex offenders that are necessary for public protection are developed by the Sex Offenders Assessment Committee. Those guidelines "identify factors relevant to a sex offender's future dangerousness and likelihood of reoffense or threat to the community" and determine public notification according to the risk level that an offender is assigned after undergoing the assessment process. *See* Ark. Code Ann. § 12-12-913.[2]

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[1] The Sex Offender Registration Act, codified at Ark. Code Ann. §§ 12-12-901 *et seq.*, was last amended by Act 1962 of 2005. We refer in this opinion to provisions of the statute as amended by Act 21 of 2003.

[2] Under Ark. Code Ann. § 12-12-913(j)(1)(A) (Spec. Supp. 2003-2004), the following information is to be made public concerning a Level 3 or Level 4 registered sex offender:

(i) The sex offender's complete name, as well as any aliases;

(ii) The sex offender's date of birth;

In the present case, a "risk assessment and offender profile report" signed by George K. Simon Jr., Ph.D., included the following summary of Claybaugh's assessment interview:

> This offender was interviewed on 9-17-03 by Diane Gray, Correctional Counselor. He was extremely uncooperative and incomprehensively evasive when questioned. George K. Simon, Ph.D. was also present for a portion of the interview and advised the offender about the lack of need for and the possible consequences of his refusal to cooperate. The offender continued to make implausible assertions and to refuse to answer questions in a straightforward manner. His refusal to cooperate reached a point that the interview had to be terminated.

The report found that Claybaugh's "extreme uncooperativeness in the face of a relatively minor sex offense of record suggests his sexual deviancy and offense history as well as his antisociality may be greater than the official conviction record suggests." Although noting the low risk given Claybaugh under the Vermont Assessment of Sexual Offense Risk (VASOR) Composite Risk, the report assessed Claybaugh at Level 3 by default "because he refused to comply or cooperate with Risk Assessment procedures."

Claybaugh filed an administrative appeal of his risk classification to SOSRA, which appointed a member of the Sex Offender Assessment Committee to conduct the review. The written review included the following findings:

(iii) The sexual offense or offenses to which the sex offender has pleaded guilty or nolo contendere or of which the sex offender has been found guilty by a court of competent jurisdiction;

(iv) The street name and block number, county, city, and zip code where the sex offender resides;

(v) The sex offender's race and gender;

(vi) The date of the last address verification of the sex offender provided to the center;

(vii) The most recent photograph of the sex offender that has been submitted to the center; and

(viii) The sex offender's parole or probation office.

> Mr. Claybaugh did not have to admit guilt, he did have to be honest as to his state of mind, intent and actions. I have listened to the tape and though he tries to come across as credible, I do not find him so. It is the policy of the Sex Offender Assessment Committee that if the individual is not open and honest during the assessment he/she cannot be adequately assessed.

Thereupon, the Committee found no reason to change the risk level from the default Level 3 that had been assigned.

Claybaugh appealed the Committee's ruling to the Sebastian County Circuit Court, essentially asserting that substantial evidence did not support the agency decision. A hearing was conducted before the trial court on December 20, 2004. The record of the hearing includes these comments by the court:

> I have been talking to the attorneys in chambers. I have reviewed the file and part of the record that was submitted. I haven't had a chance yet to review it all. Let me tell you what I had actually determined and then these attorneys can see if that is what we actually decided. I told the attorneys that based on my review of the file and the partial review of the record, level 3 seemed an inappropriate level to me. It seemed too high, but I didn't know what provisions there were. Mr. Walker indicated that the Committee was meeting today and that they could take this matter up and vote today. If they voted to leave it at a level 3, then what I propose to do is, well, I propose to suspend this hearing today. If the Committee votes to leave it at level 3, there is no need to have the attorneys or Dr. Mobley come back. I will review the file and the complete record and make a written order either saying it should stay level 3, it should be lowered to level 2 or level 1.
>
> If the Committee lowers it from level 3, then Mr. Metcalf [defense counsel] has agreed to be satisfied with the lower level and there would be an order entered. I guess, Mr. Walker, you would prepare it basically stating that, that the Committee has reduced it to a level whatever and that's it.

The parties, after agreeing to suspension of the hearing so that a compromise settlement proposal could be presented to the Sex Offender Assessment Committee the same day, submitted their statements to the trial court and introduced exhibits into evidence in the event that the Committee did not change the level. The Committee met and, rather than accept the parties' proposed compromise, let the Level 3 classification stand. The trial court then reviewed the case.

The evidence before the trial court included a consent/refusal/disclosure form bearing Claybaugh's signature; the Committee's 2002 guidelines for assessment, registration, and notification; pertinent statutes; and audio tapes. The form that Claybaugh signed stated that an assessment "is based primarily on documented information" as opposed to the examiner's opinions, but that Level 3 would be assigned if the offender should "withhold information, give false information or seriously compromise the assessment team's ability to do a fair and accurate assessment." Similarly, the 2002 guidelines state that a high-risk classification will be given to individuals "who attempt to conceal or lie about their behavioral histories." The State informed the trial court that 2002 regulations allowed an increased risk for an offender "deemed to have provided deliberately false or misleading information to the assessment team" and that later regulations, adopted in June of 2004, attempted to clarify "false or deliberate" as follows:

> It is important that the person being interviewed answer the questions openly and honestly. If the answers do not match up with the documents previously obtained, the interviewer may conclude that the individual is withholding information or being deceptive.

Also in evidence was a copy of Ark. Code Ann. § 12-12-917(b)(4)(B)(ii)(*a*) (Spec. Supp. 2003–2004), which reads in part:

> If a sex offender fails to appear, is shown by substantial evidence to have been deceptive, or voluntarily terminates the assessment process after having been advised of the potential consequences:
>
> (*1*) The sex offender shall be classified in risk level 3; and
>
> (*2*) The parole or probation officer, if applicable, shall be notified.

Finally, the State introduced into evidence cassette tapes and the transcript of Claybaugh's assessment interview.

In its order of January 3, 2005, the trial court stated that it had listened to the tapes and reviewed the entire record. The court's order included the following:

> The actual testing results indicate a Level 1, low risk assessment, which is consistent with the criminal history. Petitioner [Clay-

> baugh] did not voluntarily terminate the interview process, which lasted over one hour. Petitioner was cooperative throughout the examination and was compliant with the general instructions and requests for information. There is not substantial evidence that he was deceptive after having been warned of the possible consequences of being rated Level 3 by default.

Ruling that the default Level 3 classification was not supported by substantial evidence, was arbitrary and capricious, and was made upon unlawful procedure, the court modified the classification of Level 3 to Level 1.

The appeal arises from the trial court's order. We now turn to the point on appeal that appellant SOSRA has presented to us.

Whether SOSRA's Level 3 classification of Claybaugh is not supported by substantial evidence, is based upon unlawful procedure, and is arbitrary and capricious

The Arkansas Administrative Procedure Act provides that the agency decision may be reversed 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.

Ark. Code Ann. § 25-15-212(h) (Repl. 2002).

The appellate court's review is directed not toward the circuit court, but toward the decision of the agency. *Holloway v. Arkansas State Bd. of Architects*, 352 Ark. 427, 101 S.W.3d 805 (2003). When reviewing administrative decisions, the court reviews the entire record to determine whether any substantial evidence supports the agency's decision. *Arkansas Bd. of Registration*

for Professional Geologists v. Ackley, 64 Ark. App. 325, 984 S.W.2d 67 (1998). In determining whether a decision is supported by substantial evidence, we review the record to ascertain if the decision is supported by relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Arkansas State Bd. of Nursing v. Morrison*, 88 Ark. App. 202, 197 S.W.3d 16 (2004). In doing so, we give the evidence its strongest probative force in favor of the administrative agency; the question is not whether the testimony would have supported a contrary finding, but whether it supports the finding that was made. *Id.*

SOSRA argues that the evidence strongly supports the decision of the Committee, and that the trial court erred in ruling that the agency's decision was not supported by substantial evidence. Claybaugh responds that the examiner does not say how Claybaugh refused to comply or cooperate with this assessment or testing procedure, nor how he was deceptive and uncooperative.

Correctional counselor Diane Gray conducted the first portion of Claybaugh's assessment interview but was joined by Dr. George Simon after she requested his assistance. SOSRA, contending that substantial evidence supports its assessment that Claybaugh was uncooperative in his interview, alleges that Claybaugh "qualified" some of his answers to "simple yes or no" questions. When asked if he had shoplifted as a teenager, Claybaugh responded by asking if that included a pack of cigarettes; he also told Ms. Gray he had not been caught for the incident. He answered "no" when asked if he had set a building on fire but answered "not intentionally" when asked about ground fires. He was asked if he had ever had sex with a prostitute, and he answered "not that I paid for." He said that he had "seldom" experienced group sex. As shown in the dialogue later reproduced in this opinion, Claybaugh said that he "may have been high" when he committed the offense for which he was convicted and that he "did some methamphetamine" that night.

SOSRA argues that the answers in the previous paragraph show that Claybaugh was evasive and deceptive in his answers. SOSRA also lists Claybaugh's answers to questions about drug use as further evidence of evasive answers. Those include Ms. Gray's asking the last time he smoked "pot" and his answer, "I don't know . . . it's been years"; he did not answer when she asked how many years. Ms. Gray then asked, "Did you smoke? That would be just yes or no." Claybaugh replied, "Once." Ms. Gray asked how

much he was smoking before his incarceration, and he said "Almost none." She asked, "Occasionally?" He replied:

> I was not going out and getting any or buying any or working for any. I just can't honestly tell you I did not smoke any is what I am really telling you because I am sure I took a puff here or there somewhere, but basically it's been years since. . . .

Ms. Gray interrupted this answer to ask Claybaugh if he used "meth." He replied that he had not used it in years.

Because the transcript of the interview was central to the agency's determination, we reproduce much of it here and we italicize portions that SOSRA relies on in its brief. We begin when Ms. Gray asked Claybaugh to tell "his side," and in his own words, "what happened with the sex offense and what was going on." He responded that he had touched his fifteen-year-old daughter with a vibrator. The interview continued:[3]

Q. What were you thinking about when you did that?

A. That's really hard to say. I don't really know.

Q. Ok. So you don't know what you were wanting to happen.

A. I know what I was not wanting to happen but that's neither here nor there.

Q. What did you not want to happen?

A. I wasn't out to have sex with my daughter.

Q. So what were you out to do?

A. I really don't know.

Q. What do you remember thinking about when that happened.

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[3] So as not to interfere with the exchange between Claybaugh and his interviewers, we have left the punctuation, parentheses, and blanks largely intact and as it has been presented through the written transcript.

A. I really don't know what to say. I really don't.

Q. Ok. So, was this the first time that something like this ever happened?

A. Yes.

Q. Ok, so were you drunk or were you high, were you sober, what kind of state were you in?

Q. Do you remember if you were drinking?

A. I was not drinking.

Q. *Ok. Were you high?*

A. *I may have been.*

Q. *Ok. You would have been high on what?*

A. *That's a good question.*

Q. *What kind of drugs were you doing back in that time?*

A. *I wasn't really doing drugs at that time.*

Q. Ok. I am going to shoot straight with you Mr. Claybaugh, you are starting to get on my nerves. When I ask you a question, you better give me an answer. Ok? I got other people I got to see. I just need for you to shoot straight.

A. Ok.

Q. Don't beat around the bush, don't go all the way over there to give me an answer, just spit it out, OK? Or I'm going to have to send you on your way.

A. Alright.

Q. Were you high on some kind of drugs when you touched your daughter with a vibrator?

A. Yes.

Q. What were you on?

A. It was supposed to have been methamphetamine, I don't believe it was.

Q. Ok. What kind of drug do you recall doing before you touched her[?]

A. It was supposed to have been methamphetamine.

. . . .

Q. So alright, she woke up and she asked you what you were doing and you told her that you were trying to wake her up. Do you recall all that happening?

A. Okay, yes I do.

Q. And she said that you left out of the room that she was in and she said that she saw you zipping up your shorts as you walked away.

A. That is not correct.

Q. You weren't masturbating her?

A. No, I was not.

Q. Ok. Why do you think she would make a statement like that?

A. That may have been what she thought she saw, I don't know.

Q. Ok. Any other things happen with your daughter. Did you ever touch her inappropriately before this time?

A. No.

Q. Did you ever have thoughts about her?

A. No.

Q. So, basically one day you just woke up and decided that you would take a vibrator and touch her between the legs.

A. I did not touch her between the legs.

Q. That's her statement.

A. I am aware of that.

Q. I am going with her statement today.

A. Ok.

Q. Because that's the official record and that's what you pled no contest to and that's what you go[t] convicted of. That's what I have to go with.

Q. So how did you touch her? What do you say happened?

A. I touched her in about the area of her belly button.

Q. Ok. So she was sleeping.

A. I don't think so.

Q. Then what were you doing?

A. I really don't know what I was thinking . . . you know, I'm hoping getting some counseling.

Q. The counselor can't tell you what you were doing. Only you know what you were doing at that time.

. . . .

A. I'm not trying to . . . .

Q. I know this is not pleasant and it's not something that you really want to dwell on . . . but I am trying to understand exactly what you were thinking or going through your head at the time.

A. Well, it wasn't anything _____, I really don't know, okay? I'm being honest with you. I'm not trying to put you off. I'm not trying to say anybody else is at fault for this but me. There have been two or three times that I

thought I had done things ____ behind me. I believe I have to put it behind me. I have counseling. I'm not going to say that I don't need it. I'm not going to tell you I don't welcome it. If I need it, I welcome it. I'm not going to tell you I was a perfect father, but I was a damn good father.

Q. She made a statement that there has been several times that she felt like you were looking at her in a way that made her uncomfortable.

A. Are you aware that this is not the first time that she has made accusations of this type?

Q. Against you?

A. No.

Q. Against other people?

A. I am not pleading innocent here. I'm not.

Q. Ok. So, you don't remember having any kind of sexual thoughts or ____ about her before this time when you touched her?

A. No, I did not.

Q. So, I want you to help me to understand this because I have to present your case before a team of people who will decide what your risk level is going to be.

A. I understand that.

Q. And you are really not giving me anything to work with here. Ok?

Q. That's where I'm coming from.

A. Here's where I'm coming from . . . . I took care of . . . I don't know how to explain this. I have done the best I could to put things behind us. I'm not a ____ detective, I'm not a psychiatrist, I don't know whether she was abused very young or not I don't know for sure.

The transcript shows that taping ceased after four more short questions and answers. When taping resumed six minutes later, at 2:16 p.m., Dr. Simon was present with Ms. Gray. He was the only interviewer from then until the interview ended at 2:28 p.m. The italicized portions of the interview are those that SOSRA points to as further evidence of "evasive answers":

DR. SIMON: Is this the only sex offense that you have?

CLAYBAUGH: Yes.

DR. SIMON: Do you have any other criminal history?

CLAYBAUGH: I have been arrested on drugs once, you say twice, but I only remember once.

DR. SIMON: Were you convicted on the drug charges?

CLAYBAUGH: Yes.

DR. SIMON: What was your conviction?

CLAYBAUGH: If I remember correctly it was possession of marijuana with intent and possession of methamphetamine.

DR. SIMON: This is your only sex offense?

CLAYBAUGH: Yes.

DR. SIMON: And what did you do exactly?

CLAYBAUGH: I touched my daughter with a vibrator. It just happened. I am not trying to put you people off, I'm really not. I want to put this thing behind me and get some help. Ok? I don't see her.

DR. SIMON: You could have gotten help any time. You can stop with the theatrics.

CLAYBAUGH: I'm not . . .

DR. SIMON: You need to lower your voice. You need to stop with the theatrics.

CLAYBAUGH: Okay.

DR. SIMON: And you can stop immediately.

CLAYBAUGH: Okay.

DR. SIMON: And you can stop lying when you're caught.

CLAYBAUGH: I'm not lying.

DR. SIMON: You can stop lying when you're caught. You know like I'm not gonna catch ya.

CLAYBAUGH: Okay.

DR. SIMON: I just want to know the situation of the circumstances how you came to do this. Was she visiting you?

CLAYBAUGH: No, I have had custody of her for years.

DR. SIMON: As a single role father?

CLAYBAUGH: On two different occasions, yes.

DR. SIMON: How did you happen to get custody?

CLAYBAUGH: It's a pretty long, drawn out battle.

DR. SIMON: Give me the simple . . .

CLAYBAUGH: Her mother physically abandoned her with her father.

DR. SIMON: Her natural mother and natural father abandoned her?

CLAYBAUGH: I am her natural father.

. . . .

DR. SIMON: And then what happens that one day you decided to do this . . . what was going on?

CLAYBAUGH: I am not trying to be ___ I really.

DR. SIMON: It is ___ stop.

CLAYBAUGH: I'm not trying

DR. SIMON: Stop with the theatrics and I won't warn you again.

CLAYBAUGH: She was scheduled to go to her maternal [sic] for visitation. I had not allowed her to go the year before. . . .

. . . .

CLAYBAUGH: It's been a rule of mine all along, okay? That the adults discuss the business end of things and she had been trying to . . . the time before had been the only time that I had not allowed her to go . . . there had been a reason

DR. SIMON: Right, but you're going someplace I hope because I just want to know the circumstances under which this happened.

CLAYBAUGH: I guess I got too screwed up and just screwed up.

DR. SIMON: I don't know what you mean.

CLAYBAUGH: *I did some methamphetamine,* I got too screwed up I guess, and I just screwed up I guess.

DR. SIMON: Do you typically get hypersexual on methamphetamine?

CLAYBAUGH: *hypersexual? I don't think so. (inaudible)*

DR. SIMON: *Is it one of the reasons you use it?*

CLAYBAUGH: *Actually, I quit using it years ago.*

DR. SIMON: *Is that one of the reasons you used it?*

CLAYBAUGH: *To be honest with you, I don't know why I did.*

DR. SIMON: *Who would know?* _____

CLAYBAUGH: ____

DR. SIMON: *The question being exactly the same, who would you know?*

CLAYBAUGH: *Methamphetamine does feel good. I*

DR. SIMON: Why did it take you so long to give such a straight forward, simple answer?

CLAYBAUGH: I didn't really think it did, I'm sorry.

DR. SIMON: We've already wasted 20 minutes more of my time than I had time to waste.

CLAYBAUGH: (inaudible) I'm sorry.

DR. SIMON: Do you think taking methamphetamine had something to do with what you did?

CLAYBAUGH: Ok, yes.

DR. SIMON: Were you doing anything else besides methamphetamine?

CLAYBAUGH: No.

DR. SIMON: And you said you did something with a vibrator?

CLAYBAUGH: I touched my daughter.

DR. SIMON: Touched her where?

(inaudible)

DR. SIMON: Was there anything else that ____?

CLAYBAUGH: I especially wanted _____ you a straight answer about what happened.

DR. SIMON: _____ that's just part of his character. He knows his character and he knows it's flawed. And he knows the reason it's flawed is that he's not straight with himself or other people. That's why his life is the way it is and why he has troubles in it; he knows that. He doesn't need us to tell him that. It's just not in him to be straightforward ___ when the truth is just ____. But I'm not seeing anything else myself. Are you seeing anything?

GRAY: Just this right here.

DR. SIMON: And I wouldn't expect that in this case. Based on what I'm sensing.

GRAY: Alright, I just wanted to check with you before I let him go.

DR. SIMON: Anything else you want to tell us . . . anything you think is important?

CLAYBAUGH: I don't guess so.

DR. SIMON: You can wipe that serious look off your face. ____ can do that. You heard every word I said and you understand every word that I meant. You know exactly what it means so there's no reason for you to look surprised. You know exactly what's wrong with your character; you know how long it's been flawed; you know exactly what you need to do to fix it; and you really ought to stop acting ___; you really ought [to]; for your own sake.

Repeating its argument that Claybaugh's answers were deceptive, SOSRA submits that he "continued" refusing to give straightforward answers despite being warned by Dr. Simon. SOSRA points to Ms. Gray's written report of the interview: she stated that Claybaugh was evasive and acted as if he did not know why he committed the offense, and she noted Dr. Simon's conclusion that Claybaugh's character did not allow him to be truthful. SOSRA notes that the Committee, after listening to the tapes, found that Claybaugh was not credible. SOSRA complains that the trial court did not note what procedure was unlawful, and it concludes that the trial court substituted its judgment for that of the agency.

Default Level 3

SOSRA maintains on appeal that there was substantial evidence in the record to support the Committee's finding of default Level 3 against Claybaugh and, further, that the Committee properly followed all guidelines and laws with respect to his assessment. SOSRA notes that where an agency's decision is supported by substantial evidence, it automatically follows that the decision cannot be classified as arbitrary and capricious. *See Olsten Health Servs. v. Arkansas Health Servs. Comm'n*, 69 Ark. App. 313, 12 S.W.3d 656 (2000).

A sex offender who is shown by substantial evidence to have been deceptive, or who voluntarily terminates the assessment process after having been advised of the potential consequences, shall be classified by default as a Level 3 risk to the public safety. Ark. Code Ann. § 12-12-917(b)(4)(B)(ii)(*a*). The SOSRA guidelines at issue in this appeal allowed the Committee to override a low-risk actuarial assessment if an offender attempted to conceal or lie about behavioral histories, provided deliberately false or misleading information, or refused to submit to or seriously compromised the interview and assessment. Claybaugh had been informed that he would be assigned a high-risk classification should he withhold information, give false information, or seriously compromise the assessment team's ability to do a fair and accurate assessment.

In rendering its decision, the Committee noted that an offender was not required to admit guilt but was required to be open and honest as to his state of mind, intent, and actions. The Committee found Claybaugh not to be credible in the taped interview. Citing its policy that an offender who was "not open and honest during the assessment" could not be adequately assessed, the Committee allowed the Level 3 risk assessment to stand.

Contending that substantial evidence supports the Committee's decision, SOSRA argues that Claybaugh was uncooperative to the extent that the interviewer could not properly assess him. SOSRA characterizes particular answers by Claybaugh in the interview as qualified, evasive, and not being straightforward. These answers were in response to questions about a shoplifting incident while he was a teenager, sexual experiences, use of marijuana in past years, and use of methamphetamine at the time he committed the offense of second-degree violation of a minor.

SOSRA concludes that a fair-minded person would conclude from these answers that appellant was deceptive in his responses.

Claybaugh characterizes the issue on appeal as not one of credibility, but whether he was deceptive during his assessment. He argues that his answers "appear to be consistent with the documents assembled for the interview which are part of this record." Particularly, when Dr. Simon asked Claybaugh about the circumstances under which the offense occurred, Claybaugh admitted that he "did some methamphetamine" and "got too screwed up," and he responded affirmatively when asked if taking methamphetamine had something to do with his committing the offense. We agree that Claybaugh's answers appear to be consistent with documents assembled for the interview, and we hold that fair-minded persons considering his answers could not have concluded that he was deceptive.

Furthermore, Claybaugh argues that the Committee did not comply with the requirement of our Administrative Procedure Act that a final decision or order in an administrative adjudication shall include findings of fact and conclusions of law, separately stated. *See* Ark. Code Ann. § 25-15-210(b). (Repl. 2002). As Claybaugh notes in his brief, SOSRA has not cited any incident where his answers differed from documents assembled for the interview.

SOSRA responds in its reply brief that Claybaugh was deceptive in his answers. SOSRA argues that Claybaugh's 2002 interview could not be assessed by the 2004 guideline allowing an interviewer to conclude, if an individual's answers did not match up with the documents presented, that an individual was deceptive. However, SOSRA presented the 2004 guideline to the trial court to support its argument that 2002 regulations allowed an increased risk for an offender, and SOSRA has included the 2004 guidelines in the addendum to its appellate brief. Therefore, we will not consider its new argument that the guideline should not be considered.

We hold that the Committee disregarded the facts and circumstances of this case, as well as the applicable law and guidelines. We hold that fair-minded persons could not have reached the Committee's conclusion and that, under applicable statutes and the guidelines developed by SOSRA, there is no substantial evidence to support the Committee's decision to assign Claybaugh a default Level 3 on the basis of his answers during the assessment interview. Thus, we agree with the circuit court's

finding that Claybaugh's default classification was not supported by substantial evidence, was arbitrary and capricious, and was made upon unlawful procedure. Consequently, we reverse the decision of the Committee, and we affirm the decision of the circuit court reducing the default Level 3 to Level 1.

Affirmed.

BAKER and ROAF, JJ., agree.

Charles Leon WEATHERFORD *v.* STATE of Arkansas

CA CR 05-364 216 S.W.3d 150

Court of Appeals of Arkansas
Opinion delivered October 26, 2005

[Rehearing denied November 30, 2005.]

John W. Settle, for appellant.

Mike Beebe, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., and *Stephanie Gosnell*, 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 A'tty Gen., for appellee.

KAREN R. BAKER, Judge. Appellant Charles Weatherford was arrested by the Fort Smith Police Department on December 30, 2003, and charged with possession of methamphetamine with intent to deliver, possession of drug paraphernalia, and simultaneous possession of drugs and a firearm. Appellant filed a motion to suppress the evidence seized, arguing that information provided by an informant was overly vague and insufficiently detailed, and also that the informant did not meet the legal requirements for reliability. The trial court denied the motion and the appellant entered a conditional plea of nolo contendere. Appellant was found guilty and sentenced to ten years in the Arkansas Department of Correction with an additional suspended term of ten years. We find no error by the trial court and affirm.

An appellate court conducts a de novo review of a denial of a motion to suppress evidence based on a totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Davis v. State*, 351 Ark. 406, 413, 94 S.W.3d 892, 896 (2003).

The trial court judge held a hearing following the appellant's motion to suppress in which the State presented two witnesses —

Detective Barnett of the Fort Smith Police Department's Vice-Narcotics unit and Investigator Reese of the Twelfth-Twenty-First Judicial District Drug Force.

Detective Barnett testified that Investigator Reese contacted him prior to the appellant's arrest and advised him that there was reliable information from a confidential informant that the appellant was at Justin Burns's body shop in possession of methamphetamine, ephedrine, and a gun. Barnett drove to the location in an unmarked vehicle to assist Reese and began surveillance. Barnett testified that he was given a description of the vehicle and trailer the appellant would be driving, which he subsequently observed leaving the location under surveillance. Barnett was in contact with Reese by cell phone during the surveillance and notified him that the appellant was leaving the body shop. Based on his contact with Reese and observation of the vehicle and trailer as described by the informant, Barnett contacted a marked police vehicle to conduct a traffic stop of appellant's vehicle.

Barnett frisked the appellant and found a glass pipe of the type commonly used to smoke methamphetamine and placed him under arrest. Additional pipes, a small quantity of methamphetamine, and a large sum of cash were found on the appellant following his arrest. During this search Barnett asked the appellant if there was a gun in the vehicle, and the appellant said that there was a gun located in his briefcase. In the course of his inventory of the vehicle, Barnett found the gun, five bags of methamphetamine, and digital scales in the briefcase. There was also a gym bag found in the vehicle that contained two large bags of powder with a strong odor that Barnett surmised was Acetone — a solvent often used to break down pills containing pseudoephedrine or ephedrine for the manufacture of methamphetamine.

Investigator Reese testified that in the course of his narcotics duties in Sebastian and Crawford counties he was contacted by a police officer who had contact with an informant who had voluntarily brought information to his attention. Although Reese knew the informant by name, the informant had not provided Reese with information previously. The police officer brought the informant to Reese's office, and Reese conducted an interview with him that Reese described as "extensive" and that lasted over an hour. Reese testified that his personal knowledge previously acquired through narcotics investigations and intelligence corroborated the information that the informant provided during the interview. Specifically, Reese testified that Justin Burns's body

shop was a location known for criminal activity and Justin Burns had confessed to producing methamphetamine. Reese additionally testified that he was also able to independently verify the informant's description of the vehicle and the appellant's methods of operation.

On December 30, 2004, Reese began surveillance of the location where the informant told him that the appellant would be located, and observed the trailer but not the vehicle. At that time Reese contacted the informant, who stated that he had been at the location and that the appellant's vehicle was inside, and also that the appellant was preparing to leave. The informant verified that there was a gun and methamphetamine in the appellant's vehicle.

At some point after this conversation with the informant Reese had to leave the scene temporarily to meet with the informant and Detective Barnett, and the Fort Smith Police Department took over the surveillance. Reese notified the Fort Smith police that the vehicle was inside and that the appellant was preparing to leave. Shortly thereafter Reese was told that the vehicle was backing out of the location and hooking up to the trailer. Reese, who met with the informant for approximately ten minutes, told the Fort Smith police that he was at too great a distance away to make the traffic stop and instructed them to do so. Reese testified that he was confident of the reliability of the informant, because the information provided had all been previously proven to be truthful and corroborated by his personal knowledge and narcotics intelligence. Therefore, he had no reservations in ordering the traffic stop of the appellant.

At the conclusion of testimony by Detective Barnett and Investigator Reese the trial judge determined that the informant and information he provided was reliable based on the totality of the circumstances. The trial judge particularly noted that the informant provided the information voluntarily, and that there was subsequent contact between the police and the informant during which the informant stated that he had again seen the items to be found in the appellant's vehicle through personal observation. The appellant's motion to suppress was denied. Appellant contends that the trial court's determination that the informant was reliable was unsupported by testimony or Arkansas law and, therefore was in error.

■ The appellant mistakenly relies on *Kaiser v. State*, 296 Ark. 125, 752 S.W.2d 271 (1988), to support his argument. In *Kaiser*, the Arkansas Supreme Court addressed the question of whether the State presented evidence sufficient to support reason-

able suspicion to stop a vehicle that was suspected of carrying marijuana, a gun, and a large amount of cash. The stop was based on a tip from the Missouri State Police who told the Randolph County Sheriff's Office that the information was provided by a reliable informant. *Id.* The supreme court stated that while the Arkansas authorities "did not act improperly in stopping Kaiser's car on the basis of the information from the Missouri State Police" there had to have been reasonable suspicion by the Missouri State Police based on the reliability of the informant. *Id.* at 127-128, 752 S.W.2d at 273. The *Kaiser* court found that while the informant may have indeed been reliable, there was no testimony to support that conclusion. *Id.* at 129, 752 S.W.2d at 274. Here, in contrast to *Kaiser*, there was testimony provided by Investigator Reese that allowed the trial court to determine that the informant was sufficiently reliable, including his independent corroboration of the vehicle's location, specific description, and the appellant's method of operation.

Reliability of informants is determined by a totality of the circumstances analysis that is based on a three-factored approach the Arkansas Supreme Court adopted in *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998) (citing *State v. Bybee*, 131 Or. App. 492, 884 P.2d 906 (1994)). The factors are: 1) whether the informant was exposed to possible criminal or civil prosecution if the report is false; 2) whether the report is based on the personal observations of the informant; 3) whether the officer's personal observations corroborated the informant's observations. *Id.* at 118, 959 S.W.2d at 741. The *Frette* court examined the satisfaction of these factors:

> The first factor is satisfied whenever [the informant] gives his or her name to authorities or if the person gives the information to the authorities in person. With regard to the second factor, "an officer may infer that the information is based on the informant's personal observation if the information contains sufficient detail that 'it [is] apparent that the informant had not been fabricating [the] report out of whole cloth . . . [and] the report [is] of the sort which in common experience may be recognized as having been obtained in a reliable way.' " The third and final element may be satisfied if the officer observes the illegal activity or finds the person, the vehicle, and the location as substantially described by the informant.

Id. (quoting *Bybee, supra*).

The *Frette* court termed this explanation of the satisfaction of the factors a "useful analytical framework" and applied them to determine that an informant's tip "carried with it sufficient indicia of reliability to justify an investigatory stop." *Frette* at 118, 959 S.W.2d at 741. Because the informant in *Frette* was identifiable and thus subject to prosecution for making a false report, he was found to have greater reliability and satisfied the first factor. The informant's personal observation of the criminal activity gave him a reliable basis of knowledge and satisfied the second factor. The third factor was satisfied when the informant's information was corroborated by a law enforcement officer. *Id.* at 121, 959 S.W.2d at 743.

[redacted] Under the totality of the circumstances in the instant case — and applying the factors to determine sufficient indicia of reliability of an informant — we hold that the trial court committed no error in denying the appellant's motion to suppress. Contrary to the appellant's argument, there were sufficient facts to support the reliability of the informant. The reliability of the informant was established by the fact that he was identifiable and therefore subject to prosecution for making a false report. Additionally, Investigator Reese interviewed the informant personally for over an hour in order to determine his reliability. The information was based on personal knowledge and observation of the informant — observation which was verified again by Investigator Reese during the surveillance of the appellant and just prior to his arrest. Finally, Investigator Reese testified that he was able to corroborate information that the informant provided based on narcotics investigations and intelligence as well as with his own personal knowledge.

Based on the testimony of law enforcement officers involved in the appellant's arrest and applying that testimony to the factors to provide sufficient indicia of reliability of an informant, we find that the trial court did not err in its denial of the appellant's motion to suppress. We therefore affirm.

GLADWIN and ROBBINS, JJ., agree.

Amber HURTT *v.* Tim HURTT and Doris Hurtt

CA 04-1298 216 S.W.3d 604

Court of Appeals of Arkansas
Opinion delivered November 2, 2005

Eugene D. Bramblett, for appellant.

L. Gray Dellinger, for appellees.

WENDELL L. GRIFFEN, Judge. Amber Hurtt appeals from an order of the Fulton County Circuit Court arising from the petition of Tim Hurtt (her former husband) to modify a divorce decree regarding custody of their minor daughter. She contends that the circuit court erred by allowing Doris Hurtt (her former mother-in-law) to intervene as a third party on the day of trial; in finding that Doris had an enforceable third-party beneficiary right in

the settlement agreement that she made with Tim Hurtt that was part of the divorce decree; in ruling that neither parent had custody of the minor child; and in ruling that the divorce decree would be modified to award custody of the minor child to Tim in the event she relocates. We hold that the language in the divorce decree which mandated that Doris would be the minor child's babysitter did not create or otherwise entitle her to be a third-party beneficiary to the divorce and its child-custody provision. We also hold that the trial court erred in finding that the relocation presumption announced in *Hollandsworth v. Knyzewski*, 344 Ark. 470, 109 S.W.3d 653 (2003), is inapplicable to this case. Accordingly, we reverse and remand for further consideration consistent with the *Hollandsworth* holding.

Factual History

Amber and Tim Hurtt were married on July 21, 1995, and divorced by decree of the Fulton County Chancery Court on August 29, 2000. One daughter was born to their marriage, Lexie Jean, born April 3, 1998. The parties' settlement agreement was incorporated into the divorce decree. The portion of the decree relating to custody of Lexie states:

> Husband and Wife agree that Husband and Wife are to have Joint Custody of the minor child, LEXIE JEAN HURTT, with wife to have primary custody of the minor child. That no child support is to be paid by either party, at this time, but Husband is to keep the Health Insurance paid on LEXIE JEAN HURTT. Husband and wife will each pay one-half (½) of all other expenses for LEXIE JEAN HURTT, including, but not limited to clothing, and medical and dental expenses. DORIS HURTT is to continue babysitting LEXIE JEAN HURTT.

On March 22, 2004, Tim petitioned the circuit court to modify the divorce decree to award him full custody of Lexie and to order Amber to pay child support. His motion was prompted by Amber Hurtt's intent to relocate to New Boston, Texas (about twenty miles west of Texarkana), and remarry. Amber subsequently filed a counter-petition, which also prayed for full custody and child support. A hearing was held on July 15, 2004. The following colloquy occurred prior to the circuit court receiving testimony:

> THE COURT: . . . Four, it should be noted that in the settlement agreement, adopted in its entirety by the

Decree of Divorce, the father and mother of the child each agreed and contracted that Doris Hurtt, whom I understand to be the paternal grandmother, should continue to babysit the child. Now, unless somebody can give me convincing argument otherwise, I consider that that agreement made between the mother and father makes her a third party beneficiary of their contractual agreement made in contemplation of divorce. And I'll be glad to hear argument, pro or con.

MR. DELLINGER [COUNSEL FOR TIM]: Oh, I agree.

THE COURT: I can't see that it makes her anything else, other than a third party beneficiary.

MR. COOPER [COUNSEL FOR AMBER]: Your Honor, I don't disagree with the Court's logic, the Court and Mr. Dellinger, of course, are well aware of recent decisions by our Supreme Court involving grandparents' visitation, which this is almost tan amount [sic] to that, I think.

THE COURT: I have them here with me.

MR. COOPER: That would be the only argument that we would have in opposition to the grandmother's involvement. Of course, that statute has now been revised by our legislature and does grant some grandparent's visitation, as the Court is well aware of that.

THE COURT: Yes. For you all's guidance, I don't consider this a matter of grandparents' visitation.

MR. COOPER: No, it's not.

THE COURT: I consider this a contractual agreement made between the mother and father of the child making Doris Hurtt the babysitter. And since she is, as I understand it, the paternal grandmother, I think she's a third party beneficiary. And I consider her a necessary party to this lawsuit. I would entertain an oral motion to amend making her a party, if you want to make such.

MR. DELLINGER: Judge, I would do that to prevent further delay, unless you'd rather it be in writing, in which

event we'll continue the case and I'll file a written motion for her to intervene and assert her rights under the decree.

MR. COOPER: Your Honor, can I have just a two minute period to visit with my client?

. . .

[*after a brief recess*]

THE COURT: I believe you indicated your client does object to Doris Hurtt being made a party.

MR. COOPER: That is correct, Your Honor.

THE COURT: All right. Objection overruled. . . .

. . .

THE COURT: I might mention one thing to you all, and I don't think it's a posit really to this case, because I think this case is factually different, but I assume both of you all agree that the custodial parent who desires to move is in a situation where the move is presumed to be beneficial. Do you all both agree that's the law?

MR. DELLINGER: I think the facts will show different, Judge.

THE COURT: They may well, but there is a presumption in Arkansas Law, and it's been changed recently, there is a presumption that the move by the custodial parent is presumed to be beneficial. This is the Durham case, the Hollandsworth against Knyzewski cases that you made reference to.

MR. COOPER: Right. Yes, Your Honor, I think that is the law.

THE COURT: There isn't any question about it. As I say, I don't think it is a posit to this case because I don't think we have a custodial parent, at least that's my

> understanding. We'll see what the proof develops. And, of course, the compounding problem is that again I think Doris Hurtt is a third party beneficiary of an agreement made between the mother and father of the child that she shall be the babysitter. . . .

Doris testified that she became Lexie's babysitter in August 2000 because both Amber and Tim worked. One of them would drop Lexie off in the morning and pick her up at 5:00 p.m. After Amber and Tim's divorce, Doris kept Lexie on weekdays during the day and on Saturday nights. Doris stated that, the previous May, Amber stopped bringing Lexie by her house and started taking Lexie to Amber's sister's house. Doris opined that it was in Lexie's best interests to remain in Fulton County because her family lived nearby and because she was doing well in school.

Tim stated that he lived in Camp, Arkansas, which was roughly five minutes from his parents. He stated that, when he and Amber divorced, they agreed that Doris babysitting Lexie would be the best thing for Lexie. He noted that he and Amber did not have to worry about childcare expenses or worry about putting her in daycare with strangers. After the divorce, Doris continued to keep Lexie during the day and most Saturday nights. Tim stated that he and Amber agreed to have custody of Lexie on alternating nights. Sometime later, Amber called Tim and stated that Lexie did not want to return to his residence. He talked to everyone involved and decided to give Amber an extra night with Lexie. Tim testified that on March 21, 2004, Amber called and stated that she was leaving Fulton County and taking Lexie with her. After that time, Doris did not have the opportunity to babysit; Amber's sister Brandy Hall had been keeping her. Tim also stated that he had been unable to spend Fridays with Lexie like he had previously.

On cross-examination, Tim testified that he was afraid that Amber would keep Lexie away from Doris; however, he stated that he also wanted Doris to be Lexie's babysitter because neither he nor Amber could afford daycare and because Doris agreed to keep Lexie. Upon further examination, he stated that he never knew what "primary custody" meant. Tim testified that Amber told him that the language had to be in the agreement but that "it did not mean anything." He stated that the parties never honored the written agreement and that he and Amber split custody. Under

the current arrangement, Amber kept Lexie on Mondays, Tuesdays, Wednesdays, and Fridays, while Tim kept her Thursdays, Saturdays, and Sundays.

Amber testified that she had lived in Fulton County her entire life. She remembered going into Jim Short's office when she and Tim were finalizing the divorce. Short represented both parties. After the decree was entered, she noted that the custody arrangement with Tim and Amber alternating nights with Lexie was very unstable because Lexie could not get used to either parent. That was when she asked to go to the current arrangement. Amber stated that she was aware that the settlement agreement stated that Doris would be Lexie's babysitter; however, she noted that she let Brandy watch Lexie because it was more convenient for her (Amber).

Amber testified that her immediate plans were to accept a job offer from Century Bank, where she would make $4000 a year more than she made presently. She also stated her intention to marry her boyfriend Shane Grayson, whom she met while he was working for the Bank of Salem. Amber testified that the new job would be in the New Boston, Texas, area. She has checked out the local schools and stated that the curriculum was stronger than the curriculum in Arkansas. Amber testified that she was not concerned about the safety of her daughter moving to south Arkansas and that, if she were concerned, she would not move. Amber recognized that it would be an adjustment if she and Lexie were allowed to move; however, she opined that Lexie would be fine when she started school and made new friends.

On cross-examination, Amber stated that she did not know how the language about the primary custodial parent was put into the settlement agreement. She did not remember if she told Tim that the language meant nothing. She did remember how Doris was designated as the babysitter. Amber testified that Tim was afraid that she was going to take Lexie away from his mother.

In an order entered August 21, 2004, the circuit court allowed Doris Hurtt to intervene as a third-party plaintiff in the litigation, found that she was a necessary party to the litigation, and ruled that she had the right to enforce the provision of the settlement agreement stating that she would continue to babysit Lexie. The circuit court also found that the presumption in favor of relocation of a custodial parent with primary custody, as announced in *Hollandsworth v. Knyzewski*, 344 Ark. 470, 109

S.W.3d 653 (2003), was inapplicable, based on its reasoning that neither party had primary custody of Lexie. Accordingly, the circuit court ordered that the agreement between the parties remain unchanged while Amber remained close enough to continue the agreement. However, the circuit court ordered that, if Amber relocates in a way that would make the current arrangement unworkable, the decree would be modified to award custody of Lexie to Tim.

Standard of Review

We review traditional cases of equity, such as domestic relations proceedings, *de novo*. *Cole v. Cole*, 82 Ark App. 47, 110 S.W.3d 310 (2003). We affirm the circuit court's findings of fact unless those findings are clearly erroneous or clearly against the preponderance of the evidence. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003); *Powell v. Powell*, 82 Ark. App. 17, 110 S.W.3d 290 (2003). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Cole v. Cole, supra.* Because the question of the preponderance of the evidence turns largely upon the credibility of the witnesses, we defer to the superior position of the circuit court to evaluate the witnesses, their testimony, and the child's best interest. *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001). This court often states that there are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carry as much weight as in those involving child custody. *Id.*

Third-Party-Beneficiary Status

Amber correctly argues that the circuit court erred in ruling that Doris Hurtt was a third-party beneficiary of the settlement agreement and, therefore, had a right to enforce the provision stating that she would continue to be Lexie's babysitter. We recognize that Arkansas courts have found that parties to a divorce can intend for third parties to be beneficiaries of their settlement agreement. *Cf. Orsini v. Commercial Nat'l Bank*, 6 Ark. App. 166, 639 S.W.2d 516 (1992) (affirming a finding of third-party-beneficiary status when the former husband and wife agreed that their daughter would be the named beneficiary in the husband's life insurance policy). However, we do not agree with the circuit court that Doris was a third-party beneficiary to the divorce

decree by virtue of the fact that she was mentioned as babysitter for her granddaughter. The fact that Doris was mentioned in the divorce decree gave her no rights, either under contract or domestic-relations law.

The circuit court continuously proclaimed that the issue was not a matter of grandparent visitation, yet the evidence shows that the only interest Doris attempted to claim was for grandparent visitation. Unless they fall within the provisions of Ark. Code Ann. § 9-13-103 (Supp. 2005), grandparents have no such right. The circuit court's finding that Doris had an enforceable right in being Lexie's babysitter circumvents the presumption stated in subsection (c)(1) of the statute: "There is a rebuttable presumption that a custodian's decision denying or limiting visitation to the petitioner is in the best interest of the child." Parents cannot elevate grandparents into a quasi-parental role by agreeing to name the grandparents as babysitters. The circuit court clearly erred in finding that Doris had a third-party interest in the divorce decree. We reverse on this point.

Because Doris Hurtt had no legally enforceable interest in the divorce decree and because she failed to satisfy the statutory requirements pertaining to grandparent visitation as set forth herein, we hold that the circuit court also committed reversible error when it allowed her to intervene as a third-party plaintiff. Upon remand, Doris Hurtt should be dismissed as a party to this litigation. Because we hold that the court committed error by allowing Doris Hurtt to intervene, we decline to address appellant's argument that the circuit court erred by allowing her to intervene the day of trial.

Child Custody

We also agree that the circuit court erred in finding that neither party had custody of Lexie. The divorce decree states that the parties are to have joint custody with primary custody vested in Amber. At no time before the modification petition was filed did the parents seek the circuit court's permission to modify the terms of the divorce decree regarding child custody. No change of circumstances was demonstrated to justify modification of the decree before appellant sought to relocate. The parties cannot modify the divorce decree without permission from the court. Absent a subsequent modification, the language in the

divorce decree is controlling. Thus, the circuit court had no basis for holding that the terms of the divorce decree had essentially been nullified by the parties' conduct.

The circuit court also erred in refusing to apply Arkansas law regarding a relocating parent, as announced in *Hollandsworth v. Knyzewski, supra.* The law regarding a modification of custody is well-settled:

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

Middleton v. Middleton, 83 Ark. App. 7, 14-15, 113 S.W.3d 625, 629 (2003) (citations omitted).

Arkansas law explicitly recognizes a presumption in favor of relocation for custodial parents with primary custody. *Hollandsworth v. Knyzewski, supra.* The custodial parent does not have the obligation to prove a real advantage to the child. *Id.* Further, *Hollandsworth* explicitly states that relocation alone is not a material change in circumstances sufficient to justify a change in custody. *Id.* We have applied the *Hollandsworth* presumption where both parents had joint custody with primary custody vested in a single parent. *See Durham v. Durham*, 82 Ark. App. 562, 120 S.W.3d 129 (2003).

Here, the circuit court found that so long as appellant does not relocate, the divorce decree would govern custodial care of Lexie. However, it also found that, if appellant should relocate, appellee would have custody of Lexie by mere virtue of her relocating. In effect, the circuit court ordered a prospective change of custody, citing relocation as the triggering event, thereby finding that appellant's relocation would constitute a material change in circumstances to justify a change in circumstances. Such a finding violates our supreme court's holding that relocation, by itself, does not constitute a material change in circumstances.

Accordingly, we reverse the circuit court's order and remand this case for further action consistent with *Hollandsworth v. Knyzewski*, *supra*, and *Durham v. Durham*, *supra*.

Reversed and remanded.

VAUGHT and ROAF, JJ., agree.

RIVERSIDE MARINE REMANUFACTURERS, INC. *v.*
Patrick J. BOOTH and Juanita P. Booth

CA 05-367 216 S.W.3d 611

Court of Appeals of Arkansas
Opinion delivered November 2, 2005

Quattlebaum, Grooms, Tull & Burrow P.L.L.C., by: *John E. Tull III*, *E.B. Chiles IV*, and *Brandon B. Cate*, for appellant.

Friday, Eldredge & Clark, by: *Elizabeth R. Murray* and *Daniel L. Herrington*, for appellees.

TERRY CRABTREE, Judge. This appeal concerns appellant Riverside Marine Remanufacturing, Inc.'s liability to provide healthcare insurance to its founder and former majority shareholder and his wife, appellees Patrick Booth (Pat) and Patsy Booth (Patsy), under a consulting agreement that was part of a transaction whereby Booth sold the business to his son Tom. The dispute arose after Pat and Patsy were dropped from Riverside's group plan and were placed on a policy that provided coverage that they considered inferior to the group policy. The trial court construed the agreement as requiring Riverside to provide benefits at the same level or higher as the group plan in effect at the time of the agreement and awarded the Booths damages of $6,042.39 for their out-of-pocket expenses, together with attorney's fees of $49,558.75. Riverside appeals, raising four assignments of error: (1) the trial court erred in not recusing; (2) the trial court erred in concluding that the consulting agreement was ambiguous; (3) in the alternative, the trial court erred in not giving effect to a merger clause and in finding that Riverside agreed to provide a certain level of benefits; (4) the trial court erred in reforming the consulting agreement. We reverse and remand on the first point, thereby pretermitting discussion of the remaining points.

Pat founded Riverside in the 1970s and was its majority shareholder. Tom was the only other shareholder. In August 2001, Pat entered into a stock purchase agreement with Riverside and Tom whereby he would sell 169 shares to Tom. Riverside would redeem another 120 shares. Also as part of the sale, Pat and Riverside entered into a consulting agreement which provided, inter alia, that Pat would receive "[c]ompany paid health insurance for he and his wife and such health insurance shall continue for the life of [Pat] and the life of [Pat's] wife, Patsy Booth." The consulting agreement further provided that it would expire upon Pat's death, provided that Riverside would continue health insurance coverage for Patsy until her death. The consulting agreement was specifically mentioned in the stock purchase agreement and incorporated by reference therein.

In July 2002, Riverside's insurance agent, with Tom's approval, wrote a letter to Pat, stating that, because Pat was not a full-time Riverside employee, it was illegal under federal law to carry him on Riverside's group policy. The letter also suggested alternative coverages. On February 20, 2003, Tom notified Riverside's insurance carrier that, effective March 1, 2003, Pat and Patsy were to be dropped from the group policy. Pat and Patsy obtained other coverage, for which Riverside has continued to pay.

Pat and Patsy filed suit against Riverside in August 2003, alleging that Riverside had breached the consulting agreement by providing less favorable benefits. The complaint sought damages for their additional out-of-pocket expenses, together with specific performance of the consulting agreement. In the alternative, they sought reformation of the consulting agreement. Riverside answered, denying that it had breached the consulting agreement and stating that the agreement required only that it provide health coverage, not group coverage.

Prior to trial, Riverside filed a motion *in limine* seeking to prevent Pat and Patsy from introducing parol evidence to vary the terms of the consulting agreement. According to Riverside, the hearing on its motion was not transcribed, and during that hearing, the trial judge denied the motion and indicated that Riverside was going to lose the case.

At the end of the first day of the bench trial and before Pat and Patsy had rested their case, Riverside's attorney asked the trial judge about a ruling on the record on its motion *in limine*, and the judge indicated that the motion was denied. The trial judge then stated that "unless something happens, [Riverside is] going to have to pay. If you-all want to settle this beforehand, now is the time." The judge then stated that he was giving his thoughts on the matter in case the parties did not want to proceed and acknowledged that Riverside had not put on its defense. The next morning, Riverside moved for a mistrial and requested the trial judge's recusal because of his comments. The trial judge denied the motions.

The trial court ruled from the bench that the term "company paid health insurance" was ambiguous because it was susceptible to more than one equally reasonable construction. The court also ruled that the insurance plan should be comparable to the plan in effect at the time of the agreements, July 18, 2001, and that the net out-of-pocket healthcare costs for Pat and Patsy should be no

more than they had paid at that time. The trial court, upon Riverside's request, entered more detailed written findings of fact. The written findings also included, as an alternative basis, that the trial court was reforming the consulting agreement to specify that the insurance coverage would be at the same level as of the time of the agreement. Judgment was entered in accordance with the trial court's written findings and awarded Pat and Patsy damages of $6,042.39 and $49,558.75 for their attorney's fees. An amended judgment was entered to award Pat and Patsy an additional $3,092.28 for their costs. This appeal timely followed.

For its first point, Riverside argues that the trial court erred in not recusing after the trial judge had made statements that Riverside asserts amounted to prejudgment of the case. This court's general standard of review for cases involving recusal is well settled. The decision to recuse is within the trial court's discretion, and it will not be reversed absent abuse. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004). An abuse of discretion can be proved by a showing of bias or prejudice on the part of the trial court, and the burden is on the party seeking to disqualify. *Id.* To decide whether there has been an abuse of discretion, we review the record to determine if prejudice or bias was exhibited. *Id.* Absent some objective demonstration by the appellant of the trial judge's prejudice, it is the communication of bias by the trial judge that will cause us to reverse his or her refusal to recuse. *Id.*

The comments complained of occurred while Pat and Patsy were still presenting their case but after Tom and Riverside's insurance agent, Greg Hatcher, had testified. In making those comments, the trial judge, although recognizing that Riverside had yet to present its case, gave the appearance of having a mindset that could not be reconciled with the proposition that he was committed to hear all relevant, credible evidence, weighing it and arriving at a judicious result. *See Ross v. State*, 267 Ark. 1027, 593 S.W.2d 475 (Ark. App. 1980). In *Ross*, this court reversed the trial court's revocation of a suspended sentence. At the beginning of the hearing on a petition to revoke a suspended sentence based upon allegations of use of alcohol, the judge asked the defendant if he understood that the terms of his suspended sentence required him to refrain from using alcohol. Upon the defendant's admitting that he understood the suspended sentence was based upon this condition, the judge told the defendant's attorney: "[Y]ou can call what witnesses you want, but I cannot sanction this type of conduct. . . ." This court reversed, stating that the trial judge's

comments showed "a [mindset] which cannot be reconciled with the proposition that the trial court is committed to hear all relevant, credible evidence weighing it and arriving at a judicious result." 267 Ark. at 1032-33, 593 S.W.2d at 478.

Where the trial judge sits as a finder of fact, the appearance of fairness in trial proceedings becomes even more important. *Burrows v. Forrest City*, 260 Ark. 712, 543 S.W.2d 488 (1976); *Ross, supra.* The proper administration of the law requires not only that judges refrain from actual bias but also that they avoid all appearances of unfairness. *Bolden v. State*, 262 Ark. 718, 561 S.W.2d 281 (1978). In *Farley v. Jester*, 257 Ark. 686, 520 S.W.2d 200 (1975), our supreme court stated:

> [C]ourt proceedings must not only be fair and impartial — they must appear to be fair and impartial. This factor is mentioned in a Comment found in 71 Michigan Law Review 538, entitled, "Disqualification of Interest of Lower Federal Court Judges: 28 U.S.C. § 455," as follows:
>
> > Another factor to be considered in a judge's decision to disqualify is the contention that the appearance of impartiality is as important, if not more so, than actual impartiality. In 1952, Justice Frankfurter explained his disqualification in a case by stating that "justice should reasonably appear to be disinterested as well as be so in fact." The Supreme Court gave support to this view in the due process context when in *Murchison* Justice Black wrote for the Court:
> >
> > "(T)o perform its high function in the best way 'justice must satisfy the appearance of justice'."
> >
> > More recently the Court set aside an arbitration award and stated that "(a)ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

257 Ark. at 692, 520 S.W.2d at 203-04. The supreme court stated in *Patterson v. R.T.*, 301 Ark. 400, 784 S.W.2d 777 (1990):

> Of course, a judge trying a case without a jury may develop "bias" as the trial progresses, and that "bias" ultimately may result in the court's judgment. It is, however, the communication of that bias at inappropriate times and in inappropriate ways that will cause us to

> reverse. That is what has happened in this case. While we suggest no knowing violation or intentional misconduct on the part of the chancellor, we reverse this decision because it was so tainted by the appearance of prejudgment.

301 Ark. at 407, 784 S.W.2d at 781.

Here, the trial judge's comments gave the appearance that Riverside's liability had been predetermined. Moreover, the appearance of fairness in the case at bar was even more important because the trial judge was sitting as a finder of fact. *See Ross, supra.* To "satisfy the appearance of justice," the trial judge should have resolved the issue in favor of the appearance of fairness and disqualified himself.

There is another reason why this case should be reversed on this issue: the trial court's failure to make a record of the hearing on Riverside's motion *in limine* during which one of the statements at issue was supposedly made. Administrative Order No. 4 provides that, "[u]nless waived on the record by the parties, it *shall* be the duty of any circuit court to require that a verbatim record be made of all proceedings pertaining to any contested matter before it." (emphasis added). *See also* Ark. Code Ann. § 16-13-510 (Repl. 1999). The supreme court has said that it strictly construes and applies Administrative Order No. 4. *Robinson v. State*, 353 Ark. 372, 108 S.W.3d 622 (2003); *see also Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003) (emphasizing that a verbatim record of the proceedings is a requirement). At oral argument, the parties agreed that there was no verbatim record made of the hearing on the motion *in limine*. They could not explain this failure. Both the supreme court and this court have held that a party's silence on this issue at trial will not be construed as an implied waiver of the verbatim record requirement. *Robinson, supra*; *Mattocks v. Mattocks*, 66 Ark. App. 77, 986 S.W.2d 890 (1999).

Reversed and remanded with directions to transfer this case to another judge.

HART and GLOVER, JJ., agree.

Jane STANLEY and Rose Mary Lattin *v.* Scottie L. BURCHETT and Dick W. Burchett

CA 05-76 216 S.W.3d 615

Court of Appeals of Arkansas
Opinion delivered November 9, 2005

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

Boswell, Tucker, Brewster, & Davis, by: *John Andrew Ellis*, for appellee.

JOHN B. ROBBINS, Judge. In this case, appellants Jane Stanley and Rose Mary Lattin filed suit seeking to set aside certain

deeds executed by their stepfather Damon Utley in favor of appellees Scottie Burchett and her husband, Dick Burchett.[1] Scottie is one of Utley's daughters. At the close of Jane and Rose Mary's proof, the trial court granted Scottie's motion for a directed verdict on the basis that they had not shown that Utley lacked capacity to execute the deeds. Jane and Rose Mary now appeal, arguing that, because Scottie procured the deeds, the trial court should have shifted the burden of proof to her to prove that Utley had the capacity to execute the deeds. On cross-appeal, Scottie argues that the trial court erred in failing to award her attorney's fees under Ark. Code Ann. § 16-22-309 (Repl. 1999), asserting that there was a complete absence of a justiciable issue of either law or fact raised by Jane and Rose Mary. We affirm on both direct appeal and on cross-appeal.

In November 2000, Utley executed a will devising, *inter alia*, a mobile-home park to Rose Mary, Jane, and Scottie in equal shares. In January 2003, Utley executed a second will devising the mobile-home park and another lot solely to Scottie. In the second will, Utley left only his "love and affection" to Jane and Rose Mary and to his other daughter, Brenda Faye Eden. On February 4, 2003, Utley executed the deeds at issue, conveying certain property to himself, Scottie, and Dick as joint tenants with right of survivorship. Utley died on February 14, 2003, survived by his wife, Carolyn Utley, and his daughters, Scottie and Brenda Faye Eden.[2]

In their complaint, Jane and Rose Mary alleged that, under the November 2000 will, they had an interest in the property, that the deeds were testamentary in nature, and that Utley lacked the requisite capacity to execute the deeds. The complaint also alleged that Scottie procured the deeds and exercised undue influence over her father because of their confidential relationship. Scottie answered, denying the material allegations of the complaint and asserting that the January 2003 will superseded the November 2000 will, thereby depriving Jane and Rose Mary of any claimed interest in the property. Scottie also sought attorney's fees under Ark. Code Ann. § 16-22-309 (Repl. 1999), asserting that the suit was void of any justiciable issue of law or fact and that Jane, Rose Mary, and their attorney knew or should have known that the action was without a reasonable basis in law or equity.

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[1] We refer only to Scottie Burchett unless the context otherwise requires.

[2] Scottie, Jane, and Rose Mary are half-sisters, having the same mother.

Much of the proof at trial was directed to the execution of the 2003 will and not the deeds at issue. Carolyn Utley testified that she married Damon Utley in 1995 and that the two of them executed wills in November 2000. She stated that Utley executed another will in January 2003, after learning on December 30, 2002, that his cancer was terminal. She said that Utley's 2003 will differed considerably from the November 2000 will. Carolyn testified that Scottie met her and Utley at the doctor's office shortly after learning of the diagnosis and that she heard Scottie ask Utley where his will was located and tell Utley that he should change the executor because the person nominated in the 2000 will, Rose Mary's husband Sam, was an alcoholic who had started drinking again. She said that Scottie suggested attorney Raymon Harvey to prepare the will and was in charge of communicating Utley's changes in the will to Harvey. She explained that the 2003 will was prepared in case the deeds were not executed at the time of Utley's death. Carolyn admitted that Harvey went over the will with Utley "word for word" at her request. She admitted that Utley knew the nature and extent of his personal property and that he had started to dispose of it prior to his final illness.

Carolyn also testified that, although she had discussed the matter with Utley, Scottie had the deeds prepared because Utley did not want the property to pass through probate. She stated that Utley knew how the deeds were drawn up but opined that Utley did not know what he was signing when he executed the deeds because they represented a different disposition of his property than what she had been led to expect. She said that one reason she believed that the will was not as Utley intended was because it did not treat Scottie, Jane, and Rose Mary the same and because Scottie had assured her father that she would take care of her sisters. She also admitted that the disposition of Utley's property by the deeds was the same as the disposition in the 2003 will. She admitted that Utley executed nine deeds on February 4, including five from Utley to himself and her as tenants by the entirety. She stated that Scottie served as courier between Utley and Stewart Title, that Scottie discussed the deeds with Utley, and that Scottie communicated any changes to Stewart Title.

Scottie Burchett testified that she met Utley and Carolyn at the doctor's office after Utley received his diagnosis. She stated that Utley told her that she was going to have to operate the mobile-home park. She testified that her father obtained the contents of his lockbox and that she did not know the contents of

the 2000 will until she took it to attorney Raymon Harvey. She stated that she recommended Harvey to her father after he specifically told her that he did not want to use his previous attorney to prepare the will. She stated that Utley suggested some changes to Harvey's first draft of the will and that she communicated these changes to Harvey. She stated that, during the drafting of the will, Utley and Harvey had at least one telephone conversation about it. She denied keeping copies of the drafts.

Scottie admitted that she took the deeds to Stewart Title to be prepared. She stated that she and Carolyn went over the deeds. She said that the disposition of Utley's real property was the same under the 2003 will.

Rose Mary Lattin testified that Utley showed no previous favoritism among the three girls. She denied having a "falling out" with Utley between the execution of the first will in November 2000 and the execution of the second will in January 2003. She also stated that, prior to this dispute, she and Scottie shared a close relationship. She said that she offered to help or visit Utley but that Scottie told her such help was not necessary. Rose Mary admitted that nothing led her to believe that Utley lacked capacity to execute the deeds or that Scottie and Dick used their relationship to overpower Utley's freedom to make his own decisions. She also admitted that she did not research Utley's medical records to determine his condition when he executed the deeds.

Jane Stanley testified that she did not have a "falling out" with Utley between the execution of the first will in November 2000 and the execution of the second will in January 2003. She stated that she did not know of anything to make her believe that Utley lacked capacity to execute the deeds and that she did not inquire into Utley's mental condition at the time the deeds were executed.

At the close of Jane and Rose Mary's proof, Scottie moved for a directed verdict, arguing that there was no proof that Utley lacked capacity to execute the deeds at issue. Jane and Rose Mary argued that the burden shifted to Scottie because she procured the execution of the deeds. The trial court granted the motion. Judgment was entered dismissing the petition. Scottie moved for an award of attorney's fees pursuant to Ark. Code Ann. § 16-22-309 (Repl.1999), arguing that there was a complete absence of a justiciable issue. The trial court denied the motion without explanation. This appeal and cross-appeal followed.

As their sole point on appeal, Jane and Rose Mary argue that the trial court erred in not shifting the burden to Scottie to produce evidence of Utley's competence to execute the deeds.[3] They do not make any argument concerning the validity of the January 2003 will.

The supreme court has said that a trial court's duty is to review a motion for directed verdict or dismissal at the conclusion of a plaintiff's case by deciding whether, if it were a jury trial, the evidence would be sufficient to present to the jury. *Woodall v. Chuck Dory Auto Sales, Inc.*, 347 Ark. 260, 61 S.W.3d 835 (2001). In making that determination, the trial court does not exercise fact-finding powers that involve determining questions of credibility. *Id.*

Jane and Rose Mary, citing *Neal v. Jackson*, 2 Ark. App. 14, 616 S.W.2d 746 (1981), argue that, because Scottie procured the deeds, she bore the burden of proving that Utley had the required mental capacity and freedom of will to execute them. In *Estate of McKasson v. Hamric*, 70 Ark. App. 507, 20 S.W.3d 446 (2000), we discussed *Neal v. Jackson* and explained that, in an ordinary deed transaction, a grantee who procures a deed does not bear the burden of proving the grantor's mental capacity and freedom from undue influence:

> Appellant relies on *Neal v. Jackson*, 2 Ark. App. 14, 616 S.W.2d 746 (1981), and *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997), for the proposition that one who procures a deed has the burden of proving mental capacity and a lack of undue influence. The language in *Neal*, upon which appellant relies, was dicta. *Noland* involved an *inter vivos* trust with title to the real property to pass at the time of the settlor's death. It simply cannot be the law that in an ordinary deed transaction the grantee bears the burden of proving the grantor's mental capacity and his freedom from undue influence merely because the grantee has caused the deed to be prepared.

Hamric, 70 Ark. App. at 511, 20 S.W.3d at 449.

Here, we cannot view the deeds in isolation. This scenario is similar in that respect to the facts in *Noland v. Noland*, *supra*. These

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[3] Jane and Rose Mary appear to lack standing to challenge the validity of the deeds. The issue was raised in the trial court, but no ruling was ever rendered on the issue. It is not argued on appeal.

deeds were part and parcel of Utley's testamentary plan, which included the January 2003 will. There was testimony that Utley wanted the deeds prepared in order to avoid the time and expense of probate. Moreover, the disposition of Utley's real property under the 2003 will was the same as that accomplished by the deeds he executed on February 4, 2003. Consequently, if Scottie procured the deeds, the presumption would arise and the burden of proof would shift.

"Procurement" originally meant that the beneficiary himself wrote the will. *McDaniel v. Crosby*, 19 Ark. 533 (1858); *see also Looney v. Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992); *Greenwood v. Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979); *Estate of McKasson v. Hamric, supra.* It has been extended to situations in which the beneficiary caused the will to be prepared and participated in its execution. *See, e.g., Smith v. Welch*, 268 Ark. 510, 597 S.W.2d 593 (1980). Procurement was also found where the beneficiary held the decedent's power of attorney and directed the will to be written. *Orr v. Love*, 225 Ark. 505, 283 S.W.2d 667 (1955); *In re Estate of Garrett*, 81 Ark. App. 212, 100 S.W.3d 72 (2003). There was no proof that Scottie did anything more than serve as a courier or messenger between her father and Stewart Title, where the deeds were prepared. This is not enough to prove procurement. We cannot say that the trial court's decision finding no evidence of procurement was clearly erroneous.

On cross-appeal, Scottie argues that the trial court erred in not awarding her attorney's fees under Ark. Code Ann. § 16-22-309 (Repl. 1999), asserting that there was a complete absence of a justiciable issue of either law or fact raised by Jane and Rose Mary. If the case lacks a justiciable issue, an award of fees is mandatory. Ark. Code Ann. § 16-22-309(a)(1) (Repl. 1999). On appeal, the question as to whether there was a complete absence of a justiciable issue shall be determined de novo on the record of the trial court alone. Ark. Code Ann. § 16-22-309(d) (Repl. 1999); *Stilley v. Hubbs*, 344 Ark. 1, 40 S.W.3d 209 (2001); *Elliott v. Hurst*, 307 Ark. 134, 817 S.W.2d 877 (1991). We do not reverse the trial court's finding, however, unless it is clearly erroneous. *Cureton v. Frierson*, 41 Ark. App. 196, 850 S.W.2d 38 (1993).

We cannot say that the trial court clearly erred in denying Scottie's motion for attorney's fees pursuant to Ark. Code Ann. § 16-22-309. Subsection (a)(1) provides for an award of fees in "any civil action in which the court having jurisdiction finds

that there was a complete absence of a justiciable issue of either law or fact[.]" Subsection (b) provides in pertinent part that in order to find a lack of justiciable issue, "the court must find that the action, claim, setoff, counterclaim, or defense was commenced, used, or continued in bad faith solely for purposes of harassing or maliciously injuring another or delaying adjudication without just cause[.]" Scottie contends that, because Jane and Rose Mary admitted that they did not have any evidence that Utley lacked capacity to execute the deeds, they were acting in bad faith by continuing with this suit.

The trial court expressly declined to find a complete absence of a justiciable issue. Under the plain language of section 16-22-309, such a finding is a prerequisite to an award of attorney's fees. *City of Forth Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 209 S.W.3d 344 (June 2, 2005); *Chlanda v. Killebrew*, 329 Ark. 39, 945 S.W.2d 940 (1997). In any event, we cannot say that the record before us demonstrates a complete lack of justiciable issue such that Jane and Rose Mary acted in bad faith by continuing with their suit. Jane and Rose Mary were unsuccessful in their attempt to demonstrate that Scottie procured the deeds. However, there was nothing to indicate that this suit was filed in bad faith or that it was brought solely for the purpose of harassing or of maliciously injuring Scottie. We thus affirm on cross-appeal.

Affirmed on direct appeal; affirmed on cross-appeal.

GLADWIN and BAKER, JJ., agree.

David G. COFFEE and Kelly Lynn Coffee *v.*
Gary ZOLLIECOFFER and Linda Zolliecoffer

CA 05-148 216 S.W.3d 636

Court of Appeals of Arkansas
Opinion delivered November 9, 2005

[Rehearing denied December 14, 2005.*]

* NEAL, CRABTREE, and BAKER, JJ., would grant rehearing.

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

James C. Manard, for appellees.

JOHN B. ROBBINS, Judge. Appellants David and Kelly Coffee appeal the October 26, 2004 order of the Franklin County Circuit Court that granted custody of Kelly Coffee's fifteen-year-old daughter Kari Lynn Chambers to appellees Gary and Linda Zolliecoffer.[1] Appellants contend that the circuit court erred as a matter of law by not applying the correct legal standard to this request for a change of custody, and further that it was clearly erroneous to conclude that Kari's best interest was to be placed in appellees' custody. We affirm.

The following is a recitation of the facts leading to the present appeal. While a teenager, Kelly became impregnated by her boyfriend. Kelly gave birth to her daughter Kari on July 19, 1989. Kelly was seventeen at that time. During the next four years, Kelly lived with her boyfriend and their daughter in Ozark, Arkansas, for some period of time. However, the majority of Kari's first four years of life were spent living with Kelly in Linda and Gary's home in Altus, Arkansas.

In 1991, Kelly obtained an order establishing paternity and setting child support from Kari's biological father, though he did not participate much in her life and sent sporadic child support payments. The 1991 order stated that custody was vested in Kelly, the mother of the child.

In 1993, Kelly left appellees' home and did not seek court intervention to resume physical custody of Kari. Kelly was in a relationship with David at that time. Appellees believed that Kelly wanted them to raise Kari and did not want parental responsibility; Kelly explained that she was simply young and succumbed to Linda's refusal to allow her physical custody of Kari. Kelly regularly visited Kari and expended child-support payments for Kari's benefit, but Kari remained primarily in the grandparents' home

[1] Linda Zolliecoffer is Kelly Coffee's mother and Kari Lynn Chambers's grandmother; Gary Zolliecoffer is Kelly's stepfather and Kari's stepgrandfather. David is Kelly's husband and Kari's stepfather.

and attended the local school for the next several years. Kelly and David married in 1995, had twins in 1996, and moved to the Clarksville, Arkansas, area.

The instant litigation ensued after Kelly took twelve-year-old Kari to Clarksville on July 30, 2001, and did not return her to Linda. On August 3, 2001, appellees filed a petition for custody and requested an ex parte order of custody. An attached affidavit stated that Kari had lived with appellees her whole life, that Kari's biological father showed little interest in her life, that Kelly had not shown significant interest in Kari's upbringing, that Kelly took Kari against her will, and that the appellees were the only parental figures that Kari had known. The ex parte order was granted on August 3, 2001, and a sheriff's deputy brought Kari back to appellees.

Appellants responded with a motion to dismiss, asserting that there was no basis in law or fact to justify taking Kari from Kelly's custody. The response stated that appellants were married; that they were responsible and decent persons living in Clarksville, raising twins born in March 1996; that David was gainfully employed and Kelly was a stay-at-home mother; that Linda had physically attacked Kelly on numerous occasions during attempts to exercise her rightful custody; that Kelly had been removed from appellees' home by DHS at the age of eleven due to sexual abuse by appellee Gary; that appellants feared for Kari's well being in appellees' home; that Kelly, as Kari's natural parent, had priority in custody over Kari absent a finding of unfitness; and that Kari's best interest was served by remaining in her natural mother's legal and physical custody. The ex parte order remained in effect pending the full trial on the merits.

Appellants and appellees requested that a home study be performed on the opposing parties' homes; these requests were so ordered. The home study on appellees' home was conducted in February 2002, and the conclusion was that the home was well-maintained and suitable to provide a safe, secure, and nurturing environment for Kari. A negative factor was a finding of "true" in the Child Maltreatment Registry regarding an incident twenty years prior that involved appellee Gary. The home study concluded with a recommendation that the appellees be given custody.

The home study on appellants' home was conducted in October 2004, which revealed that appellants married in 1995 and lived in rural Clarksville. Kelly reported her history of being removed from appellees' home at age eleven; her return to

appellees' home when other placement options were exhausted; and her becoming a pregnant teen by her boyfriend Anthony Medlock. The report noted that David was employed as an electrician, and that Kelly stayed at home to care for Kari's eight-year-old half-siblings, who were also interviewed for purposes of the home study. The housing was clean, appropriate for adding Kari, and physically sound. The summary of the report stated that the family appeared to be functional, structured, and bonded, and that the social worker saw no reason to contraindicate placement with appellants.

At the trial conducted on October 12, 2004, Linda testified that Kelly chose to move out to be with David when Kari was about four years old and that she and Kelly had an altercation over that decision. Linda said that Kelly told her when she left that she could come back and get Kari anytime, to which Linda agreed. Linda had no problem with appellants' current residence in Clarksville or with Kari visiting, but she wanted Kari to continue living with her. Linda agreed that Kelly kept a savings account for child support payments and made purchases from that account on Kari's behalf for things like glasses and contact lenses. Linda denied that Kelly had demanded custody of Kari. Instead, she said that Kelly had regularly visited her daughter but expressed no desire to have Kari come live with her until the time of the ex parte order. As for the allegations that Gary sexually abused Kelly as a child, Linda did not believe it. Nonetheless, she recalled Kelly being absent from their home after those allegations until Kelly was about fifteen or sixteen years old.

Kari testified that she preferred to live with her grandparents, that she was a very good student, that she was in the tenth grade at Altus-Denning High School, and that she was a member of the basketball team. While Kari wanted to visit her mother, she got along with her twin siblings and stepfather and she enjoyed her visits, she said her mother did not ask her to come live with her until recently. Kari denied ever telling her mother that she wanted to live with her. Kari said she had never been abused by her grandfather. Kari did not want to change schools and wanted to stay where she was.

Kelly testified that she came back to live with appellees at the age of fifteen because her biological father, who lived in Texas, could no longer take care of her. Though Kelly said she and the baby lived with Anthony for a while, she ultimately ended up back at her mother and stepfather's house, despite her belief that her mother hated her. Kelly said that her mother physically and

emotionally abused her over the years, mainly because Linda did not believe Kelly's allegations of sexual abuse. Kelly said that she attempted to take Kari from her mother after she and David married but that Linda physically attacked her, screaming at her and banging her (Kelly's) head against the floor. Thereafter, Kelly said she was allowed to have visitation with and talk to Kari but not move her into her home. In summation, Kelly stated that she was terrified of her mother and had been as much a part of Kari's life as her mother would permit.

Regarding July 30, 2001, Kelly said that when she picked Kari up from a relative, Kari willingly went with her to Clarksville and wanted to stay. However, a few days later, a sheriff's deputy took Kari back to appellees. Kelly felt that her mother had been influencing Kari to see living with Kelly as a bad idea. Kelly expressed frustration that she should have to bring court action to regain custody she already had of her daughter.

Kelly had been in counseling since the spring of 2004, and her counselor testified that Kelly was a good parent in a solid marriage, but she needed counseling to work through her distress about her childhood abuse. He had no long-term therapy in mind and felt that Kelly had come a long way toward resolving her issues.

Kelly's husband David testified that they had tried several times to agreeably move Kari into their home, but that each time Linda would scare Kari into thinking she would not fit into a new school or keep any of her old friends. David said that when Kari came into their home in the summer of 2001, and several times before that event, she was ready to come live with appellants but was afraid to talk to her grandmother about it.

Both counsel offered closing arguments. In short, Kelly's attorney argued that the biological parent was given a preference unless proven unfit and that the child's best interest was to remain in her mother's legal custody, whereas Linda's attorney argued that the overriding consideration was at all times the best interest of the child that was best served by remaining in the only home Kari had known her whole life. The trial judge took the matter under advisement.

In a letter opinion dated October 15, 2004, he rendered his decision granting Linda custody. The letter stated that he considered the following in making his findings: the home studies; Kari's strongly stated preference, her health and age; the stability in employment, finances, and emotions; residence; health; love and affection; attention paid to the child; and educational attitudes. The letter opinion read in pertinent part:

> Whether this matter is considered an initial proceeding or a modification proceeding, the polestar remains the best interest and welfare of the child, Kari Lynn Chambers, who is now fifteen years of age. While there is a preference in custody cases to award a child to its biological parent, that preference is not absolute. Rather, of prime concern, and the controlling factor, is the best interest of the child.

The judge then found that it was in Kari's best interest to be placed in the custody of her grandmother Linda and that Kelly should be granted reasonable visitation privileges but should not be ordered to pay child support. A formal order incorporated this letter opinion, and a timely notice of appeal followed.

Appellants contend that the trial court clearly erred in entering an order changing custody of Kari from appellant Kelly to appellee Linda because (1) the trial court applied an incorrect legal standard, and (2) alternatively, even if the trial court used the correct legal standard, the decision to take custody from Kelly was clearly erroneous.

The standard of review in child-custody appeals is well settled. We review the evidence de novo, but we will not reverse the findings of fact unless it is shown that they are clearly contrary to the preponderance of the evidence. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). We also give special deference to the superior position of the trial court to evaluate and judge the credibility of the witnesses in child-custody cases. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999). A finding is clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999). *See also Dunham v. Doyle*, 84 Ark. App. 36, 129 S.W.3d 304 (2003). With regard to errors of law, however, no deference is given to the trial court's decision. *See Sanford v. Sanford*, 355 Ark. 274, 137 S.W.3d 391 (2003).

The substantive law on this topic is equally well settled. The law prefers a parent over a grandparent or other third person, unless the parent is proved to be incompetent or unfit. *See, e.g.*, *Schuh v. Roberson*, 302 Ark. 305, 788 S.W.2d 740 (1990); *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988); *Jones v. Strauser*, 266 Ark. 441, 585 S.W.2d 931 (1979); *Payne v. Jones*, 242

Ark. 686, 415 S.W.2d 57 (1967); *Riley v. Vest*, 235 Ark. 192, 357 S.W.2d 497 (1962). The preference is based on the child's best interests. *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988). The right of natural parents to the custody of their children as against others is one of the highest of natural rights, and the state cannot interfere with this right simply to better the moral and temporal welfare of the child as against an unoffending parent. *Payne v. Jones, supra.* The test as to custody between a natural parent and a third person has never been based solely upon who can do the most for the child. *Rayburn v. Rayburn*, 231 Ark. 745, 332 S.W.2d 230 (1960). However, the parental preference is not absolute. *Freshour v. West*, 334 Ark. 100, 971 S.W.2d 263 (1998). Rather, of prime concern, and the controlling factor, is the best interest of the child. *Id.* The rights of parents are not proprietary and are subject to their related duty to care for and protect the child; the law secures their preferential rights only as long as they discharge their obligations. *Id.*; *Lloyd v. Butts*, 343 Ark. 620, 624, 37 S.W.3d 603, 606 (2001); *Holmes v. Coleman*, 195 Ark. 196, 111 S.W.2d 474 (1937); *Jones v. Jones*, 13 Ark. App. 102, 680 S.W.2d 118 (1984); *Watkins v. Dudgeon*, 270 Ark. 516, 606 S.W.2d 78 (Ark. App.1980).

Recognizing the parental preference, our supreme court held in *Crosser v. Henson*, 357 Ark. 635, 187 S.W.3d 848 (2004), that in the context of a guardianship proceeding:

> Determining whether the child is to be better off with one party versus another is precisely what the court should decide. The natural-parent preference and the fitness of that parent are not the absolute determinants in custody-modification matters, as our case law makes clear.

By way of example, in *Freshour v. West, supra*, our supreme court affirmed the grant of custody to the child's maternal grandparent, despite the natural father's attempt to gain custody. The child had been left in the grandparent's care for a number of years, but the absent father later rectified his life and endeavored to provide as a parent to the child. The trial court was posed with a similar argument by that father, seeking to have custody vested in him because he was not proven to be "unfit." The supreme court affirmed the trial court ruling, and it noted that the trial court recognized the law's preference

for custody to be with the natural parent, but after consideration of relevant factors, decided that such placement was not in the child's best interest. *See id.*

Crosser v. Henson, supra, cited to *Jones v. Strauser,* 266 Ark. 441, 585 S.W.2d 931 (1979), which rejected a father's request to change custody of his daughter from the maternal grandparents to him, noting the parental preference. The *Jones* opinion agreed that ordinarily a natural parent will be granted custody absent a finding of unfitness. However, Mr. Jones had permitted the maternal grandparents to have custody, effectively abandoning his child for the first five years of her life. The supreme court affirmed the trial court's refusal to place the child with the father, holding that while his parental preference was not thereby forfeited forever, its effect was so diminished that he had the burden to show that taking the child from the grandparents was in her best interest.

We hold that the trial court set forth its understanding that there exists a preference for the natural parent to have custody over all others, but that the "polestar" and paramount consideration is at all times the best interest of the child, which can overcome the parental preference when a child is left in the care of a non-parent for a substantial period of time. *See also* 15 A.L.R. 5th 692, "Continuity of Residence as a Factor in Contest Between Parent and Non-Parent – Modern Status" § 35. Therefore, we hold that the trial court applied the correct legal standard and did not err as a matter of law. *See also Beavers v. Smith,* 223 Ark. 43, 264 S.W.2d 617 (1954).

Appellants argue in the alternative that the trial court clearly erred in finding that Kari's best interest was to be placed in her grandmother's custody, particularly in light of the allegations of sexual abuse perpetrated by Gary. We hold that the trial court's finding on Kari's best interest is not clearly erroneous. It is difficult to countenance Kelly's concern about sexual abuse when she permitted her child to live with appellees for at least twelve years without seeking to have her physical custody restored or seeking to have the state investigate any perceived threat to Kari in appellees' care. Moreover, we must give due deference to the trial judge's superior position to evaluate the credibility and weight to be given to the testimony and evidence in this case. *See Hamilton v. Barrett, supra.* Kari denied that she was ever subjected to abuse by her grandfather. The trial judge here was obviously swayed by the fifteen-year-old's strong preference to stay in the only home,

school, and social life she had ever known; by the fact that her grandparents were willing and able to finish raising Kari; and by the absence of any evidence that Kari was being or had been abused in her grandparents' care. After our de novo review, we cannot conclude that the trial court's findings regarding Kari's best interest were clearly erroneous or clearly against the preponderance of the evidence.

Affirmed.

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

VAUGHT and CRABTREE, JJ., concur.

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

LARRY D. VAUGHT, Judge, concurring. Although I agree with the dissent that this case should be reversed, I vote to affirm solely because I am required to follow the decisions of our supreme court. Unlike the majority, I do not believe that the most recent pronouncements on "parental preference" follow the precedent set in earlier cases or in the Arkansas statutes. Under *Crosser v. Henson*, 357 Ark. 635, 187 S.W.3d 848 (2004), there is no longer a parental preference — only a parental "factor" to be considered when determining what is in the best interest of the child.

The idea that a fit parent is presumed to be acting in a child's best interest is not a novel idea. The case law in nearly every jurisdiction supports this proposition. *See, e.g.*, *G.H. v. K.G.*, 909 So. 2d 206 (Ala. Civ. App. 2005); *Andrea S. v. David R.*, 116 P.3d 589 (Alaska 2005); *Allen v. Proksch*, 832 N.E.2d 1080 (Ind. Ct. App. 2005); *Williams v. Phelps*, 961 S.W.2d 40 (Ky. Ct. App. 1998); *McDermott v. Dougherty*, 869 A.2d 751 (Md. 2005); *Johnson-Smolak v. Fink*, 703 N.W.2d 588 (Minn. Ct. App. 2005); *Thomas v. Purvis*, 384 So. 2d 610 (Miss. 1980); *Scott v. Scott*, 147 S.W.3d 887 (Mo. Ct. App. 2004); *In re Guardianship of Brenda B.*, 698 N.W.2d 228 (Neb. Ct. App. 2005); *Bevins v. Witherbee*, 798 N.Y.S.2d 245 (N.Y. App. Div. 2005); *In re Marriage of Wilson*, 110 P.3d 1106 (Or. Ct. App. 2005); *Jordan v. Jackson*, 876 A.2d 443 (Pa. Super. Ct. 2005); *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005). In the context of grandparent visitation, the Supreme Court of the United States has stated that the interest of parents in the care, custody, and control of their children is perhaps the oldest of fundamental liberty interests. *See Troxel v. Granville*, 530 U.S. 57 (2000). Furthermore, in a long line of decisions, the Court has

recognized that the "liberty" protected by the Due Process Clause includes the right of parents to establish a home, to bring up their children, and to direct the upbringing of their children without hindrance from the state. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Santosky v. Kramer*, 455 U.S. 755 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

In *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002), our supreme court cited and quoted liberally from *Troxel* in establishing the parameters of grandparent visitation in Arkansas; the *Linder* court concluded that the appellant — a single, fit parent — had a fundamental right under the Fourteenth Amendment to be free from state intrusion on her parenting of her minor child. While the cases differ slightly when addressing visitation, custody, or guardianship, the polestar is always the same — the best interest of the child. However, a fit natural parent is *presumed* to be acting in the best interest of the child. This is the essence of the parental preference — that it is in the best interest of a child to be placed in the custody of a fit parent over a non-parent. Barring exceptional circumstances, this preference satisfies the best-interest standard.

In this case, Kelly is a fit mother who, for her child's benefit, allowed the appellees to participate in her child's upbringing. She never abandoned the child, she participated in the child's life, she provided support when she was able, and she is now in a stable and supportive marriage. That should be the end of the story, but it is not.

In *Crosser*, *supra*, our supreme court concluded that "[d]etermining whether the child is to be better off with one party versus another is precisely what the court should decide. The natural-parent preference and the fitness of that parent are not the absolute determinants in custody-modification matters, as our case law makes clear." Therefore, we are bound not by a preference but by a determination of the trial court's finding that the child is better off with the appellees than with Kelly.

That finding is not clearly erroneous, and we must affirm. This conclusion is based on the holding of our state's highest court, and I am bound by its reasoning. However, I feel compelled to express my concern that this precedent comes dangerously close to violating a fit parent's fundamental right protected by the Fourteenth Amendment to raise a child without state intrusion. To me,

a requirement that the trial court look beyond parental fitness, beyond our legislatively mandated natural-parent preference, and simply determine "whether the child is to be better off with one party versus another" too severely subjugates the rights of natural, fit parents and cannot be reconciled with their fundamental right to raise their children. With this pronouncement of law, we have thrown otherwise qualified parents into a subjective minefield pitting them against possibly more mature, more capable, or more affluent grandparents, siblings, or others.

WENDELL GRIFFEN, Judge, dissenting.

"It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

— *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

"The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."

— *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

"[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."

— *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000).

Sadly, it appears that the majority has decided to eviscerate one of the most fundamental rights: that of a fit parent to exercise custody, care, and nurture over her child without meddlesome interference by the government. It is not a challenge to find a case supporting the proposition that "a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment." *Troxel v. Granville*, 530 U.S. 57, 77 (Souter, J., concurring) (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Parham v. J.R.*, 442 U.S. 584 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)). Yet, despite the clear, longstanding, and

respected legal preference for upholding the rights of a parent to have custody of her child against the competing claim of a third party unless the parent is judicially determined to be unfit, the majority today has denied the claim of a mother to exercise custody over her daughter without even an allegation of unfitness, let alone proof of unfitness. Like Judge Vaught in his concurring opinion, I decry this decision and the reasoning behind it. However, I cannot join the majority in imposing this result for reasons set forth below.

As admitted by the majority opinion, the prime and controlling factor in child-custody cases is the best interest of the child. *Schuh v. Roberson*, 302 Ark. 305, 788 S.W.2d 740 (1990); *Dunham v. Doyle*, 84 Ark. App. 36, 129 S.W.3d 304 (2004). However, it is established law in Arkansas that "the law prefers a parent over a grandparent or other third person, unless the parent is proved to be incompetent or unfit." *Dunham*, 84 Ark. App. at 40, 129 S.W.3d at 306-07. While this preference is not absolute, *Freshour v. West*, 334 Ark. 100, 971 S.W.2d 263 (1998), it shall not be taken lightly. Our law has always stated that a third party seeking to deprive a parent of custody must first show that the parent is not a suitable person to have the child. *Schuh v. Roberson*, *supra*; *Riley v. Vest*, 235 Ark. 192, 357 S.W.2d 497 (1962). The law establishing the natural-parent preference "must prevail unless it is established that the natural parent is unfit." *Schuh*, 302 Ark. at 306-07, 788 S.W.2d at 741 (citing *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988); *Perkins v. Perkins*, 266 Ark. 957, 589 S.W.2d 588 (Ark. App. 1979)).

The common law established this preference because the law presumes that a fit parent will act in a child's best interests. *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002); *see also Parham*, 442 U.S. at 601 ("[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children."). Until clear evidence has been presented that demonstrates parental conduct concerning the child that rebuts the presumption of parental benevolency, government has no legitimate reason to deny the right of a parent to exercise custody over her child. For government to act in this fashion without such clear proof of unfitness is, in my view, a clear denial of a parent's right to due process of law as guaranteed by the Fourteenth Amendment to the federal Constitution.

The majority states, "The rights of parents are not proprietary and are subject to their related duty to care for and protect

the child; the law secures their preferential rights only as long as they discharge their obligations." However, the burden of proving failure to discharge the parental obligation has never been met by mere proof that an otherwise benevolent parent entrusted her children in the care of another party for a period of time:

> Courts are very reluctant to take from the natural parents the custody of their child, and will not do so *unless the parents have manifested such indifference to its welfare as indicates a lack of intention to discharge the duties imposed by the laws of nature and of the state to their offspring suitable to their station in life.* When, however, the natural parents so far fail to discharge these obligations as to manifest an abandonment of the child and the renunciation of their duties to it, it then becomes the policy of the law to induce some good man or woman to take the waif into the bosom of their home, and when they have done so and, through their attentions to it, have learned to love it as if it were their very own child, this bond of affection will not then be severed, although the natural parent may later repent his breach of the laws of nature and of the state and offer to resume the duties and obligations which he should never have ceased to perform.

Holmes v. Coleman, 195 Ark. 196, 198-99, 111 S.W.2d 474, 476 (1937) (emphasis added), *quoted in Lloyd v. Butts*, 343 Ark. 620, 624, 37 S.W.3d 603, 606 (2001); *Dunham*, 84 Ark. App. at 47, 129 S.W.3d at 311.[1]

The instant case is totally different from cases such as *Larkin v. Pridgett*, 241 Ark. 193, 407 S.W.2d 374 (1966), or *Jones v. Strauser*, 266 Ark. 441, 585 S.W.2d 931 (1979), where the natural parent was completely out of the child's life for a significant portion of time, thus indicating abandonment of the parental role. Kari Chambers was, to be sure, in the physical custody of her grandparents; however, the evidence shows that Kelly Coffee still played a role in her life, regularly visiting her and supporting her. Furthermore, there was unmistakable evidence that the strained relationship between Kelly Coffee and Linda Zolliecoffer made it difficult for Kelly and Kari to have a normal parent-child relation-

[1] By analogy, to establish abandonment in an adoption case, one must present evidence showing that "the parent deserted, forsook entirely, or relinquished all connection with, or concern in, the child." *Zgleszewski v. Zgleszewski*, 260 Ark. 629, 632, 542 S.W.2d 765, 767 (1976) (internal quotes omitted).

ship. Remarkably, the mother in this case is not only being denied the benefit of the natural-parent preference; today's holding works to *reward* a third party whose conflict with the parent has operated to the detriment of the parent-child relationship that the natural-parent preference — along with the rest of the law — exists to protect and foster. Thus, in this decision our court actually penalizes a parent by stripping her of the custody right and puts that parent in the very dilemma that Judge Vaught has mentioned in his concurring opinion.

I am especially concerned about the effect that this holding will have on children whose fit parents make the difficult decision to entrust them with other family members during challenging times. It is not at all unusual for children to be delivered by loving and supporting parents into the care of other family members. Sometimes this occurs to shield the children from the strain of marital discord involving the parents. Children have also been entrusted into the custody of relatives for long periods of time so that they could attend schools or be removed from influences or conditions that their parents considered undesirable, if not threatening. I am very concerned that the holding reached by the majority today operates to treat the parents who make such choices as if they were uncaring, unloving, and unfit to raise their children merely because they may be less affluent, educated, or socially attractive than some third party. My concern grows to the point of alarm as I consider that the parent in this case has never been ever alleged to be unfit, let alone proven unfit. Rather, the law has stripped her of the most fundamental right of parenthood — the right to exercise custody over her own child, without even requiring proof that she did anything — or failed to do something — so as to justify such a disruptive decision.

Today's opinion is an outright, and unwise, rejection of the longstanding principle that a natural parent has a fundamental right to raise his or her children unless shown to be unfit. Absent a showing of unfitness, I continue to believe that it is in a child's best interest to be in the custody of a natural parent and that a fit parent has the right to decide where, and with whom, her child should live. Because the majority's decision goes against this basic principle, I must respectfully dissent.

I am authorized to state that Judges GLADWIN and NEAL join in this opinion.

SUPPLEMENTAL OPINION ON DENIAL of REHEARING
DECEMBER 14, 2005

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

James C. Mainard, for appellees.

JOHN B. ROBBINS, Judge. Appellants David G. Coffee and Kelly Lynn Coffee have filed a petition seeking a rehearing of their appeal following our affirmance of November 9, 2005. Although we deny their petition, we supplement our majority opinion to briefly address appellants' contention that we have ignored their constitutional rights under the Due Process Clause of the Fourteenth Amendment. *See Troxel v. Granville*, 530 U.S. 57 (2000).

While we will not express an opinion as to the disposition of their appeal had this issue been properly presented to us, we remind appellants and the bar that, on appellate review, issues of even constitutional dimension are waived if not presented to the trial court and a ruling obtained. *See London v. State*, 354 Ark. 313, 125 S.W.3d 813 (2003); *Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222 (2001); *Warnock v. Warnock*, 336 Ark. 506, 988 S.W.2d 7 (1999); *Dansby v. Dansby*, 87 Ark. App. 156, 189 S.W.3d 473 (2004); *Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004). In the instant case, this constitutional argument was not raised before the trial court, nor was it even raised by appellants in their briefs before us. It is now raised for the first time in a petition for

rehearing. It comes too late, and we would violate a fundamental appellate rule to decide such issue.

Rehearing denied.

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

NEAL, CRABTREE, and BAKER, JJ., would grant.

CITY of CABOT *v.*
Robert BRIANS and Louise Brians

CA 05-256 216 S.W.3d 627

Court of Appeals of Arkansas
Opinion delivered November 9, 2005

Kenneth Williams, Cabot City Attorney, and *Williams & Anderson P.L.C.*, by: *David F. Menz* and *Kelly S. Terry*, for appellant.

Larry K. Cook, for appellees.

JOHN B. ROBBINS, Judge. Appellant, the City of Cabot, appeals from an order that quieted title to a 60-foot-by-122-foot parcel of land in appellees, Robert and Louise Brians. The City argued that the parcel had been dedicated to it in a plat and bill of assurance approved by the City and filed by the developer in 1994. We agree and reverse and remand.

The parcel at issue is located in the Crestwood Subdivision, Phase II, in Cabot, Arkansas. The subdivision was developed by Blount Farms & Investments Corporation and consists of thirty-five lots and three named streets. Easement strips of six feet or twelve feet in width are located on lots throughout the subdivision.

The northeast corner of the subdivision is occupied by Lot 56, which is situated on a cul-de-sac at the intersection of two streets. Lot 55, which was purchased by appellees in 1995, is south of Lot 56 on the other side of the cul-de-sac. Lying between the two lots is a 60-foot-by-122-foot parcel that the developer's plat refers to as a "60' Access Easement." A general note on the plat states that this easement is "reserved" for a future right-of-way.

In December 2002, appellees sued the City and the developer, Blount Farms, claiming that, after they purchased their lot in 1995, they began using the parcel as their own. They asked that title to the parcel be quieted in them by virtue of seven years of open, visible, notorious, distinct, exclusive, and hostile possession. Blount Farms was served with process but did not answer the complaint. As a consequence, a default judgment was entered against Blount, stating that it had no interest in the parcel. The City responded, however, and claimed that the parcel had been dedicated to it. Thereafter, a bench trial was held to determine if the City had an interest in the parcel. As the trial court recognized, if the City did have an interest, appellees could not claim the parcel by adverse possession because Ark. Code Ann. § 22-1-204 (Repl. 2004) provides:

> No title or right of possession to realty by an incorporated town, city of the second class, city of the first class, school district, county, or the state may be defeated in any action or proceeding because of adverse possession.

Following the presentation of the evidence, the trial court found that the developer had reserved the parcel for itself, and,

thus, the City had no interest in it. Title was therefore quieted in appellees, and the City now appeals.

Quiet title actions have traditionally been reviewed de novo as equity actions. *See, e.g., White River Levee Dist. v. Reidhar*, 76 Ark. App. 225, 61 S.W.3d 235 (2001). However, we will not reverse the trial judge's findings in such actions unless the findings are clearly erroneous. *See id.* A finding of fact is clearly erroneous when, although there is evidence to support it, we are left with the definite and firm conviction that a mistake has been committed. *Id.*

The City argues first that the developer's plat and bill of assurance unambiguously dedicated the parcel to the City. Alternatively, the City argues that, if the dedicatory instruments were ambiguous, the dedication was borne out by surrounding circumstances. We agree with both of these arguments.

As previously stated, the subdivision plat designated the 60-foot-by-122-foot parcel as an "access easement" and noted that this easement was reserved for a future right-of-way. The bill of assurance, which was filed by the developer prior to appellees' purchasing their lot, contained the following pertinent language:

> There are strips of ground shown on said plat and marked "Easements" reserved for the use of public utilities and or for drainage purposes, subject at all times to the proper authorities and to the easement herein reserved. Owners of the lots shall take title subject to the right of public utilities and the public.
>
> The filing of this Bill of Assurance and plat for the record in the office of the Circuit Clerk & Recorder of Lonoke County, Arkansas *shall be a valid and complete delivery and dedication of the streets and easements shown on the said plat.*

(Emphasis added.) When the plat and bill of assurance are read together, the City avers, they unambiguously dedicate the parcel in question to the City.

■ A dedication has been defined as the donation of land or the creation of an easement for public use. *Black's Law Dictionary* 442 (8th ed. 2004). A dedication may be accomplished by express written instrument, *see* 26 C.J.S. *Dedication* § 15 (2001), or often by maps or plats. *See* 26 C.J.S. *Dedication* § 17 (2001); 23 AM. JUR. 2D *Dedication* § 26 (2d ed. 2002). Plats or instruments by which dedications are made are construed as any other writing to ascer-

tain and give effect to the intention of the dedicator. *See generally* 26 C.J.S. *Dedication* §§ 66, 67 (2001). Plats should be construed fairly and reasonably, and unambiguous language should be given its manifest meaning. 26 C.J.S. *Dedication* § 67; *see also Barber v. Watson*, 330 Ark. 250, 953 S.W.2d 579 (1997) (construing a bill of assurance primarily by reference to the plain language of the document).

The plain language of the bill of assurance in this case provided that its filing, along with the plat, operated as a "valid and complete delivery and dedication of the streets *and easements*" shown on the plat. (Emphasis added.) The 60-foot-by-122-foot parcel is shown on the plat as an easement. Thus, upon the filing of the bill and the plat in 1994, the easements on the plat, including the parcel in question, were dedicated.

Appellees argue, however, that the dedicated easements referred to in the bill of assurance are the utility easements. However, this contention ignores the bill's plain language dedicating the "easements" shown on the plat without regard to whether they are utility easements. Appellees also argue that the parcel was not dedicated because it was not identified as a street. However, under circumstances like those in this case, it is unnecessary that the areas to be dedicated be marked as streets; the dedication is sufficient if it appears, from a consideration of the plat as a whole, with reference to the surrounding circumstances, that the spaces were intended to be devoted to public use. *City of Sherwood v. Cook*, 315 Ark. 115, 865 S.W.2d 293 (1993).

The evidence at trial offered a clear indication that the parcel was intended for public use. First, the bill itself states that the owners of the subdivision lots take title subject to the right of public utilities "*and the public.*" (Emphasis added.) Second, at trial, the City called witnesses John Ryan Benefield and James Von Tungeln, who testified that the City and the developer obviously intended that the parcel be dedicated to the City for use as a future street or passageway. Benefield, a former city engineer, said that, although he was not employed with the City when the subdivision plat was approved in 1994, his employment with the City in 2003 and 2004 required him to assist the City Planning Commission with subdivision approval, and he was familiar with the Crestwood development. According to him, the plat's reference to the parcel as a 60-foot access easement meant that "in the future, this area would be a city street used to access property to the east of this

subdivision." He observed that, although the area to the east of the subdivision was undeveloped, the City normally took note of whether there was adjacent, undeveloped property when viewing a subdivision plat and considered, among other things, whether there was access to unplatted pieces of land and whether there were multiple outlets to existing streets, which were important for utility service, emergency vehicles, and future subdivision. As an example, Benefield explained that, in the development of the first phase of Crestwood Estates, a piece of land, or "stub street" was left so that future development could be accessed and, in fact, under current regulations, such a stub street was required. Benefield stated that reserving an access area as a future right-of-way would allow it to be developed later as a street if needed. As he noted, the dimensions of the access easement were consistent with the City's streets.

Von Tungeln, an urban planning expert, testified that he had served as a consultant for the City in the past. Although he was not personally involved in the plat approval for this subdivision, he was familiar with the development. According to him, the 60-foot access easement mentioned on the plat was a case of the City's pursuing a policy of having multiple entrances and exits to subdivisions where possible. Specifically, he testified:

> [I]t's my opinion that they at that time wanted to leave open the possibility of connecting this subdivision with future development, saw no reason to actually build a street and pave it at that point and have the pavement sitting there, but instead, chose to have an access easement platted so that in the future, if that became a requirement and they did in fact connect this subdivision with other subdivisions, that the right-of-way would be there.

Von Tungeln stated that this was "done quite often." He also interpreted the plat's statement that the easement was reserved for a future right-of-way to mean that the Planning Commission intended the possibility that a connecting street be left open.

The above testimony, in conjunction with the language in the plat and bill of assurance, reveal that the parcel was intended for public use. Benefield and Von Tungeln offered virtually undisputed testimony that the developer and the City must have considered the parcel as dedicated. Further, appellees presented no witnesses of their own and did not rebut Benefield's or Von Tungeln's testimony in any meaningful respect.

Appellees further assert that the statement on the plat that the easement was "reserved" meant that it was reserved for the developer. It is true that, when a developer reserves a parcel of land, it may indicate his intention that the designated portion *not* be dedicated to the public. *See Arkansas State Highway Comm'n v. O.&B.*, 227 Ark. 739, 301 S.W.2d 5 (1957); *Fort Smith & Van Buren Bridge Dist. v. Scott*, 111 Ark. 449, 163 S.W. 1137 (1914). However, the surrounding circumstances must be considered in determining what the developer meant by using the word "reserved." *See, e.g., O.&B., supra; Scott, supra.* In *O.&B.*, the developer marked part of a plat as "reserved by owner for sale to Arkansas State Highway Department" and "reserved for highway use." The supreme court held that the parcels were not dedicated to the public, noting that it would be incongruous to both donate land to the public and reserve it for sale. In *Scott*, developers marked a strip of land with the notation "reserve." The supreme court held that the strip was not dedicated to the public because the parties in interest, including the city, had recognized the strip as the developers' private property and the developers and their successors had claimed the strip and exercised acts of ownership over it.

The circumstances in those cases differ markedly from those in the case at bar. Here, the developer used no language such as that in *O.&B.* that would indicate a clear intention to reserve the parcel to himself, nor did the developer exercise any acts of ownership over the parcel after the plat was filed, as in *Scott*; in fact, the developer in this case failed to appear and defend a lawsuit that asserted a claim to the reserved area.[1] Further, there is no proof beyond speculation to support the court's assumption that the developer reserved the parcel for the purpose of developing the property to the east. At the time of trial, the property to the east remained undeveloped, and there was no evidence that the developer had ever owned it. Additionally, unlike the *O.&B.* and *Scott* cases, here, we have a plat designating the parcel as an easement and future right-of-way and a bill of assurance expressly stating that easements on the plat were dedicated. Finally, we note that any doubt or ambiguity in the meaning of a dedicatory plat is construed most strongly against the dedicator and to the reasonable

[1] The dissent's position is that the developer reserved an "access easement" for a "future right-of-way" across the subject property. However, if the developer continued to own this property it is illogical that it needed to also "Reserve" it for some particular purpose.

advantage of the grantees of the dedicated use, *i.e.*, so as to benefit the public rather than the donor. *See* 11A Eugene McQuillen, *The Law of Municipal Corporations* § 33.26 (Rev. 3d ed. 2000); 26 C.J.S. *Dedication* § 67; *Ranier Av. Corp. v. City of Seattle*, 80 Wash. 2d 362, 494 P.2d 996 (1972), *cert. denied*, 409 U.S. 983 (1972).

Appellees also contend that the City did not confirm or accept the supposed dedication by passing an ordinance as required by Ark. Code Ann. § 14-301-102 (1987), which provides:

> No street or alley which shall be dedicated to public use by the proprietor of ground in any city shall be deemed to be a public street or alley, or to be under the care and control of the city council, unless the dedication shall be accepted and confirmed by an ordinance specially passed for that purpose.

Whether or not the parcel in the case at bar can be described as an existing street or alley, our courts have recognized that, despite the language in this statute, whenever a dedicator-owner of land makes and files a plat and thereafter lots are sold with reference to it, such constitutes an irrevocable dedication of any street or passageway for public use shown or indicated on the plat. *See City of Sherwood, supra*; *Wenderoth v. City of Fort Smith*, 256 Ark. 735, 510 S.W.2d 296 (1974); *see also Arkansas State Highway Comm'n v. Sherry*, 238 Ark. 127, 130-31, 381 S.W.2d 448, 451 (1964) (stating that an owner of land who sells lots by reference to a plat, makes an irrevocable dedication of the streets, alleys, squares, parks, and "other public places marked as such on the plat" to the public use and that the dedication "becomes irrevocable the moment that these acts occur"); *Gowers v. City of Van Buren*, 210 Ark. 776, 780, 197 S.W.2d 741, 743 (1946) (stating that, where lots have been sold by reference to a plat, "no formal acceptance by the city" is necessary because, by that act, the dedication becomes irrevocable). In *Bushmiaer v. City of Little Rock*, 231 Ark. 848, 333 S.W.2d 236 (1960), our supreme court addressed the same argument that appellees now make and stated:

> Relative to this point, appellants rely upon [14-301-102], which provides that streets and alleys, dedicated to public use, shall be accepted by the city through ordinance. The record does not reflect that the dedication, here in question, has been accepted by city ordinance. The same argument was made in *Brewer v. City of Pine Bluff*, 80 Ark. 489, 97 S.W. 1034 (1906). As previously

pointed out, this land was platted, the streets dedicated, lots sold by reference to the plats, and the public has used the street for many years. In the *Brewer* case, it was shown that the dedication was never accepted by city ordinance, but this Court said:

> "But the question is not important in this case, for, as before stated, the dedication of it as a public way has now become irrevocable, and the city can accept it at any time. Meanwhile the public has the right to use it, and the plaintiff has no right to obstruct it."

Bushmiaer, 231 Ark. at 855, 333 S.W.2d at 241.

Although *Bushmiaer* and *Brewer* involved situations where, at the time of the lawsuit, there had been public use of the disputed area — unlike the situation in the case at bar — this distinction is not critical. The dedication becomes irrevocable upon the sale of the lots. *See generally Wenderoth, supra*, where a dedication was held to have occurred even though there had been no public use of the parcel in question. Moreover, our courts have declared that, once the dedication has occurred, the city may accept it at any time or when the necessity should arise. *See City of Sherwood, supra*; *Sherry, supra*; *Bushmiaer, supra*; *Gowers, supra.*

In light of these authorities, the City need not have formally accepted or confirmed the dedication of the parcel under the circumstances of this case or made immediate use of the parcel once acquired. The irrevocable dedication occurred when lots were sold by reference to the plat, and the City, at that point, could accept the dedication at any time. Such dedication and right to accept it invested the City with, at the very least, a "right to possession" of the parcel, which, under Ark. Code Ann. § 22-1-204, would bar appellees' adverse-possession claim. *See generally Wood v. City of El Dorado*, 237 Ark. 681, 375 S.W.2d 363 (1964); *Bushmiaer, supra* (recognizing that an adverse claimant cannot acquire title to property that has been dedicated to the city).

Based on the foregoing, we conclude that the trial court clearly erred by quieting title to the parcel in appellees. We therefore reverse and remand this case for entry of an order consistent with this opinion.

Reversed and remanded.

HART, NEAL, VAUGHT, and CRABTREE, JJ., agree.

GRIFFEN, J., dissents.

WENDELL GRIFFEN, Judge, dissenting. The issue in this case is whether the subject property was reserved to the developer (who defaulted his interest to the Brians) or whether the developer dedicated the property to the City of Cabot. I would affirm because the developer reserved the property in question and because, even if the property was dedicated, the circumstances do not support a finding that the City accepted the dedication. Thus, to reverse would put the City in a position that neither the developer's actions nor the City's conduct supports.

The relevant portions of the bill of assurance, examined more fully, are as follows:

> There are strips of ground shown on said plat and marked "easements" reserved for the use of public utilities and/or for drainage purposes, subject at all times to the proper authorities and to the easement herein reserved. Owners of the lots shall take subject to the right of public utilities and the public.
>
> The filing of this Bill of Assurance and plat for record in the office of the Circuit Clerk & Recorder of Lonoke County, Arkansas, shall be a valid and complete delivery and dedication of the streets and easements shown on the said plat.

In addition, Note 7 of the plat specifies: "Access easement shown between Lots 55 and 56 reserved future right-of-way." Every other easement on the plat is merely labeled as an "easement."

The determinative factor is whether the developer intended the above language to function as a reservation or a dedication. Dedication is ordinarily considered as the opposite of reservation. *Arkansas State Highway Comm'n v. O. & B., Inc.*, 227 Ark. 739, 301 S.W.2d 5 (1957). Thus, the term "reserved" is a term of art that does not evince an intent to dedicate property to a city but to retain an interest in property. The majority contends in footnote 1 of its opinion that if the developer continued to own the property, then it is "illogical" that the developer needed to also reserve the property for a particular purpose. It is true that the developer was not *required* to reserve the property for a particular purpose. However, the developer clearly *was* required to reserve any interest in the property that he intended to retain — if the reservation of the access easement had *not* been made, then the property would have been dedicated to the City via the language in the bill of assurance and the plat. Thus, the logical conclusion is that, by

taking the *additional* step of reserving the access easement, the developer intended not to dedicate that property to the City but to reserve it for future use as he saw fit. Accordingly, it was not "illogical" for the developer to dedicate some property but to reserve other property for a specific use. To the contrary, the fact that the developer here reserved property for a specific purpose convincingly demonstrates that *he* intended to determine the future use of the property, rather than to allow the City to make that determination.

The majority relies on the language from the bill of assurance stating that the filing of the plat and the bill of assurance shall constitute a "valid and complete delivery and dedication of the streets and easements shown on the said plat." Due to that language, and due to the fact that the disputed piece of property is an easement, the majority concludes that the disputed property, which contains the word "easement" in its description, was dedicated to the City because *all* easements under the plat are dedicated to the City. This is not true.

The majority, while accusing the Brians of ignoring the plain language of the plat and bill of assurance, itself ignores the plain language of the plat and bill of assurance dedicating "easements" as public-usage easements, but specifically reserving the subject property as an "*access* easement" (emphasis added). In so doing, the majority points to the language in the bill of assurance indicating that the owners of the lots take title subject to the rights of public utilities and the public. However, the majority disregards the fact that this provision more fully states:

> There are strips of ground shown on said plat and marked "easements" reserved for the use of public utilities and/or for drainage purposes, subject at all times to the proper authorities and to the easement herein reserved. Owners of the lots shall take subject to the right of public utilities and the public.

Thus, while the owners of the lots take subject to the rights of the public utilities and the public, the rights of the public utilities and the public are limited by the reservation and other limiting language in the plat and bill of assurance in this case.

The plain, unambiguous language as quoted above indicates that the lots marked merely "easement" are the lots intended for public purposes. However, the lot in question is marked, "access easement." On its face, the reservation of an "access easement" for

a "future-right-of-way" where the remaining easements are dedicated for public usage evinces a clear intent to treat the subject property differently, and not as an easement presently dedicated for public usage. *See Arkansas State Highway Comm'n v. O. & B., Inc., supra,* (affirming a jury verdict finding no dedication where the owner reserved the land for sale to the public agency involved).

The majority also claims that the reservation is ambiguous and thus, that the surrounding circumstances must be considered in determining what the developer meant by using the word "reserved." However, when the language of the bill of assurance and plat is construed in its entirety, there is no ambiguity. Moreover, tellingly, none of the City's witnesses testified as to the *surrounding circumstances at the time the plat was adopted*, except for the City Clerk, who merely testified that the City did not pass an ordinance accepting the plat. The testimony by John Benefield and James Von Tungeln, who were not employed by the City at the time the plat was adopted, merely established the Cabot City Planning Commission interpreted the language in Note 7 of the plat stating that "access easement shown between Lots 55 and 56, reserved future right-of-way" to mean that in the future that area would be a city street used to access property east of the subdivision.

Quite simply, the fact alone that the City would *presently* benefit if the developer had dedicated the property to the City in 1994 does not establish that it was the developer's intent to do so or that he thereafter did so. Nor is it relevant that under the City's *current regulations*, which were not in effect when the plat was adopted, that a "stub street" is required to access future development. Further, it does not matter that the trial court speculated or assumed that the developer reserved the land for the purpose of developing the property to the east or even, as the City asserts, that the developer may have reserved the property in 1994 with the *eventual* intent to provide the City a future right-of-way. The owner's intent must be ascertained from the acts of the owner and not from any purpose hidden in his mind. *Fort Smith & Van Buren Bridge Dist. v. Scott*, 111 Ark. 449, 163 S.W. 1137 (1914). Thus, it matters only that the developer did not, when the plat was filed or thereafter, actually dedicate the property to the City.

Moreover, the majority errs in holding that the City can claim fee title to the land and thereby defeat the Brians's adverse possession claim because "the dedication was borne out by surrounding circumstances." Although the trial court did not appear

to rely on this fact, I would affirm on this alternate ground because it is clear that the plat was not accepted by a City ordinance, as is required pursuant to Ark. Code Ann. § 14-301-102 (1987). This statute provides:

> [n]o street or alley which shall be dedicated to public use by the proprietor of ground in any city shall be deemed to be a public street or alley, or to be under the care or control of the city council, unless the dedication shall be accepted and confirmed by an ordinance specially passed for that purpose.

It is clear here that the City did not enact an ordinance accepting the plat and that even if the City did accept the plat, that acceptance never became irrevocable.

As previously noted, the only surrounding circumstance at the time the plat was adopted that was established was that the City did not pass an ordinance accepting the plat. Under the 1994 subdivision regulations in effect at the time the plat was filed, the City did not require that an ordinance be passed in order to accept a plat — only approval by the City Council was required. Thus, the City passed no ordinance to accept the plat in this case. However, despite the fact that the City of Cabot in 1994 did not require the City to pass an ordinance to accept a plat, Arkansas law did impose that requirement.

Despite this requirement, the majority insists that the City gained fee title to the property, reasoning that the City's acceptance has become irrevocable since the plat was filed and plots have been sold in reference to the plat. It is true that where the plat is filed and lots are sold in reference to it, the *public areas*, such as streets, passageways, public use squares, or other public places shown on the plat become public property, the dedication becomes irrevocable, and a city may thereafter accept the dedication at any time. *City of Sherwood v. Cook*, 315 Ark. 115, 865 S.W.2d 293 (1993); *Arkansas State Highway Comm'n v. Sherry*, 238, Ark. 127, 381 S.W.2d 448 (1964). However, the City here has not gained fee title by this method — the area in question is not a public area because it was reserved, it was not used for public purposes, and it was *privately* used.

The majority cites to *Wenderoth v. City of Fort Smith*, 256 Ark. 735, 510 S.W.2d 296 (1974), to support that a dedication of public areas may become irrevocable even where there has been no public use of the property in question. In that case, the trial court

specifically determined that a twenty-five foot strip of property was dedicated to the city for street purposes even though the area had not been used by the public. However, that case is distinguishable. First, the plat in that case specifically stated that the streets shown were dedicated for public use as highways and contained two similar twenty-five foot strips of land that had been named as streets. Second, the land in question had never been used by the public, but also had never been treated as private property. Finally, the party in *Wenderoth* was estopped from arguing the land in question had been dedicated as a public street when they had previously taken an inconsistent position at a meeting with city officials.

By contrast, here, it cannot be said that the property at issue was "dedicated" in any respect, much less as a public area — the majority's opinion in this regard simply ignores the effect of the reservation in Note 7 of the plat. Simply because a plat is filed and lots are sold with reference to the plat does not mean that *all* of the property shown on the plat is thereby dedicated to the public. The fact that public areas become dedicated to the city upon filing of a plat does not preclude a developer from reserving an interest in certain property; to the contrary, that is the precise purpose of a reservation.

In any event, the property in this case is not a public area as was the property in *Wenderoth*. Although the property could have been dedicated or developed as an extension of Birchwood Drive, which borders the property on the west, it was not so dedicated or developed. Further, unlike the property in *Wenderoth*, nothing on the plat supports that there were other similar lots that were reserved for public use. To the contrary, as noted previously, the property at issue is the only property that is labeled an access easement that is reserved for future right-of-way.

Like the property in *Wenderoth*, the property in this case was not used by the public; however, unlike the property in *Wenderoth*, the instant property was put to private use that rose to such a level that the trial court found that the Brians had possessed the property by adverse possession. Thus, unlike the property owners in *Wenderoth*, it cannot be said here that the Brians ever averred that the property was public property or that they should be estopped from asserting that the property was reserved.

Accordingly, even assuming that the plat was properly accepted by the City, that acceptance did not grant to the City fee title to that property included in the plat that was *not* a public area

and that was not otherwise dedicated to the City. For the above reasons, I would affirm the trial court's order quieting title in the Brians.

Sean P. TUMLISON *v.* STATE of Arkansas

CA CR 04-1367 216 S.W.3d 620

Court of Appeals of Arkansas
Opinion delivered November 9, 2005

John F. Gibson, Jr., for appellant.

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

WENDELL L. GRIFFEN, Judge. Sean Tumlison appeals from the sentence he received for his conviction for computer fraud. He argues that the trial court erred in not submitting the issue of restitution to a jury and by ordering excessive restitution. Appellant does not challenge the sufficiency of the evidence to support the conviction. We hold that appellant waived his right to a jury trial with regard to the calculation of restitution. However, we agree that the trial court ordered excessive restitution. Accordingly, we reverse and remand.

Appellant was charged with computer fraud, theft of property worth over $2500, and five counts of second-degree forgery. Scott Woodward, criminal investigator for the Arkansas State Police, began his investigation by looking at business records provided by Paula McMahan, district manager for Johnson's Warehouse-Showroom. He took statements from various people who purchased furniture from the store. Some of the contracts he saw indicated that the customer returned the merchandise, but in at least two cases, he went to the customer's home and discovered that the customer had not made a return. During an interview with appellant, appellant stated that he told McMahan about the account for a friend of his. Appellant told Woodward that he was being pressured to collect on the account and that he started a scheme to get his employer off his back. The scheme involved taking money from one account to cover another. When that account became due, he would pay the old account with a new one.

Ricky Ellis testified that he purchased a stainless steel refrigerator for his business. He stated that he did not buy the refrigerator immediately; however, appellant marked the refrigerator as "sold" and held it for him. Thirty days later, Ellis received a bill for the refrigerator. He told appellant that he had been billed for the refrigerator, and appellant told him that he would mark the refrigerator as unsold and then "sell" it again. Ellis actually purchased the refrigerator six months later. He was shown a contract indicating a purchase of various other appliances; however, he stated that he did not sign the contract. He also stated that he got behind on his payments in early 2002 and that appellant started coming to him and asking for payment.

Robert Leonard testified that he worked at Pauline Baptist Church. He stated that one Sunday, he made an appeal to the church for new furniture. Appellant later showed Leonard a couple of sectionals in the store's warehouse. Appellant told Leonard that he wanted to donate them to the church, and Leonard accepted them. Leonard was shown a purchase agreement indicating that the church had purchased two glider rockers, two gliders, and a sectional. He testified that the church only received the sectional. The purchase agreement stated a purchase price of $2623.47; however, Leonard testified that no payment plan was discussed and that he did not sign the agreement. The State also presented the testimony of several other customers who noticed either inconsistences with the purchase agreement and the actual agreement or fraudulent signatures on contracts.

John Johnson, part owner of Johnson's Warehouse-Showroom, testified that appellant was an excellent manager but that "it just kind of fell apart." Regarding the Ellis account, Johnson testified that appellant sold more than $7000 worth of appliances for about a $700 markup from wholesale, which was cheaper than any employee could buy them. Johnson testified that he pressed appellant to stay on top of Ellis over this deal. Ellis eventually paid the account. On cross-examination, Johnson testified that appellant was taking money from other accounts to pay on Ellis's account. He noted that, when he checked the computer, he discovered several outstanding accounts. Johnson learned of appellant's scheme after he started calling customers.

Paula McMahan was called to talk about the investigation. Her direct testimony went into the specifics of appellant's scheme. On cross-examination, she testified that her investigation took approximately three months. The investigation started when she noticed that the company had money posted to an account for which it was not intended. A collection for J.R. Jackson was the first one that alerted McMahan to the problem. When calculating the loss to the business, she counted the difference between the contract that appellant wrote for the customer and the money collected from that customer. The company was holding appellant responsible for any shortage in profits.

After hearing all of the testimony in the case, the jury found appellant guilty of computer fraud but acquitted him on the theft and forgery charges. The following colloquy then occurred:

> THE COURT: The verdicts will be received then and then tendered to the Clerk for insertion in the court

file. Approach the bench, counsel. Do y'all want to submit the sentencing to the jury?

MR. GIBSON [COUNSEL FOR APPELLANT]: I don't know that we really need to. He's already —

MR. CASON [COUNSEL FOR THE STATE]: Let me talk to my people and see if they're agreeable to a certain number of years and I'll —

MR. GIBSON: We'd go the max.

MR. CASON: The max is six.

MR. GIBSON: How about five?

MR. CASON: Wait a minute now.

MR. GIBSON: Back up one. Ask him about five.

MR. CASON: How about five supervised and one unsupervised.

MR. GIBSON: Oh, no, no, no. Let's just go five supervised.

MR. CASON: Well —

MR. GIBSON: See what he says.

THE COURT: I might let you talk to them and —

MR. CASON: Let me talk to them.

[*after a brief recess*]

MR. CASON: Five years supervised is fine.

THE COURT: Okay. Thank y'all. Ladies and gentlemen, normally, the case would at this time be submitted to you regarding your deliberations on the sentence to be imposed. However, in this case, the parties have agreed what the recommended sentence should be and that is five years supervised probation, and this has been agreed

to between the parties so we don't need to keep y'all any longer for any further deliberations or considerations. I thank you for your work the last three days. You're excused tomorrow and you can be dismissed at this time if you would like to be. In fact, I'm probably going to delay sentencing in order for some paperwork to be done at a later date, and so I'll dismiss y'all at this time if you would like to be.

[*jury is dismissed*]

THE COURT: Counsel, regarding the sentencing, I know what the recommendation is. I suppose that, I guess, conditions of the probation are open for discussion argument. Now, I know we've got to do some paperwork, in order for Mr. Tumlison to have those conditions, whatever they might be. I suggest that we set this for sentencing hearing. It would be the most reasonable way to do it.

MR. GIBSON: That's what the defendant would move, Your Honor, if the Court would do that, sentencing hearing, the first opportunity of the Court.

. . .

THE COURT: Okay. Well, we'll put this back on the docket then and I'll order Mr. Tumlison back. Let's take it up on May 17th. Since we're going to have other people here that day, too, let's set it at 3:00 p.m. and we'll take it up at that time, and I'll excuse Mr. Tumlison and order him back at to court at that time. We'll be in recess.

At the sentencing hearing, McMahan testified that Johnson's suffered losses of $40,614.15 due to appellant's computer fraud. The losses were broken into three categories. The first category represented losses where no payment was posted. For example, McMahan noted the J.R. Jackson account, where appellant wrote a fraudulent contract of $5294.88 but was paid with a check for only $4500. Appellant had put the money on three other accounts and did not credit Jackson's account. The company paid sales tax on $5294.88. There were eleven other instances, allegedly costing Johnson's $16,140.78.

Next, McMahan accounted a $10,902.40 loss for fraudulent contracts to cover inventory. For example, she noted $2453.31 for Pauline Baptist Church. Appellant intended to pay for the inventory but did not. In addition, the contract was in the name of the church when it should have been in appellant's own name. Other contracts of this type included contracts for items that appellant purported were returned but were not and contracts for items for which there was no payment.

Finally, McMahan noted a loss of $13,570.97, which represented the time that she and Johnson spent finding and fixing the computer problems. She noted that Johnson spent ninety-two hours finding the problem, which she calculated to be worth $2300. She stated that she spent three months fixing the problems and calculated that twenty-five percent of her salary went to fixing the problem when she could have been doing something else. McMahan calculated her time to be worth $11,270.97.

Appellant testified that the first set of accounts where no payment was posted was a result of swapping accounts to cover the Ellis account. He stated that nothing prevented the company from posting payments on those accounts. Regarding the second set of fraudulent contracts, appellant testified that he did not see where Johnson's had lost money. He stated that the contracts were drafted to get the items off the inventory books. Appellant also testified that, while Johnson's paid sales tax on the contracts, it should have been credited with the sales tax they paid when the item was "returned." Appellant also calculated what the Pauline Baptist Church contract cost Johnson's. He stated that Johnson's lost $204 in commissions, $1097.80 from the cost of the furniture given to the church, and $98.80 in sales tax. This came to $1400.60, which he was willing to pay.

On cross-examination, appellant stated that there would be no way for Johnson's to recover the sales tax it paid on the contracts to which there were no payments posted. Regarding the fraudulent contracts, appellant stated that the contracts should have been redone. He discussed one account, the Reinhart account. He noted that the oven the Reinharts wanted was still in the warehouse when he left Johnson's. The contract had not been paid because the oven had not been delivered. He concluded that his opinion was simply different from McMahon's regarding the $10,902.40 figure.

The trial court ordered appellant to pay $29,429.95 in restitution. It noted that the computer fraud began to cover up the

$5000 owed on the Ellis account; however, the fraud went much further than that. It found that Johnson's was entitled to the $13,570.97 that Johnson's requested for fixing the problem. It also found that Johnson's was entitled to its out-of-pocket expenses for the fraud, which included sales tax paid. Regarding the Pauline Baptist account, the court allowed $1400, the amount appellant stated he owed. For the remainder of the damages claimed by Johnson's, the trial court stated that markup on Johnson's inventory was about fifty percent and that the markup represented out-of-pocket expenses.

Appellant argues that the trial court erred by ordering him to pay restitution. He first contends that he did not waive his right to sentencing by a jury; thus, the issue of restitution should have been a question for the jury. Alternatively, he contends that he did not agree to the amount of restitution as a condition of his probation.

Arkansas Code Annotated section 5-4-205 (Supp. 2005) provides in relevant part:

> (a)(1)(A) A defendant who is found guilty or who enters a plea of guilty or nolo contendere may be ordered to pay restitution.
>
> . . .
>
> (2)(A) The sentencing authority, whether the trial court or a jury, shall make a determination of actual economic loss caused to a victim by the crime.
>
> . . .
>
> (3)(A) The determination of the amount of loss is a factual question to be decided by the preponderance of the evidence presented to the sentencing authority during the sentencing phase of a trial.
>
> (B) The amount may be decided by agreement between a defendant and the victim represented by the prosecuting attorney.
>
> . . .
>
> (c) If the defendant is placed on probation or any form of conditional release, any restitution ordered under this section shall be a condition of the suspended imposition of sentence, probation, parole, or transfer.

[redacted] Appellant contends that he did not waive his right to sentencing by jury; however, the record shows the contrary. Rule 31.2 of the Arkansas Rules of Criminal Procedure requires that, if

a defendant wishes to waive his right to trial by jury, he must do so personally, either in writing or in open court. Waiver is defined as "an intentional relinquishment of a known right." *Calnan v. State*, 310 Ark. 744, 748, 841 S.W.2d 593, 595 (1992) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Here, appellant's counsel negotiated a probation term of five years, then agreed to have a sentencing hearing on the conditions for probation *after* the trial court dismissed the jury. This constitutes a waiver of sentencing by jury. Appellant states that the waiver was ineffective because "[t]he record reflects that all discussions concerning the sentencing phase of the trial were between the Court, the prosecuting attorney and *defense counsel*" (emphasis added). However, appellant cannot sit idly by while his counsel proceeds to waive his right to a jury. *See Johnson v. State*, 314 Ark. 471, 863 S.W.2d 305, *reh'g denied*, 314 Ark. 471, 868 S.W.2d 42 (1993). Appellant's right to sentencing by jury was effectively waived.

Appellant also relies on Ark. Code Ann. § 5-4-303 (Supp. 2003), the statutory provision regarding the conditions that a court can impose on probation. Subparagraph (h)(1)(A) provides:

> If the court suspends the imposition of sentence on a defendant or places him or her on probation conditioned upon his or her making restitution or reparation under subdivision (c)(8) of this section, the court, by concurrence of the victim, defendant, and the prosecuting authority, shall determine the amount to be paid as restitution.

Appellant reads this statute to mean that if the court imposes restitution, the victim, defendant, and prosecuting attorney must agree on the amount. He also relies on the supreme court's interpretation of the statute in *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988), where the supreme court stated:

> If the court suspends the imposition of sentence or places her on probation conditioned upon making restitution as provided by Ark. Code Ann. § 5-4-303, payment must be in an amount she can afford to pay and the victim, defendant and prosecuting attorney must agree on the amount. This section of the code appears to be aimed at allowing an accused to remain out of prison so long as satisfactory payments of restitution are being made. Immediate imprisonment would thwart such intent. Section 5-4-303 is available to the trial courts if deemed just and proper.

Id. at 27, 746 S.W.2d at 374. However, that same case noted that Ark. Code Ann. § 16-90-305 (which has since been repealed and replaced by Ark. Code Ann. § 5-4-205) allowed the prosecuting attorney to make a recommendation about what amount of restitution would be proper and allowed the defendant to introduce evidence in mitigation of the amount recommended.

We agree with the State's interpretation of Ark. Code Ann. § 5-4-303. The statute authorizes the court to set the amount of restitution if the victim, defendant, and prosecuting attorney agree to allow the court to do so. Without the phrase "by concurrence of the victim, defendant, and the prosecuting authority," the latter portion of subparagraph (h)(1)(A) reads, "[T]he court shall determine the amount to be paid as restitution." The additional phrase imposes the condition upon which the court would make that determination, that condition being the victim, defendant, and prosecuting attorney agreeing to allow the court to do so. Appellant's interpretation of the statute would lead to an interpretation inconsistent with allowing the trier of fact to determine restitution as allowed by Ark. Code Ann. § 5-4-205. Accordingly, appellant did not have to agree with the amount of restitution before the trial court imposed that amount.

Next, appellant argues that the amount of restitution ordered by the trial court was excessive. Specifically, he argues that restitution should have been limited to the Ellis account and that because the account was eventually paid, no restitution was due. Restitution is meant, as far as it is practicable, to make the victim whole with respect to the financial injury suffered. *Nix v. State*, 54 Ark. App. 302, 925 S.W.2d 802 (1996). When compensating a victim for actual losses suffered, compensation may include an amount over and above the actual value of the interest that is the subject of the case. Therefore, we disagree with appellant's contention that restitution could not be more than what was owed on the Ellis account.

However, we hold that the trial court's award of restitution was indeed excessive. Arkansas Code Annotated section 5-4-205 requires the sentencing authority to make a determination of "actual economic loss." *See also Donovan v. State*, 71 Ark. App. 226, 32 S.W.3d 1 (2000). The cost to investigate appellant's fraud does not constitute actual economic loss. Furthermore, it is the function of law enforcement to investigate violations of the law. Johnson's

investigatory expenses, for the purposes of this criminal proceeding, were self-incurred. It cannot recover those losses from appellant. It is, however, entitled to incur actual economic losses resulting from appellant's fraud, which at a minimum includes excess taxes and commissions paid on non-existent sales.

Therefore, we reverse the award of restitution and remand this case with instructions to hold another hearing and award restitution based on Johnson's actual economic loss.

Reversed and remanded.

VAUGHT and ROAF, JJ., agree.

WAL-MART STORES, INC. Claims Management, Inc. *v.* Irena KING

CA 05-291 216 S.W.3d 648

Court of Appeals of Arkansas
Opinion delivered November 9, 2005

Bassett Law Firm, LLP, by: *Curtis L. Nebben*, for appellant.

Orvin W. Foster, for appellee.

KAREN R. BAKER, Judge. Appellant Wal-Mart Stores, Inc., appeals the decision of the Workers' Compensation Commission awarding benefits to appellee Irena King. Appellant's sole point on appeal is that substantial evidence does not support the Commission's finding that appellee was engaged in employment services at the time of the accident, thereby sustaining a compensable injury. We find no error and affirm.

The facts and circumstances surrounding the events leading to appellee's injury were primarily undisputed and submitted to the Administrative Law Judge by stipulations contained in the prehearing order, medical records, the deposition of appellee, the deposition of Charles Bentley who was the store manager of the Mena Wal-Mart, and the deposition of Carol Moran who was both the manager of the bakery and appellee's supervisor. Appellee was employed by appellant at its Mena store on May 12, 2003, when she slipped and fell, fracturing her right wrist. The medical evidence presented included radiographic studies of the injuries. Appellee fell while she was attempting to take her break and moving from her assigned work area to the employee lounge.

The real controversy in this case centers on the provisions of Arkansas Code Annotated section 11-9-102(4)(B)(ii) (Supp. 2001). This subdivision expressly excludes from the statutory definition of a compensable injury any injury that occurred at a time when employment services were not being performed. Appellee's accidental fall and resulting injury occurred during appellee's regular working hours and while she was being paid, or "on the clock." All of the witnesses agreed that when appellee took her allowed break, she was required to leave her work area that was located in the front of the store in the bakery area. Appellee testified that she was required to take her break in the employee lounge located in the back of the store. The store manager, Charles Bentley, testified that appellee was free to go anywhere she desired and could even have left appellant's premises. Carol Moran, the assistant store manager and the bakery department manager, testified that appellee was allowed to take her break anywhere inside the store, but could not leave the premises except on her lunch break. Both Mr. Bentley and Ms. Moran testifed that in their opinion, appellee's break began when she left her assigned employment area; however, Ms. Moran indicated that any time appellee or any other employee was out in the area of the store

open to the public, even if on a scheduled work break, they were expected to answer any questions or provide any reasonable service to the store's customers.

Regarding the discrepancy in testimony as to whether appellee was required to take her break in the employee's lounge, the Commission concluded that although appellee's supervisors had not expressly ordered or directed her to take her breaks in the employee lounge, it was apparent that she and the other store's employees were implicitly encouraged to do so. Mr. Bentley expressly stated that the normal procedure was for the employees to take their breaks in the employee lounge. Ms. Moran testified that the bakery employees "need to take their break in the break room." In making its finding, the Commission observed that "[i]t is often difficult for a salaried employee, such as the [appellee], to differentiate between a direct order and such 'encouragement.' " The Commission found that while appellee may have been mistaken in her belief that she "had to take her break" in the employee lounge, that she sincerely believed that it was required and was attempting to follow what she perceived to be a directive from her employer. The Commission awarded benefits to appellee finding that at the time of her accidental fall and resulting injury, she was performing employment services within the meaning of Arkansas Code Annotated section 11-9-102(4)(B)(iii) and that her employment related injury is not expressly excluded from constituting a compensable injury by the provisions of this subsection. Furthermore, the Commission held that appellee had proven that the physical injuries that she sustained satisfied all of the statutory requirements for a compensable injury.

Appellant asks us to reverse the Commission arguing that because appellee slipped and fell while going on her break, her actions were totally personal in nature. It asserts that because her intent was to go to the employee lounge, that appellant received no benefit from her actions. Appellant also argues that although appellee had a duty to help any customer on her way to the break room, that she was not actually performing any of these types of duties when she fell. Appellant relies heavily on the cases of *McKinney v. Train and Travelers Indemnity Co.*, 84 Ark. App. 424, 143 S.W.3d 581 (2004) and *Robinson v. St. Vincent*, 88 Ark. App. 168, 196 S.W.3d 508 (2004), in its argument. In both of those cases, we affirmed the Commission's denial of benefits.

In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable infer-

ences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Smith v. City of Fort Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004). Substantial evidence exists if reasonable minds could reach the same conclusion. *Id.* When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Id.*

Here, appellant challenges the Commission's award of benefits asserting that the Commission erred as a matter of law by determining that appellee was engaged in employment services at the time of the accident, thereby sustaining a compensable injury. Arkansas Code Annotated section 11-9-102(4)(A)(I) (Supp. 2001) defines "compensable injury" as "an accidental injury causing internal or external harm ... arising out of and in the course of employment. . . ." Employment services are performed when the employee does something that is generally required by his or her employer. *Collins v. Excel Spec. Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002); *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002). We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." *Collins, supra; Pifer, supra.* The test is whether the injury occurred "within the time and space boundaries of employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interests directly or indirectly." *Collins, supra*; *Pifer, supra.* In both *Collins* and *Pifer*, the supreme court specifically overruled "all prior decisions by the Arkansas Court of Appeals" to the extent that they were inconsistent with the holdings in *Collins* and *Pifer.* See *Collins*, 347 Ark. at 819, 69 S.W.3d at 20; *Pifer*, 347 Ark. at 859, 69 S.W. 3d at 5.

While appellant urges us to find similarities between the employees' situations in *McKinney* and *Robinson*, the relevant inquiry is whether reasonable minds could reach the same conclusion as the Commission given the evidence presented. In the case before us, the store manager testified that the normal procedure followed by employees taking a break was to go to the employee lounge. Appellee's direct supervisor specifically stated that the bakery employees "need to take their break in the break room."

Appellee explained that she believed she was required by her employer to go to the break room while on her break, and the Commission accepted her belief as sincere. Additionally, appellee was required to assist customers during her break if assistance was requested. Our supreme court in *Collins* and *Pifer* directed this court to focus our attention on what appellant was doing at the time of the injury. The testimony regarding the employee breaks and the lounge provided by the employer for the breaks supports the Commission's finding that appellee was generally required by her employer to go to the employee lounge during her break. *See Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002) (holding that an employee injured when she returned to her locker to secure her personal items before returning to work after a break was carrying out Wal-Mart's purpose or advancing Wal-Mart's interests). Consequently, we cannot say that the Commission's decision that the injury occurred within the time and space boundaries of employment when the employee was carrying out the employer's purpose or advancing the employer's interests, directly or indirectly, was in error. Accordingly, we affirm.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.

Kathy Kay WELLS and Rodney Dutton *v.*
STATE of Arkansas

CA CR 04-914 217 S.W.3d 145

Court of Appeals of Arkansas
Opinion delivered November 16, 2005

[redacted]

Erwin L. Davis, for appellant.

Mike Beebe, Arkansas Attorney General, by: *Karen Virginia Wallace*, Assistant Attorney General, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. After a jury trial, appellants Kathy Wells and Rodney Dutton were found guilty of abuse of an adult and false imprisonment, and Dutton was additionally found guilty of use of a prohibited weapon. On appeal, appellants contend that there is no substantial evidence to support their convictions and that the trial court erred in denying their motion to suppress evidence obtained in the warrantless search of their residence. We affirm.

Preservation of appellants' right to freedom from double jeopardy requires a review of the sufficiency of the evidence prior to a review of trial errors. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984). In determining the sufficiency of the evidence to support a criminal conviction, we view the evidence in the light most favorable to the State, considering only the evidence that supports the verdict, and we affirm if there is substantial evidence to support the verdict. *Lowe v. State*, 357 Ark. 501, 182 S.W.3d 132 (2004). Substantial evidence is evidence that is forceful enough to compel reasonable minds to reach a conclusion one way or the other without having to resort to speculation or conjecture. *Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004).

Viewed in light of this standard, the evidence reflects that the victim, who was eighty-seven years of age at the time of trial, has suffered from Alzheimer's disease since 1996. There was evidence that the previous residence of appellants and the victim was purchased at a foreclosure sale by Ottie Talkington. Mr. Talkington testified that, when he inspected the residence following the sale, he found it to have an unbearable smell of urine and feces and had what appeared to be human feces in the carpet and on the floor. The air conditioner in the house was broken and the toilets were filled with human waste. Thirteen truckloads of waste were removed from the residence. The room where appellant Wells had informed him that the victim stayed had an unlit, unventilated closet that reeked with an overpowering odor of urine. The closet was fitted with a deadbolt that locked from the

outside and that could not be opened from inside the closet without a key. Talkington found a Burger King box filled with human feces just outside the closet, and a hand print on the inside of the closet door. After making these discoveries Mr. Talkington's wife, Latisha Sue Talkington, concluded that someone had been imprisoned in the closet, and she called the police.

Detective Lannie Reese assisted in the ensuing investigation into the welfare of the octogenarian victim. Upon receiving information that the victim was at 1117 N. 34th Street, he promptly went to that address. Appellants both answered the door and invited Detective Reese into the living room. Detective Reese informed them that he was there to check on the welfare of the victim. When appellants informed Detective Reese that the victim was visiting a friend, but that they did not know the friend's name or address, he concluded that the victim was in danger and began to conduct a warrantless search of the residence. Appellant Wells ran to the back bedroom and tried to shut the door. Forcing the bedroom door open, Detective Reese saw that the bedroom closet was barred with a two-by-four secured by L brackets. What appeared to be fecal stains were seen on the bedroom carpet. The two-by-four was removed, and the victim emerged from the closet. She was naked, disoriented, and was carrying dried feces in both hands. Her eyes had difficulty adjusting to the light. She was very frail and white and said that she was hungry. The closet in which the victim was imprisoned smelled strongly of urine and contained a sheet, a cup, a food container, and a bedpan. There was no air conditioning, window, or other ventilation in the closet. Appellants admitted that they locked the victim in the closet, stating that they did so for an hour or ninety minutes at a time, eight to ten times per day. The victim, who was unable to walk without assistance and was in need of medical attention, was transported to the hospital. The victim weighed eighty-eight pounds when she was rescued, and has since returned to her normal weight of approximately one hundred and twenty pounds.

Appellants were convicted of violating Ark. Code Ann. § 5-28-103 (Repl. 1997), which in pertinent part provides that:

> (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 law.

At the time of the offenses, "abuse" was defined in section 5-28-101(1) as including:

> (A) Any intentional and unnecessary physical act which inflicts pain on or causes injury to an endangered or impaired adult, including sexual abuse; or
>
> (B) Any intentional or demeaning act which subjects an endangered or impaired adult to ridicule or psychological injury in a manner likely to provoke fear or alarm[.]

Ark. Code Ann. § 5-28-101 (Supp. 2001).

Appellants argue that their actions did not constitute Class B felony adult abuse because there is no substantial evidence that the victim was seriously injured or placed in substantial risk of death. We disagree. "Serious physical injury" is defined as physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ. Ark. Code Ann. § 5-1-102(19) (1987). The record shows that the victim was aged and suffered from severe disorientation and confusion as a result of Alzheimer's disease. By the time she was found and rescued by Detective Lannie Reese, the victim had lost thirty pounds and had become too weak to walk without assistance. By their own admission, appellants kept her locked in a closet for hours at a time several times per day, and there was evidence that the closet was filthy and unventilated. In light of the evidence of the victim's profound weight loss, debilitation, and inability to walk when rescued; of the unsanitary, unhealthy, and inhumane conditions of her confinement; and of the expert testimony that such confinement was dangerous and never appropriate for an Alzheimer's patient, we cannot say that the finder of fact could not properly conclude that the victim suffered protracted impairment of health and substantial risk of death because of her confinement by appellants. We hold that the evidence is sufficient to support a finding of serious physical injury.

Appellants also argue that the evidence is insufficient to support their convictions for false imprisonment and appellant Dutton's conviction for use of a prohibited weapon.

These arguments are not well-taken and require little discussion. Appellants' argument that there is no evidence that the victim was held against her will defies logic in light of the victim's condition, the locked and barred closet in which she was confined, and appellants' efforts to conceal her imprisonment. There was no evidence that the victim consented to her imprisonment and much evidence that she was incapable of doing so. With regard to appellant Dutton's argument that there was no evidence that he was the person in possession of the prohibited weapon, a sawed-off shotgun, there was evidence that Dutton admitted possessing it, that it had been inoperable when he first obtained it, and that, when seized, it had been cleaned, repaired, and was loaded.

The remaining issue involves the denial of appellants' motion to suppress evidence found in the warrantless search of their house. In reviewing the trial court's denial of a motion to suppress evidence, we conduct a *de novo* review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003).

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. *Holmes v. State*, 347 Ark. 530, 65 S.W.3d 860 (2002) (citing *Payton v. New York*, 445 U.S. 573 (1980)). In the absence of a warrant, both probable cause and exigent circumstances must be present in order to enter a residence or private dwelling without violation of the Fourth Amendment prohibition against unreasonable searches. *Butler v. State*, 309 Ark. 211, 829 S.W.2d 412 (1992). Exigent circumstances are those requiring immediate aid or action. *Id.* Based on our *de novo* review of the totality of the circumstances, we hold that there existed both probable cause and exigent circumstances to support the search in this case. Detective Reese had, four days before the search, obtained evidence indicating that someone had been imprisoned under appalling conditions in the closet at appellants' former residence and that the victim, an Alzheimer's patient, was missing. Investigation proceeded and, after learning of appellants' new address from utility records, the detective recruited other officers to assist him and went to appellants' address out of concern for the victim's welfare. After appellant Wells gave implausible and evasive answers concerning the victim's whereabouts, Detective Re-

ese conducted a search that immediately disclosed the barred closet in which the victim was imprisoned. Given the evidence of the victim's age, medical condition, and disappearance; and considering appellant Wells's evasive answers concerning the victim's whereabouts in light of the officer's knowledge of the strong evidence of imprisonment under inhumane conditions found at the appellants' former residence, we hold that the record supports a finding of both probable cause and exigent circumstances.

Affirmed.

GLADWIN and GLOVER, JJ., agree.

Rodell AVERY *v.* STATE of Arkansas

CA CR 04-395 217 S.W.3d 162

Court of Appeals of Arkansas
Opinion delivered November 16, 2005

Clay Law Firm, by: *Alvin D. Clay*, for appellant.

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

WENDELL L. GRIFFEN, Judge. Rodell Avery, Jr., appeals from his convictions for one count of aggravated robbery, three counts of kidnapping, and one count of second-degree escape. He argues that the evidence is not sufficient to support his conviction for kidnapping, that the trial court erred in denying his motions to have an independent mental evaluation and to hold a competency hearing, that the circuit court lacked jurisdiction to try him for the escape charge, and that the trial court erred in refusing to set aside his convictions even though two of the prosecutors had previously represented him. We affirm on each point.

Appellant was charged with aggravated robbery and kidnapping in connection with events that the State alleged took place on April 17, 2002, in Thornton, Arkansas, which is in Calhoun County. On that date, two men forced Robert and Margaret Rosenbaum and their toddler granddaughter into the Rosenbaums' home and robbed them at gunpoint; also present was the Rosenbaums' two-month old grandson. Mrs. Rosenbaum identified appellant from a photographic line-up; he was apprehended

later that same day near Fordyce in Dallas County. Appellant escaped in Dallas County while being escorted back to Calhoun County by Calhoun County officers. He was apprehended nearly four months later and was charged with second-degree escape.

Prior to trial, appellant requested and received a mental evaluation; the evaluation indicated that he was fit to stand trial. Appellant thereafter filed a motion for an independent mental evaluation, but failed to obtain one. After two hearings during which he presented no evidence regarding his mental status, appellant requested a competency hearing. That request was denied by the trial court because appellant had been declared fit to proceed and because he failed to obtain an independent mental evaluation.

Appellant received a jury trial and was convicted of all charges. He was sentenced to serve 360 months for the aggravated robbery and kidnapping charges, and to serve a consecutive term of 120 months for the escape charge.

I. Kidnapping

Appellant's first argument is that the trial court erred in denying his motion for a directed verdict on the kidnapping charge. We treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. *Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.*

Appellant was charged with kidnapping under Ark. Code Ann. § 5-11-102(a)(3) (Repl. 1997), which provides that a person commits kidnapping if, without consent, he restrains another person so as to interfere substantially with his liberty with the purpose of facilitating the commission of any felony or flight thereafter. Appellant argues that the State's evidence regarding the kidnapping was insufficient because the State failed to demonstrate that any force was used beyond that force necessary to commit the offense of aggravated robbery.

It is true that a defendant may be prosecuted for kidnapping only when the restraint used exceeds the restraint that is normally incidental to the crimes of rape or robbery. *Moore v. State*, 355 Ark. 657, 144 S.W.3d 260 (2004). However, we summarily affirm appellant's kidnapping convictions without reaching the merits of his argument because he is attempting to change the grounds for his argument on appeal.

At the conclusion of the State's case-in-chief, appellant's counsel made the following motion:

> Judge, as it related to kidnapping, they have to show restraint, and for the purpose of causing physical injury. There as been no, no testimony as it relates to any kind of physical injury.

The trial court denied this motion.[1] At the close of all of the evidence, appellant's counsel stated, "we renew all of the motions including the directed verdict and all of the prior motions that have been made in this case." The trial court again denied appellant's motion.

Thus, it is clear that appellant did not raise a challenge below to the State's proof regarding whether the physical restraint imposed exceeded that necessary to commit aggravated robbery — he solely challenged whether the restraint was for the purpose of causing physical injury.[2] A party cannot change the grounds for a directed-verdict motion on appeal, but is bound by the scope and nature of the argument presented at trial. *Marbley v. State*, 81 Ark. App. 165, 100 S.W.3d 148 (2003) (refusing to address an argument that the degree of restraint used during a kidnapping did not exceed the force necessary to commit rape, where that argument was not the basis for the defendant's directed-verdict motion). Accordingly, we affirm appellant's kidnapping convictions.

II. Mental Evaluation

Appellant's next argument is that the trial court erred in denying his motion for an independent mental evaluation and in denying his request to hold a mental competency hearing. Appellant argues that he had the right to be examined by an examiner of his own choosing and that the trial court was required to hold a competency hearing because he challenged the court-ordered mental evaluation report. *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1988). We hold that the trial court did not err because appellant was not entitled to a second court-ordered mental evaluation and because he, in fact, received a competency hearing.

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[1] Appellant failed to abstract his motions for a directed verdict; however, the State did so in its supplemental abstract.

[2] Appellant appears to have confused the "physical force" required to show robbery pursuant to Ark. Code Ann. § 5-12-102(a) (Repl. 1997), with the "physical restraint" required to show kidnapping for the purpose of inflicting physical injury under Ark. Code Ann. § 5-11-102(a)(4) (Repl. 1997).

. If a defendant files notice that he or she intends to rely on the defense of mental disease or defect the trial court is required to stay criminal proceedings and to order a mental examination. Ark. Code Ann. § 5-2-305(a)(1)(A) and (b)(1) (Supp. 2005). Further, when a defendant wishes to be examined by a doctor of his own choice, that doctor shall be permitted to have reasonable access to the defendant for the purposes of examination. Ark. Code Ann. § 5-2-306 (Repl. 1997). Additionally, Ark. Code Ann. § 5-2-309 (Repl. 1997) provides:

> (a) If the defendant's fitness to proceed becomes an issue, it shall be determined by the court.
>
> (b) If neither party contests the finding of the report filed pursuant to 5-2-305, the court may make the determination on the basis of the report.
>
> (c) If the finding is contested, the court shall hold a hearing on the issue.

On January 27, 2003, pursuant to § 5-2-305, appellant filed a motion for a mental examination at the Arkansas State Hospital. That same day, the trial court ordered the examination, which was ultimately conducted by Dr. William Peel. In his evaluation, filed on May 28, 2003, Dr. Peel concluded that appellant was able to conform his conduct to the requirements of the law at the time of the offense, that appellant understood the nature of the legal proceedings against him, and that he was competent to stand trial.

On July 7, 2003, pursuant to Ark. Code Ann. § 5-2-203, appellant filed a notice that he would raise the defense of mental disease or defect at his trial and also requested to have a mental evaluation performed by the examiner of his own choosing. At a hearing held on appellant's motion, on August 21, 2003, appellant's counsel informed the court that appellant had not been evaluated, due to unspecified "logistical" and financial problems.[3] Counsel further stated that he had enlisted the assistance of two attorneys to make arrangements for an evaluation in Little Rock. Counsel stated that the evaluation would probably be scheduled within the next two weeks and that it would not affect the trial,

[3] Appellant did not abstract the August 21 proceedings but the State provided this information in its supplemental abstract.

which had been scheduled for September 15, 2003. Counsel emphasized that he was "not asking for a delay of the trial days." The trial court informed the parties that the trial was set for September 15 and that appellant was entitled to "whatever you can obtain."

In the absence of any independent evaluation obtained by appellant, on September 5, 2003, the court entered an order declaring appellant fit to proceed based on Dr. Peel's evaluation, and again notified the parties that the trial would proceed on September 15. Another hearing was set for September 11, 2003. On that same day (September 5), appellant filed a motion requesting a second evaluation under § 5-2-305 and expressly requesting a competency hearing. During the hearing, the trial judge noted that appellant had done nothing since the August 21 hearing to obtain an independent evaluation and informed the parties that the trial would proceed as planned based on Dr. Peel's evaluation. In a motion for a competency hearing filed on September 12, 2003, three days prior to trial, appellant for the first time specifically contested the trial court's determination that he was fit to proceed.

■ On these facts, we hold, first, that the trial court did not err in denying appellant's request for a second evaluation. A defendant is not automatically entitled to a *second* evaluation simply because, after the first evaluation, he raises the defense of mental defect or mental incapacity or contests the first evaluation. Whether a second mental evaluation is necessary is within the trial court's discretion to determine. *Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001); *Dirickson v. State*, 329 Ark. 572, 953 S.W.2d 55 (1997). Moreover, it is not an abuse of the trial court's discretion to deny a second examination to a defendant who fails to act diligently to secure the necessary information on which to establish the defense of mental disease or defect. *Dirickson, supra* (holding that a defendant who did not raise the issue of incompetency at the first opportunity and who waited over one month after receiving notice of the mental evaluation to request supporting documents was not entitled to a second mental evaluation).

■ Appellant here did not act with diligence to secure the information necessary to establish his defense of mental disease or defect, namely the independent evaluation. It is the defendant's burden to prove the existence of a mental disease or defect. *Dirickson, supra.* Even though appellant requested an independent mental evaluation by an examiner of his choice *two months prior to*

trial, and despite reassurances to the trial court that the evaluation was forthcoming, appellant never obtained an independent evaluation and never presented evidence supporting that he was mentally incompetent. Therefore, the trial court did not err in determining that appellant was not entitled to a second court-ordered mental evaluation.

Nor did the trial court err in denying appellant's request for a competency hearing. Appellant is correct that the trial court was required under § 5-2-309(c) to hold a hearing when he contested the findings of the mental evaluation through his motions and his attorney's arguments. However, the case cited by appellant, *Greene*, *supra*, is inapposite because in that case, *no hearing* was held and thus, the defendant was denied any opportunity to raise his objections to the mental evaluation. By contrast here, the trial court conducted two hearings, one on August 21 and one on September 11, during which appellant's attorney specifically asserted that appellant was mentally unfit to stand trial.

In short, appellant cannot demonstrate prejudice because he, in fact, was granted a competency hearing; the August 21 hearing (and possibly the September 11 hearing) served as his competency hearing. The August 21 hearing was held in response to appellant's notice of his intent to rely on the defense of mental disease or defect and his request for an independent mental examination. A letter sent by the case coordinator to appellant's attorney indicated that the August 21 hearing was being held "regarding the mental condition of the defendant." Thus, appellant was clearly on notice that his mental competency would be the subject of the August 21 hearing. However, he did not object to the hearing, did not request a continuance, and did not assert that his rights concerning a competency hearing were being violated in any way.

Moreover, during the August 21 hearing, appellant offered no proof that he suffered from a mental disease or defect, but focused on the fact that he had requested an independent mental evaluation, which he had not yet obtained. Thus, the only evidence that the court had before it during this hearing was Dr. Peel's report that appellant was mentally competent to proceed to trial. Accordingly, on September 5, 2003, the trial court entered an order declaring appellant fit to proceed. This order stated:

> A mental evaluation was performed on the defendant in February 2003, at the request of the defendant. *A hearing to determine fitness to*

> *proceed was held on August 21, 2003.* Defendant presented no evidence to cast doubt on his fitness to proceed. Based upon the evaluation, the Court finds the defendant fit to proceed.

(Emphasis added.)

While appellant thereafter obtained a second hearing on September 11, during which he again failed to provide evidence of his unfitness to proceed, he never objected to the above order, and never objected that neither the August 21 nor September 11 hearing satisfied his right to a competency hearing. Appellant cites no authority requiring a trial court to conduct *subsequent* competency hearings once a competency hearing has been held, especially in the absence of any evidence indicating that a defendant has a mental disease or defect. On these facts, we cannot say the trial court erred in denying appellant's subsequent request for an additional competency hearing.

III. Escape

In a post-trial motion to dismiss, appellant asserted that the Calhoun County Circuit Court had no jurisdiction to try him for the escape that occurred in Dallas County. The trial court denied the motion because appellant did not object to the court's jurisdiction prior to trial. While appellant frames his argument as a challenge to the sufficiency of the evidence, he did not move for a directed verdict on the escape charge. Clearly appellant's argument is one of jurisdiction because it challenges the trial court's power to hear a case. *State v. Osborn*, 345 Ark. 196, 45 S.W.3d 373 (2001). As such, the trial court's ruling in this respect was in error, because jurisdiction cannot be waived and can be raised at any time. *State v. Dawson*, 343 Ark. 683, 38 S.W.3d 319 (2001). Nonetheless, the trial court properly exercised jurisdiction over appellant's escape charge.

This case presents a question of local jurisdiction, that is where the offense is to be tried. *Osborn, supra.* Pursuant to Ark. Code Ann. § 16-88-105(b) (1987), "The local jurisdiction of circuit courts and justices' courts shall be of offenses committed within the respective counties in which they are held." Further, a circuit judge may act in a criminal case only when he is within the geographical area of the judicial district in which a charge is filed. *Waddle v. Sargent*, 313 Ark. 539, 855 S.W.2d 919 (1993). In short,

this means that a circuit judge has no jurisdiction to try offenses that are not committed in that judge's county. *State v. Vaughan*, 343 Ark. 293, 33 S.W.3d 512 (2000). However, Arkansas law recognizes that some crimes are committed in more than one county. Ark. Code Ann. § 16-88-108(c) (1987) provides: "Where the offense is committed partly in one county and partly in another, or the acts, or effects thereof, requisite to the consummation of the offense occur in two (2) or more counties, the jurisdiction is in either county."

Appellant was charged with second-degree escape, which requires the use of physical force or the threat of physical force in escaping custody. Ark. Code Ann. § 5-54-111(a)(1) (Repl. 1997) (the statute in effect when appellant escaped). A detailed recitation of the facts surrounding appellant's escape is not necessary. It is sufficient to note that he committed the offenses of aggravated robbery and three counts of kidnapping in Calhoun County and was apprehended the same day in Dallas County. He knocked down an officer and escaped, while still in Dallas County, as he was being transported back to Calhoun County by Calhoun County officers.

Appellant asserts that the offense of escape is completed the moment the suspect is out of custody and thus, is not a continuing offense. Because he was taken into custody in Dallas County and escaped in Dallas County, he maintains that Calhoun County lacked jurisdiction to try him for escape. The State concedes that Dallas County would have jurisdiction to try appellant for escape. However, it also counters that, pursuant to § 16-88-108(c), the Calhoun County Circuit Court had jurisdiction to try appellant for escape because the effects of his escape delayed for four months Calhoun County's ability to try him for the crimes he committed in that county.

We affirm pursuant to the Arkansas Supreme Court's interpretation of the "effects" clause of § 16-88-108(c) under *Osborn, supra*. In *Osborn*, a murder was committed in Franklin County and an investigation ensued; the suspect was interviewed in Crawford County and provided the police with false information. He was ultimately charged and convicted in Franklin County with hindering apprehension or prosecution. He appealed, arguing that the Franklin County Circuit Court lacked jurisdiction to try him.

Interpreting for the first time the effects clause of § 16-88-108(c), the *Osborn* court held that, although the act of providing

false information occurred wholly in Crawford County, jurisdiction was proper in either Franklin or Crawford County. The court reasoned that the effects requisite to the consummation of the offense, *i.e.,* hindering the apprehension or prosecution of the three murder suspects, occurred in Franklin County, where the murder occurred and where the investigation was ongoing. The court further stated that were it not for the murder in Franklin County, Osborn would not have been interviewed by police and there would have been no investigation or prosecution for him to hinder.

Here, had appellant not committed the crimes of aggravated robbery and kidnapping in Calhoun County, he would not have been placed into custody in Dallas County, he could not have escaped from that custody, and the prosecution in Calhoun County would not have been delayed. Thus, pursuant to *Osborn* and § 16-88-108(c), jurisdiction in this case was proper in either Calhoun County or Dallas County. Hence, we affirm appellant's conviction for second-degree escape.

IV. Motion to Vacate/Conflict of Interest

Appellant's final argument is that, because two prosecutors represented him in previous criminal matters, the trial court erred in denying his post-trial motion to reverse his convictions and vacate his sentences.

The charges in the instant case were filed against appellant in 2002. During a hearing on appellant's motion to vacate, Jamie Pratt, the prosecuting attorney, admitted that he represented appellant in 1997 on a criminal matter; Gregg Parrish, the deputy prosecutor, admitted that he represented appellant on a criminal matter in 1999. Neither Parrish nor Pratt could recall the nature of their previous representation of appellant, except that it involved criminal matters. Pratt participated in only the pretrial proceedings. The case at trial was prosecuted by Parrish and Deputy Prosecutor Mark Klappenbach. Parrish and Pratt both testified that they did not recall any confidential information that appellant had provided to them. Pratt was not employed by the prosecutor's office when the charges were filed against appellant; he testified that he did not participate in discovery or other pretrial preparation of the case. He became involved in the case the week before trial. He denied using any confidential information given to him by appellant.

Both Parrish and Pratt testified that they did not remember representing appellant until Klappenbach reminded them of that fact the week before trial started. Parrish further testified that he informed appellant's attorney of the prior representation the first time they met, which was the Thursday before trial began on the following Monday. Appellant's trial attorney, Alvin Clay (who is also appellant's appellate counsel) admitted at the hearing that he knew before trial that Parrish and Pratt had previously represented appellant, but that he filed no motion for the prosecutor's office to recuse prior to trial.

The trial court denied appellant's motion to vacate on two independent grounds: that appellant failed to raise the issue in a timely manner and that there was no conflict of interest. Appellant now appeals only the trial court's finding that there was no conflict of interest; he does not appeal the trial court's finding that he failed to raise the issue in a timely manner. That alone is sufficient reason for this court to affirm the trial court's denial of appellant's motion to vacate. We will not reverse where a trial court bases its ruling on more than one independent ground, but the appellant challenges only one of those grounds. *Pugh v. State*, 351 Ark. 5, 89 S.W.3d 909 (2002).

However, had appellant challenged both findings, we would affirm on both grounds. First, we agree that he did not raise the issue in a timely manner. Appellant's attorney admitted that he knew of the prior representation before trial, yet failed to raise the issue until after trial. Thus, appellant could have attempted to cure an alleged defect, but failed to do so and his failure to do so should not inure to his benefit on appeal. *Williams v. State*, 327 Ark. 97, 923 S.W.2d 547 (1997).

We would also affirm on the merits of appellant's conflict-of-interest argument. Arkansas Rule of Professional Conduct 1.9 provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
>
> . . .

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known.

Additionally, Rule 1.11(d)(2)(I) provides that a lawyer currently serving as a public officer or employee shall not participate in a matter in which the lawyer participated personally and substantially while in private practice, unless the appropriate government agency gives its written, informed consent to the same. In short, Parrish and Pratt's involvement in appellant's prosecution in this case was not improper because it did not involve the use of information relating to the prior representation and did not involve the same or substantially related matter as the prior representation.

Appellant notes that during the cross-examination of his mother, Parrish questioned her about the fact that appellant had three different children by three different women and that two of the mothers had obtained restraining orders against him. Appellant asserts that this information was not in the prosecutor's file, and therefore, Parrish's knowledge of the same must have come from confidential information he obtained from appellant during his prior representation of appellant. Appellant is simply wrong in this regard — the information regarding the restraining orders brought by the mothers of appellant's children is contained in Dr. Peel's report, which, although appellant failed to abstract it, is part of the record in this case.

Further, a prosecutor is not automatically prohibited from prosecuting any former client; the law does not require that a trial court disqualify a duly-elected prosecutor unless there is some evidence of specific misconduct. *Logan v. State*, 299 Ark. 266, 773 S.W.2d 413 (1989). Rather, as noted above, the rules prohibit a prosecutor from representing another person, here, the State, in the same or substantially related matter in which the State's interests are materially adverse to defendant.

There was no conflict of interest here because appellant failed to allege or prove that this case involved the same or a substantially related matter as the matters in which Pratt and

Parrish previously represented him. The mere fact that the current case is a criminal case and that the prior representations also involved criminal matters does not establish that the cases involved the same or a substantially related matter. Finally, the cases cited by appellant simply do not compel reversal because, unlike the instant case, they involved circumstances in which the prosecutor who was involved in the case represented the defendant in the same or a substantially related matter in the prior representation or in which the information used by the prosecutor was based on his prior relationship with the defendant.

Affirmed.

ROBBINS and BIRD, JJ., agree.

Randy CARVER *v.* Pam CARVER

CA 05-194 217 S.W.3d 185

Court of Appeals of Arkansas
Opinion delivered November 16, 2005

Ogles Law Firm., P.A., by: *John Ogles*, for appellant.

Gilbert Law Firm, by: *Melinda R. Gilbert*, for appellee.

WENDELL L. GRIFFEN, Judge. Randy Carver appeals from an order modifying his divorce decree to equally divide his retirement benefits between him and appellee Pam Carver, his former wife. He argues that pursuant to Arkansas Rule of Civil Procedure 60, the trial court had no jurisdiction to modify the divorce decree. We disagree and affirm the trial court's order.

Appellee filed for divorce in late 2003. It appears that no testimony was taken because there were no custody issues and because the parties agreed on the division of property. This agreement was set out in a letter prepared by appellant, which was forwarded by his attorney to appellee's attorney in a letter dated March 5, 2004. It is undisputed that the parties agreed that appellee would waive her claim for spousal support in exchange for receiving one-half of appellant's 401(k) retirement account with Fidelity IPM Group, Inc., valued at approximately $198,000.

The original divorce decree in this case was entered on April 26, 2004, and specified the manner in which certain property

would be divided pursuant to the parties' agreement, and further specified that appellee relinquished her request for spousal support in exchange for the terms of the property agreement. The decree stated that "[t]he plaintiff and defendant have entered into an Agreement that settles the respective rights and claims of each party to property and support among other matters." The decree also stated that the court retained jurisdiction "for such other orders and actions as may be necessary and proper." However, the decree did not include a provision dividing appellant's retirement account. Despite that omission, both parties signed the order, which was entered without objection.

On June 10, 2004, appellee's attorney realized that the divorce decree did not provide for the equal division of appellant's retirement account when she drafted the Qualified Domestic Relations Order to effectuate the division. On that same day, she sent appellant's attorney a letter requesting agreement to an amended decree to correct the mistake. Appellant's attorney failed to respond, so on June 16, 2004, appellee filed a motion to modify or set aside the divorce decree; she subsequently filed a supplemental motion and brief-in-support thereof, asserting that the retirement provision had been "inadvertently omitted" from the divorce decree. In response, appellant did not deny the retirement provision had been inadvertently omitted. Instead, he asserted that appellee's motion to modify should be denied because omission of a provision dividing a retirement plan is not a clerical error under Arkansas law that may be corrected after ninety days after entry of the order, that the divorce decree was unambiguous and did not need to be amended, and that the court could only correct the record to confirm the action actually taken at the time the decree was entered.

Pursuant to Rule 60, the ninety-day deadline for amending the divorce decree expired on July 26, 2004. Due to its docket, the trial court was unable to schedule a hearing on the matter within this ninety-day period. Therefore, at appellee's request, on July 19, 2004, well-within the relevant ninety-day period, the trial court entered an order specifically retaining jurisdiction over the issue of the division of appellant's retirement account. Appellant subsequently filed a motion to dismiss.

The hearing was held on August 23, 2004, and consisted of counsel reiterating the arguments that they raised in their motions. During the hearing, appellant's counsel conceded that the parties intended for the retirement provision to be included as part of the

property settlement that was incorporated into the original divorce. The trial court thereafter entered an order amending the divorce decree to reflect that each party would receive one-half of the value of appellant's retirement account. The issue appealed to us is whether the trial court had jurisdiction under Rule 60(a) to modify the divorce decree. We hold that it did and affirm the court's order modifying the decree.

Rule 60(a) provides that a trial court may modify or vacate an order within ninety days of its entry to correct errors or mistakes. After ninety days, the trial court may modify or vacate orders under Rule 60(b) for clerical errors or for reasons stated in Rule 60(c) (which are not applicable here). This means that a trial court loses jurisdiction to set aside or modify an order pursuant to Rule 60 after ninety days, unless it has reserved jurisdiction over an issue, unless the error is a clerical error under Rule 60(b), or unless one of the reasons stated in Rule 60(c) are present. *Slaton v. Slaton*, 330 Ark. 287, 956 S.W.2d 150 (1997); *Jones v. Jones*, 26 Ark. App. 1, 759 S.W.2d 42 (1988); *Cox v. Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986). Moreover, although Rule 60(a) permits trial courts to correct their judgments, this power is confined to correction of the record to make it conform to the action that was actually taken at the time, and does not permit a decree or order to be modified to provide for action that the court, in retrospect, should have taken, but which, in fact, did not take. *Jones, supra.*

Appellant's argument is that because the omission of a retirement provision in a divorce decree is not a clerical error that can be corrected after ninety days, *Tyer v. Tyer*, 56 Ark. App. 1, 937 S.W.2d 667 (1997), the trial court lacked jurisdiction to amend the divorce decree more than ninety days after the date of its entry.[1] While we agree that the omission of a retirement provision is not a clerical error, we disagree that the trial court here lacked jurisdiction to amend the divorce decree.

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[1] He also argues that Arkansas Rule of Civil Procedure 6, which specifies the circumstances in which the time for taking an action may be enlarged, prohibits the enlargement of the time frame under Rule 60(a). However, appellant did not raise this argument below. Further, he cites to no convincing authority, and it is not apparent without further research that his argument is well-taken. Accordingly, we do not consider this argument. *Webb v. Bouton*, 350 Ark. 254, 85 S.W.3d 885 (2002); *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998).

Generally, the parties to a divorce action may enter into an independent agreement to settle property rights which, if approved by the court and incorporated into the decree, may not be subsequently modified. *Jones, supra.* Nonetheless, a general reservation of jurisdiction will permit modification of a decree after ninety days with respect to issues that were before the trial court in the original action. *Jones, supra; Cox, supra.* The terms of the agreement and the intention of the parties determine whether a property settlement covers all property owned by the parties. *Jones, supra.*

The parties here undeniably intended for a provision equally dividing the retirement account to be part of the property settlement. Because the parties intended the property agreement to settle their rights, and because appellant's retirement account was not included in the property settlement, it was proper for the trial court to determine whether the parties intended for the retirement account to be included in the property settlement. *Jones, supra.* Further, because the issue of the property settlement was clearly before the trial court, its general reservation of jurisdiction was sufficient to allow it to retain jurisdiction over the matters related to the property settlement, even though the specific issue of the retirement account was not mentioned in the decree. *Cox, supra* (affirming the modification of a divorce decree after ninety days and finding that the general reservation clause was sufficient to reserve the specific issue of tax liability even though the divorce decree did not include a finding of tax liability). Further, within the ninety-day period, the trial court entered an order specifically reserving the issue of the retirement account, thus retaining jurisdiction over that issue beyond the ninety-day limitations period. *See contra Jones, supra* (reversing modification of a divorce decree where the issues upon which the court amended the decree were not presented to the trial court until after the ninety-day period had expired).

Appellant relies heavily upon *Tyer, supra,* but that case is inapplicable for several reasons. Most importantly, unlike the parties in the instant case, the parties in *Tyer* never reached a property settlement agreement that was incorporated into the divorce decree and thus did not agree how the retirement account should be divided. Further, the *Tyer* spouse did not move for division of the retirement account within the requisite period under Rule 60, but waited until thirteen months after the divorce decree to raise the issue to the trial court.

Additionally in *Tyer*, we relied on the fact that the record did not contain sufficient information concerning the nature of the benefits to determine how the wife's share should be apportioned; therefore, we concluded that there was no record made that would justify amending the decree to include a provision dividing the retirement plan on the strength of a general reservation of jurisdiction. The same cannot be said of the instant case because here, within the ninety-day period, the trial court was made aware of the undisputed fact that the parties agreed as to the value of the retirement account and that it should be equally divided. Therefore, unlike the trial court in *Tyer*, it cannot be said that the trial court here did not have sufficient information to determine how appellee's share of the retirement account should be apportioned.

Additionally, the trial court's amendment here did not improperly modify the decree to take an action that it should have taken in the original order but did not take. *Jones, supra.* In *Jones*, we reversed the trial court's modification of a divorce decree after ninety days because the trial court erroneously amended the decree to include certain provisions that the parties did not intend to be included in the property settlement. That clearly is not the case here. Rather, this case is more akin to *Cox, supra.* In that case, despite the omission of a finding of tax liability in the divorce decree and in light of the ex-wife's expressed willingness at trial to sign a joint return, we affirmed the trial court's modification of a divorce decree after ninety days that required her to either sign a joint federal tax return or to pay one-half of the increased tax liability caused by her refusal to sign. Like the amendment in *Cox*, the modification here does not change the effect of the original decree but merely requires the parties to do what they were willing to do at the time the original decree was entered.

Finally, none of the remaining cases cited by appellant warrant reversal. In short, the instant case is distinguishable from those cases because those cases required a showing of fraud or because the trial court in those cases did not reserve jurisdiction over the contested issues or had no basis for exercising continued jurisdiction.

Affirmed.

VAUGHT and ROAF, JJ., agree.

Ingrid COWAN *v.* ELLISON ENTERPRISES, INC.
d/b/a Price Chopper

CA 04-1281 217 S.W.3d 175

Court of Appeals of Arkansas
Opinion delivered November 16, 2005

James R. Pate, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *John S. Cherry* and *James D. Robertson*, for appellee.

WENDELL L. GRIFFEN, Judge. In this slip-and-fall case Ingrid Cowan appeals from a grant of summary judgment in favor of Ellison Enterprises, Inc. d/b/a Price Chopper. She contends that there are genuine issues of material fact that can only be resolved by a trial on the merits. Because appellant failed to present a genuine issue of material fact regarding appellee's alleged negligence as cause for her slip and fall, we affirm.

Background Facts

In her complaint filed July 7, 2003, appellant alleged that she slipped on a grape in appellee's grocery store and charged appellee with negligence in allowing the grape to fall onto the floor. She specified appellee's alleged negligent acts in a February 11, 2004 amended complaint:

> a. The positioning of the grapes in the produce section of Price Chopper was negligent in that this created a substantial risk of loose

grapes falling onto the floor of the store, and this danger and negligence was known to Price Chopper and any reasonable person.

b. The use by Price Chopper of woven mesh plastic bags with holes in them to sack the grapes for display for sale created an inherently dangerous condition in that grapes could fall through the holes to the floor when the sacks were picked up creating a dangerous condition for customers. This danger was known to Price Chopper and to any reasonable person.

c. Price Chopper had experience and reasonable cause to know that customers routinely pick up produce for inspection prior to purchase, and it was routine and customary for grapes and other produce to fall onto the floor and create a dangerous condition.

d. Price Chopper was negligent in not placing non-slip mats and other protective flooring in the aisles of the produce section, and especially in the aisle where the grapes were displayed, to prevent slips and falls by customers.

e. Price Chopper knew that it could not inspect the aisles around the produce section of the store, and in particular where the grapes were displayed, every minute of every day, and Price Chopper should have taken extra precaution to protect customers from injury as a result of produce items falling to the floor before Price Chopper made a routine clean-up inspection.

f. For the minimal cost of non-slip mats placed in the aisles of the produce section, and especially in the area where the grapes were displayed, and of using solid produce bags without holes or produce bags with very tiny holes, Price Chopper could have prevented this accident in which the plaintiff was severely injured.

On January 30, 2004, appellee filed a motion for summary judgment, wherein it alleged that there was no evidence that it knew or should have known of the grape's presence on the floor and that there was no evidence that appellee's employees dropped the grape. Appellee relied heavily on appellant's deposition testimony in support of its motion. During the deposition, appellant testified that she was at the end of the counter in the produce department of appellee's store when she suddenly slid. She remembered seeing two grapes on the floor when she fell. Appellant was certain she slipped on a grape because a grape was on her heel

when she landed. She stated that she did not know how the grapes came to be on the floor or how long they were on the floor; however, she assumed that the grapes came from the counter because the grapes were being sold in woven plastic bags with holes in them. Appellant testified that the floor was dark and dirty and that there were no mats on the floor around the area where she fell.

In response to appellee's motion for summary judgment, appellant submitted an affidavit, wherein she stated:

> I have been a frequent customer for several years prior to my fall in the Price Chopper store of the defendant in Russellville, Arkansas. I am a senior citizen, and I know that many elderly people shop at this store.
>
> I have seen produce items on the floor of the store in the produce section. Even before my fall on June 13, 2002, friends and relatives of mine have seen loose grapes on the floor in the produce section and they have seen them since the date of my fall. I learned all of this after my fall because friends and relatives expressed concern because they knew that I slipped on loose grapes on the floor.
>
> At the time of my fall, the grapes were displayed in woven mesh plastic bags with holes in them. This was a dangerous condition in that individual grapes could fall through the holes onto the floor of the store. I know from my experience as a shopper, and watching other customers, that customers normally lift produce items for inspection before buying. I know that people will inspect the grapes to see if they are fresh and not bruised or overripe. I believe that in this inspective process it would be easy for grapes to fall onto the floor.
>
> At the time of my fall, the grapes were positioned for display on a counter slanted up where loose grapes could easily fall onto the floor. The grapes were positioned in the direct path of shoppers who were pushing shopping carts. It would be hard for shoppers to see any small grapes that had fallen onto the floor.
>
> There were no protection mats in the aisles of the produce section. These were added after I fell. If protection mats had been on the aisle when I stepped on the loose grapes on the floor, I would have not slipped and fallen and hurt myself so badly. Even if I had slipped and fallen, a mat would have cushioned my fall.

> At the time I fell, the area of the floor where the grapes had fallen was slick and very dirty. It would have been very hard for any person to have noticed small grapes on the floor.
>
> The grapes on the floor were light green in color and hard to see. The floor was very dirty. After the fall, my pants were very dirty from the fall, and it was obvious that the dirt came from the floor.
>
> I realize that a store like Price Chopper cannot have an employee watching the produce aisles twenty-four hours of every day. I also know that it is common knowledge to shoppers and the store personnel that people pick up produce items for inspection and that it is common for produce items to fall on the floor. I believe with a little bit of precaution in the placement of the grapes on display, the use of solid plastic bags or bags with tiny holes, and the use of non-slip floormats, accidents such as mine could be easily prevented.
>
> I am also aware that after my fall, Price Chopper stopped using woven mesh plastic bags with holes in them for the display and sale of grapes.

In its reply brief in support of its motion for summary judgment, appellee submitted the affidavit of Seth Maxwell, assistant store director on the date appellant fell. He noted that it was appellee's policy to keep the floors clean at all times. Maxwell stated that he was in the produce area of the store within an hour prior to appellant's fall, pursuant to the store's policy requiring hourly inspections, and that the grape was not on the floor at that time. Maxwell concluded that the grape on which appellant slipped could not have been on the floor for more than a matter of minutes.

The circuit court granted appellee's motion for summary judgment on August 10, 2004. It also denied appellant's subsequent motion to set aside summary judgment on September 1, 2004. This appeal followed.

Discussion

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 on 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, and 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).

Before determining whether appellant has presented a *prima facie* case sufficient to warrant denial of appellee's motion for summary judgment, we must make a determination of what evidence is properly before this court. Rule 56(e) of the Arkansas Rules of Civil Procedure requires that an affidavit provided for or against a motion for summary judgment be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. In reviewing the motion for summary judgment, we do not consider appellant's statement, "friends and relatives . . . have seen loose grapes on the floor in the produce section." That statement was not based on personal knowledge, and it is nothing more than inadmissible hearsay. As such, it should not be accepted as the basis for finding a genuine issue of material fact to deny entry of summary judgment.

Appellant's affidavit also states a belief that grapes could fall on the floor while other customers were inspecting grapes or because the grapes were stacked on a slanted counter. However, appellant also lacks personal knowledge to testify to

these facts. Her affidavit does not declare that she has actually seen grapes fall because of the packaging or the slanted counter. Because appellant lacks the personal knowledge to testify to this fact, she is precluded from presenting such "evidence" in opposition to appellee's motion for summary judgment.[1]

Arkansas has well-established law regarding slip-and-fall cases. A property owner has a duty to exercise ordinary care to maintain its premises in a reasonably safe condition for the benefit of an invitee. *Kelly v. National Union Fire Ins. Co.*, 327 Ark. 329, 937 S.W.2d 660 (1997); *Sanders v. Banks*, 309 Ark. 375, 830 S.W.2d 861 (1992); *Tomlin v. Wal-Mart Stores, Inc.*, 81 Ark. App. 198, 100 S.W.3d 57 (2003). To prevail in a slip-and-fall case, one must show either (1) that the presence of a foreign substance on the premises was the result of the owner's negligence or (2) that the foreign substance had been on the premises for such a length of time that the owner knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *Kelly v. National Union Fire Ins. Co.*, *supra*; *Tomlin v. Wal-Mart Stores, Inc.*, *supra*; *see also* AMI Civil (2005) 1106. In virtually every case involving a fall, the plaintiff will describe a floor as slick or slippery, and this alone is not sufficient to support a case for negligence. *Black v. Wal-Mart Stores, Inc.*, 316 Ark. 418, 872 S.W.2d 56 (1994); *Newberg v. Next Level Events, Inc.*, 82 Ark. App. 1, 110 S.W.3d 332 (2003); *Wal-Mart Stores, Inc. v. Bernard*, 69 Ark. App. 238, 10 S.W.3d 915 (2000). Possible causes of a fall, as opposed to probable causes, do not constitute substantial evidence of negligence. *Kelly v. National Union Fire Ins. Co.*, *supra*. Moreover, the doctrine of *res ipsa loquitur*[2] is inapplicable in slip-in-fall cases. *Alexander v. Town & Country Discount Foods, Inc.*, 316 Ark. 446, 872 S.W.2d 390 (1994).

The dissent also notes an additional line of slip-and-fall cases. In *Brookshires Grocery Co. v. Pierce*, 71 Ark. App. 203, 29

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[1] The dissenting opinion would reverse based in part on this speculative assertion. Had we done so, our decision would undermine the whole purpose for requiring summary-judgment opponents to meet proof with proof. *See O'Marra v. Mackool*, *supra*; *Pugh v. Griggs*, *supra*.

[2] *Res ipsa loquitur* is a "doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case." *Black's Law Dictionary* 1336 (8th ed. 2004).

S.W.3d 742 (2000), we noted that where the slippery condition is not the result of an isolated incident but is instead a recurring one, the traditional slip-and-fall analysis is inapplicable, and the question is simply whether the business owner used ordinary care to keep his premises free from dangerous conditions likely to cause injury to invitees. *See also Heigle v. Miller*, 332 Ark. 315, 965 S.W.2d 116 (1998); *Conagra, Inc. v. Strother*, 68 Ark. App. 120, 5 S.W.3d 69 (1999). The dissent refers to the ordinary slip-and-fall case as the "typical" case and cases such as *Brookshires Grocery* as the "atypical" case. However, appellee has the same duty under both lines of cases: a duty to exercise ordinary care in maintaining its premises in a reasonably safe condition for the benefit of its invitees.

An entry from American Jurisprudence 2d is instructive:

> Although it has been said that a store owner has no duty to keep all produce wrapped in cellophane or similar substance in order to prevent it from falling to the floor where it may cause customers to slip, a supermarket operator who chooses to sell fruits and vegetables from open bins on a self-service basis must do what is reasonably necessary to protect customers from the risk of injury which such mode of operation is likely to generate. A storekeeper may be negligent if he displays his goods in such a manner that they will cause a hazardous condition on the floor, and this rule has also been applied to a store displaying a plant for sale.
>
> On the other hand, stacking of produce in an unsafe manner has been held not to give rise to liability where it could not be shown that the supermarket had failed to act as a reasonably prudent person would have acted in similar circumstances, or that such stacking was the proximate cause of the injury. Recovery for injuries sustained in a fall alleged to have resulted from litter or debris on the floor of a store will also be denied where there is insufficient proof to show that the floor in which the fall occurred was in a dangerous condition. Furthermore, nonliability of storekeepers to customers injured by falling on litter and debris may be based on the fact that the foreign matter must have been dropped or knocked to the floor by other customers or third parties for whose negligence the storekeeper is not liable.

62A Am. Jur. 2d *Premises Liability* § 557 (1990) (internal footnotes omitted) (superceded by 62A Am. Jur. 2d *Premises Liability* § 520 (2005)).[3]

Appellant's case cannot survive a motion for summary judgment because she fails to present evidence showing that appellee breached its duty of ordinary care to her and that the breach caused her damages. Summary judgment is proper when a party fails to present proof of a material element of her claim. *Calcagno v. Shelter Mut. Ins. Co.*, 330 Ark. 802, 957 S.W.2d 700 (1997). Appellant alleges several theories about how the grapes may have fallen on the floor. While she suggests that grapes could fall out of the woven plastic bags either though the customer-inspection process or through just sitting on the slanted counter, she never presented facts showing that the grape upon which she slipped fell to the floor as a result of these conditions. Had she at least done that, summary judgment would have been inappropriate.

The instant case is similar to *Sanders v. Banks, supra*. There, the appellant alleged that she slipped on a brown, slimy substance that she believed to be tobacco juice. In his deposition, the store's assistant manager testified that no store employee was aware of the foreign substance. He also stated that the store was "spot mopped" nightly and completely mopped weekly. However, he admitted that customers were allowed to chew tobacco inside the store and that the store did not provide disposal facilities for the residue. Our supreme court affirmed the grant of summary judgment, stating "we cannot say there was any evidence whatever as to how the foreign matter came to be present or that [store] personnel had any knowledge of its presence." *Id.* at 379, 830 S.W.2d at 863 (citing *Bank of Malvern v. Dunklin*, 307 Ark. 127, 817 S.W.2d 873 (1991); *Diebold v. Vanderstek*, 304 Ark. 78, 799 S.W.2d 804 (1990)).

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[3] The encyclopedia entry cites several helpful cases. *See, e.g., Wroblewski v. Hillman's Inc.*, 43 Ill. App. 2d 246, 193 N.E.2d 470 (1963) (affirming motion for directed verdict in favor of the store when the plaintiff failed to show that a vegetable leaf was on the floor due to the store's negligence and rejecting the notion that the store should have been obligated to pre-wrap vegetables, stating that nothing in the record indicated that the falls were of such frequent occurrence as to warrant the extraordinary protective measure); *Swan v. Kroger Co.*, 452 S.W.2d 793 (Tex. Ct. App. 1970) (affirming motion for directed verdict in favor of the store when the customer failed to show that a green bean was on the floor due to the manner in which the store stacked its green beans).

The dissenting opinion over-relies on *Brookshires Grocery Co. v. Pierce, supra.* It identifies three "similarities" to the instant case. First, the dissent states that both cases involve the packaging and display of grapes. Both cases do have that fact in common. Second, the dissent states that in both cases the plaintiff presented evidence that others had noticed the dangerous objects on the floor. The only "evidence" that others noticed produce on the floor in the instant case was the hearsay assertion in appellant's affidavit, which should not be considered because it is hearsay, not appellant's statement of her own experience. Finally, the dissent notes that the employee responsible for cleaning up spills in *Brookshires Grocery* was "slouchy" and non-diligent. No such evidence exists in this case. The dissent acknowledges this, but continues by stating that this is an "atypical" slip-and-fall case. However, Arkansas law does not allow the "atypical" label to excuse an appellant's failure to present a *prima facie* case of negligence.

The dissent also assumes that the grape fell because of an allegedly inherently dangerous condition, which it opines provides an issue of fact regarding whether appellant slipped on the grape because of appellant's negligence. It is nothing but circular reasoning to suppose the very fact that is in dispute and then use that supposition as the basis for denying a motion for summary judgment. Appellant presented possibilities as to how a grape might have come to be on the floor, but she did not establish any of these possibilities as a fact. Furthermore, she did not show that any of them caused her fall. As already stated, *possible* causes of the fall do not constitute substantial evidence. *Kelly v. National Union Fire Ins. Co., supra.* Was the grape on the floor as a result of the stacking and packaging of the grapes, or was it there because another customer negligently placed the grape on the floor? Appellant's affidavit fails to provide an answer to this question. Under any slip-and-fall analysis, this failure is fatal to her case.

Because appellant failed to present evidence showing that appellee breached a duty that caused her to slip and fall, the circuit court properly granted appellee's motion for summary judgment. The dissent would require appellee, and any other similarly-situated store owner, to proceed to trial when appellant cannot prove the cause of her fall. This is tantamount to a *res ipsa loquitur* holding, which is inapplicable to slip-and-fall cases under Arkansas law. *Alexander v. Town & Country Discount Foods, Inc., supra.*

Affirmed.

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

ROBBINS, NEAL, BAKER, and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I do not agree that this case should be affirmed, and would reverse and remand for trial. Ingrid Cowan was injured when she slipped and fell on a grape while shopping at Price Chopper. Cowan has alleged that Price Chopper was negligent in that there were no safety mats in the aisle where she fell; that the floor was so dingy, dark, and dirty that the fallen grapes would not be easily seen on the floor; that the counter where the grapes were displayed was sloping and dangerous; and that the open-mesh plastic bags in which the grapes were bagged for sale were inherently dangerous. What she has *not* alleged is that Price Chopper either put the grape on the floor itself or that it was there for such a length of time that Price Chopper should have removed it.

A trial court should grant a motion for summary judgment only when there are no genuine issues of fact to litigate and when it can decide the case as a matter of law. *Carver v. Allstate Ins. Co.*, 77 Ark. App. 296, 76 S.W.3d 901(2002). Once the movant has made a *prima facie* showing of entitlement to summary judgment, the responding party must, in order to preclude summary judgment, demonstrate that there remain genuine issues of material fact. *Id.* This court's review is limited to a determination as to whether the trial court was correct in finding that no material facts were disputed. *Id.*

To prevail in a typical slip-and-fall case involving an invitee, the plaintiff must show either that: (1) the presence of a substance upon the premises was the result of defendant's negligence or (2) the substance had been on the premises for such a length of time that the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *Kopriva v. Burnett-Croom-Lincoln-Paden, LLC*, 70 Ark. App. 131, 15 S.W.3d 361 (2000). This case falls closer to the former category. Additionally, this court has recognized that not all such cases fall into the "typical" category, and these cases should be analyzed differently. Where the slippery condition is not the result of an isolated incident but is instead a recurring one, the traditional slip-and-fall analysis is inapplicable and the question is simply whether the business owner used ordinary care to keep his premises free from

dangerous conditions likely to cause injury to invitees. *Brookshires Grocery Co. v. Pierce*, 71 Ark. App. 203, 29 S.W.3d 742 (2000) (citing *Conagra, Inc. v. Strother*, 68 Ark. App. 120, 5 S.W.3d 69 (1999)); *Heigle v. Miller*, 332 Ark. 315, 965 S.W.2d 116 (1998). The court also applied this standard-of-care in another atypical slip-and-fall case where the plaintiff slipped and fell in an area known to be dangerous, where safety mats had been placed throughout the area, and where the plaintiff testified that the safety mats were not in place when she fell. *Conagra, supra.* Also, where the plaintiff did not argue that her fall was caused simply by the presence of a substance on the floor but rather by the floor's overly slippery condition resulting from the faulty manner in which the wax was applied, this court applied this same standard of care because it was not the typical slip-and-fall case. *Kopriva, supra.*

In *Pierce, supra*, Pierce slipped on some grapes near the produce area at Brookshires and was injured. There was evidence that Pierce had noticed tomatoes, lettuce, onions, cauliflower, grapes, and other such items on the floor in the produce section on prior shopping trips. *Id.* There was also evidence that, on the day he was injured, Pierce drew the produce clerk's attention to two separate spills, but the produce clerk appeared unconcerned and told Pierce he would clean them up later. *Id.* In addition, there was evidence that store management was aware that the produce section was a particularly dangerous area for falls and that management did not adhere to its own schedule for inspection of the floors. *Id.* This court noted that this case was different than the typical slip-and-fall case, because this case involved a recurring slippery condition. *Id.* Brookshires argued the trial court should have granted its motion for directed verdict because there was no substantial evidence to show that the grapes were on the floor because of Brookshires's negligence or that the grapes were on the floor so long that they should have been discovered by Brookshires's employees. *Id.* This court disagreed and applied a different standard: whether there was sufficient evidence to support a jury finding that there was a recurrent slippery condition in Brookshires and whether Brookshires employed ordinary care to keep its premises free from that condition. *Id.* This court held that the evidence supported the finding that there was a recurrent slippery condition as the result of Brookshires's failure to exercise ordinary care. *Id.*

The present case is similar to both *Pierce* and *Kopriva*. In both *Pierce* and this case, the plaintiff slipped and fell on some grapes.

Pierce involved a recurrent slippery condition, and the present case involves the allegation of a "recurrent" dangerous/slippery condition of grapes on the floor because of the manner in which they were packaged and displayed. Here, just as in *Pierce*, there are claims that others had noticed the dangerous condition of the floor on previous occasions. Because this case is not the "typical" slip-and-fall case it should be analyzed under the standard that this court used in *Pierce*: whether Price Chopper used ordinary care to keep its premises free from dangerous conditions likely to cause injury to invitees. In *Kopriva*, it was the manner in which the floor was rendered slippery that was ultimately at issue.

Price Chopper argues that the present case is unlike *Pierce* because here there is no evidence that Price Chopper was on notice of a foreign substance on the floor and no proof of a dilatory employee failing to conduct inspections or clean up messes. Even though there are differences between *Pierce* and the present case, it does not change the fact that this case is not the typical slip-and-fall case and that therefore this court should use a different standard of care than what it usually uses to analyze the typical slip-and-fall cases. This is because Cowan's contention is that grapes were on the floor as a result of Price Chopper's negligence in the manner in which the grapes were packaged and displayed, regardless of whether it was a customer or a store employee who dropped the grape to the floor, or whether the grape had rolled off the sloped display. Cowan does not need to prove precisely who dropped the grape or that Price Chopper failed to timely clean up its floor under this theory. The majority makes much of the fact that Cowan cannot say exactly how the one particular grape she slipped on came to be on the floor. However, it is not that one or even more grapes happened to be on the floor or the day in question that is the key allegation, but rather that Price Chopper's negligence made it likely and, in fact, inevitable that grapes would be on the floor.

Even if this court applies a different standard of care, Cowan must still demonstrate that there are genuine issues of material fact to be litigated so that she can overcome summary judgment in this case. There is a dispute as to whether there was a safety mat in place at the time of Cowan's fall. There are also the disputed issues concerning how the grapes were displayed and the fact they were packaged in loosely woven cellophane bags. What is not in dispute, because it is not at issue under Cowan's theory of

negligence, is either how long the grape had been on the floor, who dropped it there, or the frequency of Price Chopper's inspections. A jury should be able to decide whether the actions by Price Chopper of which Cowan complains of in this case were negligent, not the case imagined by the majority.

I would reverse.

ROBBINS, NEAL, and BAKER, JJ., join.

Susan Lynn CLEAVES *v.* James Raymond PARKER and John Edward Parker

CA 05-130 217 S.W.3d 136

Court of Appeals of Arkansas
Opinion delivered November 16, 2005

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

Stephen W. Tedder, for appellee John Edward Parker.

Ralph G. Brodie & Associates, Ltd., by: *Ralph G. Brodie* and *Michael K. Cornett*, for appellee James Raymond Parker Jr.

DAVID M. GLOVER, Judge. Jack Parker, the testator, left a holographic will when he died. Appellant, Susan Cleaves, lived with the testator at the time of his death and was named as a beneficiary in the will. Appellees James Parker and John Parker were the testator's brothers. James was named as executor of the will, and John was a beneficiary under the will. The only portion of the will at issue in this appeal is the final devise. The trial court found that Mr. Parker's chosen language was ambiguous, and after hearing testimony about surrounding circumstances, found that the final provision was a specific, rather than a residuary, devise. The effect of this finding resulted in a *pro rata* sharing of expenses among the beneficiaries, rather than paying the expenses out of what appellant contends was a residuary devise to appellee John Parker. We reverse and remand.

Standard of Review

Probate cases are reviewed *de novo* on the record. *Balletti v. Muldoon*, 67 Ark. App. 25, 991 S.W.2d 633 (1999). However, an order of the probate court will not be reversed unless clearly erroneous. *Id.* Clearly erroneous means that, although there is evidence to support the court's findings, the appellate court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id.*

The holographic will

Mr. Parker's two-page holographic will is reproduced in full as follows:

[redacted]

Will 12/10/02

2003 JUL 31 PM 12:22 TP 2003-1201

CIRCUIT-COUNTY CLERK

WILLS
BOOK: 41
PAGE: 772

I, JACK ALAN PARKER DO HEREBY LEAVE MY WORLDLY POSSESSIONS AS FOLLOWS :

MY HOME IN LITTLE ROCK (DOYLES PLACE) 3929 N. LOOKOUT, TO SUSAN CLEAVES ALONG WITH ALL CONTENTS OF THE HOME, WITH THE EXCEPTION OF MY FIREARMS COLLECTION.

TO MY BROTHER JOHN E. PARKER

FIREARMS : (See serial # LIST IN SAFE)
- HK-91
- AR-15
- AK-47
- UZI (full AUTO – MUST BE LEGALLY TRANSFERED AS IS A CLASS III WEAPON, check state Regulations)
- SKS
- L.C. SMITH
- M 1300 WIN 12 GA.
- MAC 11 · 9mm
- RUGER MKII .22 RF
- SW M. 17 .22 RF Revolver 6"
- SW M. 29 .44 MAG 6"
- .45 S.A.
- .40 cal Glock M 23
- .40 cal HK USP COMPACT
- 9mm BERETTA 92 FS
- 9mm SIG SAUER
- AMT .380
- IMI 44 MAG D.E.
- .38 colt Diamondback

Add. 1

Dec 14

My LANDCRUISER FJ-40 GOES to Stephen Riley IF he WANTS IT, otherwise to SUSAN CLEAVES

My TACOMA 4WD GOES to SUSAN CLEAVES

My LIFE INSURANCE policy ($500 — redeem value — and ~ 20K death payment) GOES to Susan Cleaves

All the remaining monitary Assets GO to my Brother John to do with as he sees fit.

JACK ALAN PARKER

12/10/02

As earlier stated, the devise that is at issue in this case appears at the very end of the will, just above Mr. Parker's name and the date. The devise provides: "All the remaining monetary assets go to my Brother John to do with as he sees fit." Appellant contends that the trial court erred in holding that this devise was specific rather than residuary. We agree.

In the interpretation of wills, the paramount principle is that the intent of the testator governs. *Metzgar v. Rodgers*, 83 Ark. App. 354, 128 S.W.3d 5 (2003). The testator's intent is to be gathered from the four corners of the instrument itself. *Id.* However, extrinsic evidence may be received on the issue of the testator's intent if the terms of the will are ambiguous. *Id.* An ambiguity has been defined as an indistinctness or uncertainty of meaning of an expression in a written instrument. *Id.* The apparent meaning of particular words, phrases, or provisions in a will should be harmonized, if possible, to such scheme, plan, or dominant purpose that appears to have been the intention of the testator. *Id.* When the words of one part of a will are capable of a two-fold construction, the construction that is most consistent with the intention of the testator, as ascertained from other portions of the will, should be adopted. *Id.*

In *Harrison v. Harrison*, 82 Ark. App. 521, 526, 120 S.W.3d 144, 147 (2003), we explained the court's role:

> The function of a court in dealing with a will is purely judicial; and its sole duty and its only power in the premises is to construe and enforce the will, not to make for the testator another will which might appear to the court more equitable or more in accordance with what the court might believe to have been the testator's unexpressed intentions. "The appellants are correct in the statement that the purpose of construction is to arrive at the intention of the testator; but that intention is not that which existed in the mind of the testator, but that which is expressed by the language of the will." *Jackson v. Robinson*, 195 Ark. 431, 112 S.W.2d 417, 418.

Examining the four corners of Mr. Parker's holographic will, we find no ambiguity in the devise in question, and we hold that it is residuary in nature. *Black's Law Dictionary* defines "residuary devise" as a "devise of the remainder of the testator's property left after other specific devises are taken." *Id.*, page 484 (8th ed. 2004). "The 'residue' of an estate is that which remains after the payment of all costs, debts, and particular legacies."

Goforth v. Goforth, 202 Ark. 1017, 1023, 154 S.W.2d 819, 822 (1941). On the other hand, a specific legacy or devise is a gift by will of a specific article or part of the testator's estate, which is identified and distinguished from all other parts of the same kind, and which may be satisfied only by delivery of the particular thing. *Goforth, supra.*

> "The mere enumeration of property in a residuary clause of a will in general terms does not constitute the legacy or devise a specific one. There must be something in connection with the enumeration of property to show that the testator's intention was to make the devise or legacy a specific one before the courts will so declare it." ... "The general rule is that an enumeration of specific articles in a residuary clause will not make the bequest specific as to such articles unless they are designated in such a way as to differentiate them from the residue. A bequest of all of a man's property is residuary and not a specific legacy, since its import is the same as expressed by the words, 'rest and residue.' "

202 Ark. at 1022, 154 S.W.2d at 822. The *Goforth* court affirmed the trial court's finding that the following devise was general, or residuary, rather than specific in nature: "I bequeath to my beloved son, Walter Goforth, all of my personal property of whatsoever kind and wheresoever situated left by me at my death."

Here, appellant contends that the devise should be construed to give effect to each of the three essential words. That is, that Mr. Parker intended to devise his remaining assets, which just happened to be "monetary" in nature. We agree. In addition, in the context of Mr. Parker's will, the phrase "remaining monetary assets" does not contain the necessary language of specificity for it to be a specific devise. The devise is immediately preceded by a devise of $20,000 in life insurance proceeds, which, although ineffective, nevertheless tends to explain Mr. Parker's use of the word "monetary" in the devise in question. Further, the devise is placed at the end of the will where residuary clauses are normally placed. Mr. Parker's use of the word "remaining" is certainly residuary in nature. Also, with respect to the other devises in the two-page holographic instrument, all of which were specific, Mr. Parker repeatedly used the word "my," yet did not use that possessory word in the devise in question.

In light of our interpretation of Mr. Parker's holographic will, we also hold that the trial court erred in concluding that the

estate's expenses should be shared on a *pro rata* basis by all of the beneficiaries. *See* Ark. Code Ann. § 28-53-107 (Repl. 2004) (abatement statute).

For her second point of appeal, appellant challenges the trial court's award of fees to the executor. However, this point was presented as an alternative point of appeal, to be addressed only if the trial court's interpretation of the will were affirmed. Because we are reversing the trial court on the first point of appeal, it is not necessary for us to address appellant's second point of appeal.

We reverse and remand this case to the trial court to enter an order consistent with this opinion.

Reversed and remanded.

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

PITTMAN, C.J., GLADWIN, CRABTREE, and ROAF, JJ., dissent.

ROBERT J. GLADWIN, Judge, dissenting. In reversing the trial court, the majority has completely ignored the basic rules of English and has determined that the word "monetary" has no meaning in this holographic will. It has also ignored our standard of review for probate cases. For these reasons, I dissent.

At issue in this case is the devise that provides, "All the remaining monetary assets go to my brother John to do with as he sees fit." The trial court found this final devise to be ambiguous and allowed evidence of the decedent's intent to determine whether the devise was specific or residuary. The trial court made the following findings of fact: 1) that the funds in question were inherited funds; 2) that the decedent protected those funds, neither permitting invasion, sale, distribution nor transfer during his lifetime; 3) that decedent did not comingle the funds with those of the distributee, Susan Lynn Cleaves; 4) that distributee Susan Lynn Cleaves and decedent shared household expenses; 5) that it was not unreasonable to assume decedent would intend to have those funds remain in the family; 6) that the term "monetary" was meant to cover the decedent's liquid funds as described in the February 26, 2004 order. The court therefore found the clause in question to be a specific devise.

Probate cases are reviewed de novo on the record. *Balletti v. Muldoon*, 67 Ark. App. 25, 991 S.W.2d 633 (1999). However, an order of the probate court will not be reversed unless it is clearly

erroneous. *Id.* We defer to the superior position of the chancellor to judge the credibility of the witnesses. *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997). The function of the court in dealing with a will is purely judicial; and its only power in the premises is to construe and enforce the will, not to make for the testator another will which might appear to the court more equitable or more in accordance with what the court might believe to have been the testator's unexpressed intentions. *Jackson v. Robinson*, 195 Ark. 431, 112 S.W.2d 417 (1938).

The majority holds that the devise in question is not ambiguous and is residuary in nature. The majority goes on to state that the clause in question "remaining monetary assets" does not contain the "necessary language of specificity" for it to be a specific devise. However, it does not explain what "necessary language of specificity" would be sufficient. The majority totally fails to explain how the trial court's ruling is clearly erroneous after giving deference to the trial court's superior position to make findings of fact.

A rudimentary review of elementary English will show that the majority has determined that the word "monetary" has no meaning in this will. "All the remaining monetary assets" is a subject phrase with assets being the subject. The assets are modified by the words "all the remaining" that describe which assets go to the brother, John. If this were the entire phrase, then it would be residuary, and the majority's analysis would be correct. However, the decedent did not give John all the remaining assets. The decedent gave all the remaining *monetary* assets. "Monetary" is a word of limitation describing which remaining assets go to John.

Webster's 3rd International Dictionary defines "monetary" as "of or relating to money or to the instrumentalities and organization by which money is supplied to the economy." Webster's II New College Dictionary defines "monetary" as "of or relating to money or its means of circulation." Given these definitions, I fail to see how the trial court was clearly erroneous in finding that the term "monetary" was meant to cover the decedent's liquid funds. The majority seems to actually bolster this argument by stating that the devise immediately preceding the devise in question "tends to explain Mr. Parker's use of the word 'monetary'." In that devise, the decedent stated "my life insurance policy ($500) redeme (sic) value - and - 20K death payment ? goes to Susan Cleaves." If the majority is insinuating that a life insurance policy is a monetary asset, then monetary assets would surely

include those assets that the trial court found to be liquid funds, and not the entire remaining estate.

The majority further states that the clause is residuary because it is at the end of the will, yet it cites no law to support the proposition that the final devise must be residuary. While I agree that many residuary clauses tend to appear at the end of wills, it is by no means presumed that a final devise of a will must be residuary. Further, I fail to see the importance of the decedent's use of the word "my" in the other devises. "My" is simply a possessive pronoun, and there is no question that all the remaining monetary assets belonged to the decedent also. Therefore, the use of the word "my" is of no legal import at all.

Given that I believe "all the remaining monetary assets" means something less than all remaining assets, I would hold that the devise of the decedent's will is a specific devise. Therefore, I would further hold that the trial court was not clearly erroneous and would affirm.

PITTMAN, C.J., and CRABTREE, J., join.

ANDREE LAYTON ROAF, Judge, dissenting. I would affirm the trial court because I believe the devise at issue is a general devise, and because the appellant did not make this argument to the trial court, nor does she raise it on appeal.

A specific legacy, as defined in *Holcomb v. Mullin*,167 Ark. 622, 268 S.W. 32 (1925), is a "gift by will of a specific article or part of the testator's estate, which is identified and distinguished from all other parts of the same kind, and which may be satisfied only by the delivery of the particular thing." The devise at issue in the present case is worded as follows: "All the remaining monetary assets go to my Brother John to do with as he sees fit." Jack Parker, the testator, did not distinguish any funds he might own from the rest of his monetary assets. Here, he used the general term "monetary assets" and did not list any funds or accounts that this money might possibly come from. *See Barnes v. Sewell*, 269 Ark. 1, 598 S.W.2d 77 (1980) (holding that will paragraph in which testatrix bequeathed "all monies I may possess, my checking account monies, savings account monies, Certificates of Deposits, bonds of any nature and other evidence of debt such as promissory notes" was a specific rather than general bequest despite the contention that the bequest mentioned no amount and referred to no particular fund). Jack knew that he owned certain funds and

could have listed the funds and account numbers in his will. If Jack had referred to his "remaining monetary assets" and then listed out what funds and accounts he wished this money to come from, then it would have clearly been a specific devise. Here, the devise is only a general one because Jack did not even hint as to what these "monetary assets" were and, he, in no way, attempted to distinguish certain monetary assets from others.

This case is confusing, however, because the parties have framed the issue in terms of specific devises versus residual devises when the issue is whether this is a specific devise or a general devise. According to the parties in this case, if it is not residual, then it is specific. This is not a correct statement of the law, because a devise can be properly classified as a general devise and *neither* a residual *nor* a specific devise.

According to the Arkansas abatement statute, the order of abatement is as follows:

> (1) Property not disposed of by the will;
>
> (2) Property devised to the residuary devisee;
>
> (3) Property disposed of by the will but not specifically devised and not devised to the residuary devisee; and
>
> (4) Property specifically devised.

Ark. Code Ann. § 28-53-107 (Repl. 2004). The trial court found that the appellee John's devise falls into category (4) along with appellant's devise, so that the two devises abate equally. However, John's devise instead falls into category (3), which is "[p]roperty disposed of by the will but not specifically devised and not devised to the residuary devisee." This means that the property of the devise at issue in the present case would abate before any property specifically devised. John's bequest of monies therefore would abate before appellant's specific bequest of the house.

The language of Ark. Code Ann. § 28-53-107(b)(1) further sheds some light on the issue. It states, "A general devise charged on any specific property or fund, for purpose of abatement, shall be deemed property specifically devised to the extent of the value of the thing on which it is charged." This language clearly demonstrates that the "general devise" category (Category 3 in the

statute) clearly exists. It also supports the argument that general devises of money not charged on a specific property or fund are deemed general devises and *not* specific devises. In the present case, the decedent did not charge his general devise of money on any specific property or fund.

Finally, the trial court is correct in that the devise at issue is certainly not a residual devise. The appellant, however, has not argued that the bequest is a general devise, but rather that it is a residuary devise. We can affirm a trial court if it reaches the right result for the wrong reason *Middleton v. Lockhart*, 355 Ark. 434, 139 W.W.3d 500 (2003); *Moore Inv. Co., Inc. v. Mitchell*, 91 Ark. App. 102, 208 S.W.3d 803 (2005). However, we do not reverse a trial court where, as in the case before us, an argument is raised neither below nor on appeal. *Crockett v. Essex*, 341 Ark. 558, 19 S.W.3d 585 (2000); *Sheets v. Dollarway Sch. Dist.*, 82 Ark. App. 539, 120 S.W.3d 119 (2003); *McGuire v. Smith*, 58 Ark. App. 68, 946 S.W.2d 717 (1997). We should not do so in this case.

FAYETTEVILLE SCHOOL DISTRICT
and Risk Management Resources *v.*
James KUNZELMAN

CA 05-479 217 S.W.3d 149

Court of Appeals of Arkansas
Opinion delivered November 16, 2005

Friday, Eldredge & Clark, by: *Betty J. Demory*, for appellants.

The Niblock Law Firm, by: *Raymond L. Niblock*, for appellee.

DAVID M. GLOVER, Judge. This is a workers' compensation case. The Commission affirmed and adopted the ALJ's decision, which found that appellee, James Kunzelman, sustained a compensable right-eye injury on January 7, 2003, and that he was entitled to additional medical treatment for his right eye, reimbursement for sunglasses, and $3000 for permanent facial disfigurement. For their sole point of appeal, appellants, Fayetteville School District and Risk Management Resources, contend that the Commission's opinion is not supported by substantial evidence. We affirm the Commission.

Standard of Review

When reviewing a decision from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Swaim v. Wal-Mart Assocs., Inc.*, 91 Ark. App. 120, 208 S.W.3d 837 (2005). Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether the appellate court might

have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, the appellate court must affirm the decision. *Id.* When the Commission affirms and adopts the ALJ's opinion as the decision of the Commission, the Commission makes the ALJ's findings and conclusions the findings and conclusions of the Commission. *Id.* Therefore, in reviewing the case, we consider both the ALJ's decision and the Commission's majority opinion. *See id.*

Award of Additional Benefits

The parties stipulated below that appellee sustained a compensable injury to his eye on January 7, 2003, and that medical expenses had been paid to December 15, 2003. The issues that the parties agreed to litigate were 1) additional medical after December 5, 2003, and 2) permanent disfigurement pursuant to Arkansas Code Annotated section 11-9-524 (Repl. 2002).

For their sole point of appeal, appellants contend that the Commission's award of additional benefits to appellee is not supported by substantial evidence, and that "[i]nstead, the evidence in this case reveals that the appellants provided the appellee with extensive medical treatment for a condition which is not the result of a work-related accident." In support of this assertion, appellants contend that "the medical testimony of the regional specialist on iritis, Dr. Christopher Walton, shows that the treatment the appellee received, as well as the dilated condition of the appellee's eye, is due to herpes." The bulk of appellants' argument then consists of recounting the evidence that they contend supports their position and undermines appellee's. We do not find the argument convincing.

Appellee testified that on January 7, 2003, as he was stirring a ceramic glaze for his art class, "either some glaze splashed into my eye, or it splashed onto my face, and I wiped my face with my hand." He stated that he kept working for another twenty to thirty minutes until his students got to class and that when the students entered they immediately asked him what was wrong with his eye. He said that he looked in the mirror and then ran to the nurse's office. He said that his right eye was very bloodshot; that the nurse told him to flush it out; and that he did so for five to six minutes. He explained that by 3:30 that afternoon, his eye had become so light sensitive that he could not go outside without completely closing his eye.

He stated that after school he went by the office of his friend, Don Marr, and then to the office of Dr. Brian Buell, an optometrist. He stated that he had some pain and discomfort in his eye and that he knew "there was something going on." He explained that Dr. Buell checked his eye pressure when he arrived, found it to be high, and that he stayed there until about 9:30 p.m., while Dr. Buell put various eye drops in his eye to get the pressure back into a safe range. That effort continued for the next two days, with appellee staying at Dr. Buell's office from 8:00 a.m. until 5:00 p.m. and Dr. Buell putting eye drops in appellee's eye every hour. He stated that on the third day following the accident, he went back to work. He explained that his eye was very light sensitive and that he had problems with blurry vision and seeing details. He testified that those problems lasted several weeks and that he saw Dr. Buell daily during that period. He said that Dr. Buell referred him to Dr. Paul Henry, an ophthalmologist, after about three weeks, but that he continues to see Dr. Buell several times a week.

Appellee testified that his eye stayed "totally bloodshot" for six or seven weeks; that the left side of his eye stayed red for almost a year; and that there is still some redness and some scarring. He said that he only missed two days of work and that he wore sunglasses in the classroom for approximately two to three weeks because the lights were too bright. He said that his doctor told him that the light entering his eyes would cause cataracts.

Appellee testified that he saw Dr. Walton in Memphis one time for fifteen minutes; that Dr. Walton did not prescribe any treatment for him; and that he considered Dr. Henry to be his treating doctor. He explained that his main problem now is the permanently dilated pupil; that as an artist, his inability to focus causes difficulty in helping his students; and that he cannot perceive color like he used to be able to do.

Appellee testified that before the incident on January 7, 2003, he never had any eye problems and never wore prescription glasses or contacts; that he had never been told by a doctor that he had herpes; that he now uses a topical steroid routinely for his eye; that he never used a topical steroid for his eye before January 7, 2003; that he will need surgery in the near future, when he is weaned off of the steroids, to correct his cataract; and that before January 7, he did not believe nor have any information that he had a cataract.

Donald Marr testified that he has known appellee for fifteen to sixteen years; that they have lived together for fourteen to

fifteen years; that during that time, he had never heard appellee complain about eye problems until January 7, 2003; and that prior to that date, appellee did not wear glasses or contacts and did not use prescription eye drops or medications. He explained that when appellee came to his office on the afternoon of January 7, his eye was still bothering him; that appellee either had his hand over his eye or he would have to squint and look out of his left eye to see; that his eye was also very bloodshot and red; and that he had a headache. He stated that since January 7, appellee's eye has continued to be light sensitive; that he still wears a visor or sunglasses; and that the lights in their house are always dimmed.

Anita Lawson, the principal at appellee's school, testified that she has known appellee for four and a half years; that he has a strong work ethic, is very professional, an excellent employee, and very honest; that on January 7, 2003, he came to talk to her about something and she noticed that his eye was very red; and that she called it to his attention and encouraged him to go to the doctor. She stated that his eyes had always been clear blue and that now one eye looks different because it is constantly dilated. She said that appellee told her he had been mixing a glaze when it splashed in his eye and that he has had consistent problems with his eye after that date.

The remaining testimony at the hearing came from the deposition testimony of three doctors: Brian Buell, the optometrist who first saw appellee; Paul Henry, the ophthalmologist to whom appellee was referred; and Robert Christopher Walton, the Memphis ophthalmologist who was consulted in the case and who evaluated appellee on April 17, 2003. Appellants rely primarily upon Dr. Walton's testimony, opining that the eye injury was not caused by ceramic glaze, in contending that the Commission's decision is not supported by substantial evidence.

Workers' compensation law provides that an employer shall provide the medical services that are reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a) (Repl. 2002); *Stone v. Dollar Gen. Stores*, 91 Ark. App. 260, 209 S.W.3d 445 (2005). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Stone v. Dollar Gen. Stores, supra.* It is the province of the Commission to weigh conflicting medical evidence; however, the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. *Id.* The resolution of conflicting evidence is a question of

fact for the Commission. *Id.* We defer to the Commission's findings on what testimony it deems to be credible, and it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Hargis (War Eagle) Transport v. Chesser*, 87 Ark. App. 301, 190 S.W.3d 309 (2004).

Here, the ALJ recounted the medical testimony and exhibits in detail. Summarizing that evidence, the ALJ noted that "Dr. Walton stated that overall, his impression was that uveitis and all the other findings that were noted concerning the claimant were not related to a chemical exposure that occurred in January 2003 and that he would state that opinion within a reasonable degree of medical certainty." With respect to Dr. Buell's medical assessment, the ALJ noted that "Dr. Buell responded that based on a reasonable degree of medical certainty, he believes the claimant's eye was injured as a result of the glaze that entered his eye on January 7, 2003, that the claimant's treatment since January 7, 2003, has been reasonable and necessary, and that he believes that the major cause of the claimant's need for treatment is a direct result of the glaze which entered his eye on January 7, 2003." Concerning Dr. Henry's assessment, the ALJ noted that Dr. Henry responded to written questions the same as Dr. Buell and that Dr. Henry stated that "he felt that based on the claimant's history, the claimant's right eye was injured as a result of the chemical glaze."

The ALJ then concluded:

> After a complete review of all the documentary evidence as well as the testimony, I find that the claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment after December 5, 2003. Dr. Henry and Dr. Buell have continually treated this claimant since his initial injury on January 7, 2003, when he splashed a ceramic glaze into his right eye. Although none of the claimant's treating physicians are 100 percent certain that his ongoing need for medical treatment is a direct result of this January 7, 2003, event, it is certain that he has no record of treatment of his right eye prior to this date and subsequent to that date it has been continual. Dr. Henry, in his deposition, very clearly sets forth that the event of getting chemical in the claimant's eye started the need for a treatment process, some of the treatment itself has triggered other problems which must be addressed such as his cataracts.

While it is true that Dr. Walton's opinion differed from that of Dr. Henry and Dr. Buell, his testimony was not arbitrarily disregarded. It is the Commission's duty to weigh the medical

evidence, and the resolution of conflicting evidence is a question of fact for the Commission. *Stone v. Dollar Gen. Stores, supra.* Viewing the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission, we hold that the Commission's decision is supported by substantial evidence.

The Facial Disfigurement

The ALJ also found that appellee was entitled to $3000 for his facial disfigurement. The ALJ stated: "Although the claimant's right eye injury, which has resulted in his eye being watery looking, red and with a permanently dilated pupil, is not grotesque, it is quite noticeable and does detract from the claimant's appearance. Stating it quite bluntly, it looks weird." Appellants contend that this award was in error because "[t]here is no evidence whatever that the appellee's eye had caused him to be refused any employment." We find no error.

Arkansas Code Annotated section 11-9-524 (Repl. 2002) provides:

> Compensation for disability — Disfigurement.
>
> (a) The Workers' Compensation Commission shall award compensation for serious and permanent facial or head disfigurement in a sum not to exceed three thousand five hundred dollars ($3,500).
>
> (b) No award for disfigurement shall be entered until twelve (12) months after the injury.

The wording of the statute alone supports the Commission's award. Appellants, however, rely upon *Jolly v. J.M. Hampton & Sons Lbr. Co.*, 234 Ark. 574, 353 S.W.2d 338 (1962), to support their argument. The *Jolly* case did hold that in order to recover compensation for disfigurement *under the statute at issue in that case* the claimant had to show that the disfigurement would affect his/her future earning capacity. However, the language of the statute has changed since *Jolly* was decided.

In the *Jolly* case, our supreme court quoted the statute at issue, which at that time was Ark. Stat. Ann. section 81-1313(g). According to the opinion, the statute provided:

> "The Commission shall award compensation for serious and permanent facial or head disfigurement in a sum not to exceed two

> thousand ($2,000.00) dollars, *based solely upon the effect such disfigurement shall have on the future earning capacity of the injured employee in similar employment.* No award for disfigurement shall be entered until twelve (12) months after the injury."

234 Ark. at 576, 353 S.W.2d at 340 (emphasis in original). The language italicized by the supreme court in *Jolly* no longer exists in the current statute. Consequently, appellants' reliance upon *Jolly* is misplaced, and the award for facial disfigurement is supported by the current language of Arkansas Code Annotated section 11-9-524 (Repl. 2002).

Affirmed.

NEAL and VAUGHT, JJ., agree.

Robert HATTABAUGH, David W. Ware, and Linda Ware *v.* Jacquelyn E. HOUSLEY

CA 04-1295 217 S.W.3d 132

Court of Appeals of Arkansas
Opinion delivered November 16, 2005

Troy Gaston, for appellants.

Otto R. Fry, for appellee.

DAVID M. GLOVER, Judge. This appeal is a result of a boundary dispute. Appellants, David and Linda Ware and Robert Hattabaugh, argue that the trial judge erred in quieting title in favor of appellee, Jacquelyn Housley, and in finding that an existing fence was not the boundary by acquiescence. We agree that the trial court was clearly erroneous in finding that the fence line in this case had not become the boundary by acquiescence; therefore, we reverse and remand.[1]

Our standard of review in boundary-line cases is set forth in *Hedger Brothers Cement & Material, Inc. v. Stump*, 69 Ark. App. 219, 222, 10 S.W.3d 926, 928 (2000) (citations omitted):

> Although chancery 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. 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.

In the present case, appellee and her late husband purchased their property in 1977, and in 1980, the late Mr. Housley erected a fence without the benefit of a survey that, according to Mrs. Housley's testimony, was where Mr. Housley thought that the property line "might be." Mrs. Housley said that it was her husband's intention to build the fence on the property line. She testified that she was present at her son's deposition and heard him testify that the late Mr. Housley had treated the fence line as the property line. Mrs. Housley testified that she removed the fence after a 2002 survey she had done indicated that the fence was not the property line, but she said that for the twenty years prior to the survey, she had never used the property on the other side of the fence.

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[1] We note that appellee argues, as an additional basis for affirming the trial court's decision in her favor, that appellants did not plead in a compulsory counterclaim the theory of boundary by acquiescence. We disagree. A review of the pleadings indicates that appellants did sufficiently plead the theory of boundary by acquiescence in their counterclaims.

Ron Daniel, who owns a portion of the property on the east side of Mrs. Housley, testified that he thought that the fence was the property line when he purchased his property in 1990. He said that he had used the land on his side of the fence exclusively for the last fourteen years and that no one had told him that they claimed it. Daniel said that all of Mr. Housley's behavior indicated that he treated the fence line as the property line, and Daniel said that he understood that the fence line was the property line not only between his property and the Housley property, but also between the Housley property and the Hattabaugh property.

David Ware, who owns the property south of the Housley property and who is one of the appellants, testified that he bought his land twenty years ago and that there was an old fence there when he purchased his property. Ware testified that although Mr. Housley never made specific statements as to what he was treating as the property line, the actions that Mr. Housley took indicated that the fence line was the property line.

During appellants' case in chief, appellant Robert Hattabaugh testified that he owned fifteen acres to the east of the Housley property, which he acquired in 1989. He stated that when he bought the property, he understood that the fence was the western boundary of his property. Hattabaugh testified that he had cut timber off all of the property, including the land in question; that he had built a pond right next to the fence line; and that he had built a "food plot" there for his animals. He also said that he had always maintained a road that ran "right up to the fence line." He said that whenever anyone needed access to the property, they came to see him, and that when the Housleys had some dozer work done, they only dozed the property on their side of the fence.

In *Hedger Brothers Cement, supra*, we set forth the requirements to establish a boundary by acquiescence:

> 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. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). 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.* The location of a boundary line is a question of fact. *Id.* . . . Whether a boundary line by acquiescence exists is to be determined upon the

> evidence in each individual case. *Neely v. Jones*, 232 Ark. 411, 337 S.W.2d 872 (1960).

69 Ark. App. at 222-23, 10 S.W.3d at 928.

In *McWilliams v. Schmidt*, 76 Ark. App. 173, 181, 61 S.W.3d 898, 905 (2001), this court held:

> As we stated in *Summers v. Dietsch,* 41 Ark. App. 52, 849 S.W.2d 3 (1993), 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 the concepts of acquiescence and adverse possession. A fence, by acquiescence, may become the accepted boundary even though it is contrary to the surveyed line. *Id.* 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.* It is not required that there be an express agreement to treat a fence as a dividing line; such an agreement may be inferred by the actions of the parties. *Id.* Acquiescence need not occur over a specific length of time, although it must be for a long period of time. *Lammey v Eckel*, 62 Ark. App. 208, 970 S.W.2d 307 (1998). A boundary line may be established by acquiescence whether or not it has been preceded by a dispute or uncertainty as to the boundary line. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). When a boundary line by acquiescence can be inferred from other facts presented in a particular case, a fence line, whatever its condition or location, is merely the visible means by which the acquiesced boundary line is located. *Id.* Whether a boundary line by acquiescence exists is to be determined upon the evidence in each individual case. *Hedger Bros. Cement and Materials, Inc. v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000).

In the case *Boyette v. Vogelpohl*, 92 Ark. App. 436, 214 S.W.3d 874 (2005), this court reversed the trial court's finding that appellants had not established a boundary by acquiescence and reiterated the requirements for a boundary by acquiescence, citing *Summer v. Dietsch, supra*. In *Boyette*, the appellees had possession of their property for eight years prior to taking any action regarding the fence line in question. The fence line in that case had been in existence for forty years, with the Boyette family continually claiming the property on one side and other predecessor owners claiming the property on the other side of the fence. In reversing, this court held that it was of no consequence that the fence line was

not originally erected to serve as a boundary line, but rather it was the conduct of the parties that determined whether there was a boundary by acquiescence.

In the present case, Mrs. Housley's testimony indicates that her husband believed that he placed the fence on the property line. However, even if Mr. Housley had known that he did not put the fence on the property line, all of the evidence, even Mrs. Housley's testimony, is consistent and not disputed, indicating that all of the parties treated the fence as the boundary line for over twenty years, which, according to case law, indicates that there was in fact a boundary by acquiescence, and the trial court erred in holding otherwise.

Reversed and remanded with instructions to quiet title in the appellants.

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

HART and CRABTREE, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. I respectfully dissent. As stated by the majority, appellee Jaquelyn Housley testified that she and her late husband acquired the property in 1977, and when her husband built the fence in 1980, he constructed the fence where he thought the property line might be. She testified further that her husband built the fence "so that he could run cattle" and that her husband "thought he put it as close to the property line as he . . . thought it was . . . but his main objective was to run cattle." Housley first learned of the actual property line when she obtained a survey on January 16, 2002. The trial exhibits show that while the fence line closely approximated the property line at the southwest and northeast corners of Housley's property, the fence line angled inside the property line on the south and east sides so that the fence's southeast corner was inside Housley's actual southeast corner.

In my view, Housley testified that, while her husband placed the fence where the boundary line might be, his main objective in building the fence was to run cattle. This testimony evidences their intent, not to claim property just to the fence line, but instead to construct a fence as close to the property line as possible in order to run their cattle. Consequently, Housley's testimony establishes that she and her husband intended to claim their property to the property line, not the fence line. Moreover, according to appellant Robert Hattabaugh, and as corroborated by appellant David Ware,

in 1999 a person working for Housley used a bulldozer and pushed trees over the fence, knocking the fence down in places. As this occurred before Housley learned of the discrepancy in 2002, it further indicates that she did not treat the fence line as the property line. In sum, there was no testimony from Housley showing that she and her husband intended the fence to be the property line, so Housley's testimony does not support a claim of boundary by acquiescence, and appellants presented testimony that supported Housley's position as well.

Accordingly, the only proof of their claims of acquiescence came from appellants. When discounted, as it was by the circuit court, there is no evidence remaining to support reversal of this case. Given the deference accorded the circuit court in determining the credibility of the witnesses and the weight to be given their testimony, we should affirm the court's finding that there was no boundary by acquiescence. *See Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004).

Furthermore, we recently restated settled law that a landowner who puts his fence inside his boundary line does not thereby lose title to the strip on the other side. *Robertson*, *supra*. The cases relied on by the majority do not rebut this position. Rather, the fences described in *Boyette v. Vogelpohl*, 92 Ark. App. 436, 214 S.W.3d 874 (2005), and *Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993), were not constructed by the parties who owned the property but were instead constructed by predecessors in title.

I am deeply troubled by the holding of this case, which supports the notion that a landowner, by putting up a fence, can lose title to his own property. Certainly, this case suggests that a landowner who wishes to put up a fence of convenience for such purposes as fencing in cattle must either expend funds and pay for a survey or err on the side of caution by placing the fence on his neighbor's land.

I respectfully dissent.

CRABTREE, J., joins.

Sylvia LUEBKER and David Luebker *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 05-152 217 S.W.3d 172

Court of Appeals of Arkansas
Opinion delivered November 16, 2005

Stephen W. Tedder, for appellant.

Gray Allen Turner, for appellee.

LARRY D. VAUGHT, Judge. Sylvia and David Luebker appeal from an order of the Circuit Court of Pulaski County denying their petition to adopt three minor children, C.C. (age seven), E.C. (age six), and D.C. (age four). The Luebkers contend that the trial court erred (1) in its determination that the Department of Human Services did not unreasonably withhold its consent to the adoption and (2) in its conclusion that it was not in the best interest of the children that they be adopted by the Luebkers. We affirm.

Sylvia Luebker is the putative biological grandmother of the children whom she sought to adopt. David Luebker is Sylvia's husband and the "putative step-grandfather" of the children. Two of the three children initially came into foster care following the arrest of their putative father, Scott Cantrell. Thereafter, the third child was brought under the jurisdiction of the trial court. As part of the original plan for parental reunification, the court ordered the parents to establish legal paternity over the children; however, paternity was never established.

During the pendency of the case, the Luebkers intervened and sought custody of the children. On May 8, 2001, prior to the Luebkers' formal intervention, the court placed the children in the Luebkers' temporary legal custody on the conditions that they not place the children in the custody of any other person without first obtaining a court order, that they not change their home address without first giving DHS advance notice, and that an expedited home study be completed on the Luebker residence. At that time, the trial court's goal for the case remained reunification with either of the natural parents.

On January 16, 2002, DHS filed an emergency motion for a change of custody after it obtained information — believed to be

credible — that Mrs. Luebker placed the children with someone else, in direct contravention of the court's order. As a result of this motion and subsequent hearing, all three children were returned to DHS custody. Following a lack of any significant progress in achieving the goal of reunification — notably the putative father's continued incarceration and the fact that during this time the children's mother was convicted of murdering her newborn child and was sentenced to seventy-seven years' imprisonment — the natural parents' rights were terminated after a hearing on May 27, 2003. At this same time, the court also considered — and denied — a motion from the Luebkers to intervene and to transfer custody.

On January 30, 2003, the Luebkers filed a petition seeking to adopt the three minor children. A hearing on the matter was held on July 9, 2004. At the hearing, the DHS staff member assigned to the case testified that the agency was unwilling to consent to the adoption and outlined a myriad of concerns with the proposed adoption. These concerns included: (1) a psychological evaluation performed by Dr. Paul Deyoub concluding that Mrs. Luebker was not up to the task of parenting the children; (2) Mrs. Luebker's age of sixty, which exceeded the agency's guideline calling for a maximum-age limit of fifty-five; (3) the fact that Mrs. Luebker was totally disabled and had health issues of rheumatoid arthritis, fibromyalgia, and lupus; (4) the fact that after the court had placed the children in the Luebkers' temporary custody, the agency was required to provide occasional day care and respite care when Mrs. Luebker was too tired to care for the children due to her lupus or other health problems; (5) an indication from Mrs. Luebker that if the children's mother were paroled, the mother would be allowed to reside in the Luebkers' home, and the Luebkers might return the children to their mother's care; (6) the fact that, while in the Luebkers' custody, the two elder children were entrusted to the care of a third party, Shaina Wright (a "relative" through marriage); (7) the fact that prior to the putative father's immediate incarceration he was residing in the Luebker home and engaging in improper drug activities while there. Also, the agency representative expressed a generalized concern about Mrs. Luebker's everyday ability to raise the children until they were eighteen.

In response, Mrs. Luebker argued that the children had only been allowed to visit Ms. Wright for a weekend. However, DHS argued that the evidence proved that the Luebkers were attempting a longer and more significant placement action. DHS based its

contention, in part, on the fact that Ms. Wright had contacted the agency about the possibility of being a foster parent for the children. Although this matter was a highly debated and disputed topic in three separate hearings, the court did not credit the Luebkers' testimony on the subject and refused to return the children to their custody.

The trial court went on to conclude that although DHS's concerns appeared well reasoned, appropriate, and in good faith, the overarching question concerned the best interest of the children. As to that end, the trial court found that "the [Luebkers] have not met their burden of proof that this adoption is clearly and convincingly in the children's best interest." First, the trial court noted that although the Luebkers' advanced age — standing alone — was not a great concern, that when it was coupled with the myriad of health problems from which Mrs. Luebker suffers and the young ages of the children it took on a "greater significance." Second, the trial court found that "in addition to the reasons stated by [DHS]," it had independent concerns about the Luebkers' "negative baggage." Specifically, the court focused on the fact that two of Sylvia's adult sons were "in and out of jail" after trouble with drugs, alcohol, sexual assault, and other convictions. The court further mentioned that, although not related to the Luebkers, the children's mother "is now a convicted infant murderer who tries to maintain contact with the Luebkers from prison." Third, the court expressed concern about the Luebkers' ability, commitment, and willingness to raise these children until they are adults. Specifically, the court was concerned about the permanency of the placement, noting that it believed "it would be only a matter of time before Mrs. Luebker would find it necessary to make other arrangements for the placement of these children." Finally, the court credited DHS's testimony that these three young children were very adoptable and that they could be adopted as a sibling group. In sum, the court determined that, "Based upon the record before the court, the court finds that it would be in the children's best interest to be adopted as a sibling group by another more appropriate adoptive family."

On appeal, the Luebkers argue that the trial court erred in its best interest determination and in its decision that DHS was reasonable in its decision to withhold consent. A trial court may grant a petition for adoption if it determines at the conclusion of a hearing that the required consents have been obtained or excused *and* that the adoption is in the best interest of the child.

Bemis v. Hare, 19 Ark. App. 198, 718 S.W.2d 481 (1986) (emphasis added). However, even where the trial court has determined that parental consent to an adoption is not required, the trial court still must find from clear and convincing evidence that the adoption is in the best interest of the child. *Waldrip v. Davis,* 40 Ark. App. 25, 842 S.W.2d 49 (1992). The burden rests on the one seeking adoption to prove by clear and convincing evidence that adoption is in the child's best interest. *Manuel v. McCorkle,* 24 Ark. App. 92, 749 S.W.2d 341 (1988). The ultimate determination of best interest is the primary objective of the trial court in custody matters. *Manuel, supra.* We defer to the trial court's personal observations when the welfare of a young child is involved because we know of no other case in which the superior position, ability, and opportunity of the trial court to observe the parties carries as great a weight as one involving minor children. *King v. Lybrand (In re Lybrand)*, 329 Ark. 163, 946 S.W.2d 946 (1997). On appeal, we review the evidence de novo, but we will not reverse a trial court's findings unless it is shown that they are clearly contrary to the preponderance of the evidence. *Mason v. Mason,* 82 Ark. App. 133, 111 S.W.3d 855 (2003).

In this case, we have limited our review to the *independent* findings of the trial court, discounting any findings based on the court's conclusion that it should give "some deference to [DHS's] refusal to consent to the adoption." The remaining factual determinations and findings made by the court are more than ample to support an independent conclusion relating to the children's best interest. Because the trial court's independent findings were not contrary to a preponderance of the evidence and the court's conclusion that the adoption is not in the children's best interest is supported by clear and convincing evidence, we affirm the trial court's denial of the adoption petition. Further, because we have affirmed the trial court's best interest finding, the issue of whether DHS improperly withheld its consent need not be addressed.

Affirmed.

GRIFFEN and ROAF, JJ., agree.

Allen Jason WOOTEN *v.* STATE of Arkansas

CA CR 04-1109 217 S.W.3d 124

Court of Appeals of Arkansas
Opinion delivered November 16, 2005

[redacted]

[redacted]

Eugene D. Bramblett, for appellant.

Mike Beebe, Arkansas Attorney General, by: *Clayton K. Hodges*, Assistant Attorney General, for appellee.

KAREN R. BAKER, Judge. A jury in Ouachita County Circuit Court convicted appellant, Allen Jason Wooten, of first-degree murder of Ruiz Stone and abuse of her corpse and sentenced him to forty years' imprisonment. On appeal, appellant makes three allegations of error. We find no merit to his arguments and affirm.

Appellant described the events leading to Ms. Stone's death in a video-taped confession that was admitted into evidence. In that statement, he explained that his relationship with Ms. Stone began approximately a year before her death when he went to work for Coca-Cola in Camden, Arkansas as a route salesman and Ms. Stone worked there as an account salesperson. As he described it, Ms. Stone, pursued a sexual relationship with appellant. He stated that he initially resisted her sexual overtures, but two or three months after he first met her, he relented and had sexual intercourse.

Recounting the events of Monday, June 23, the day of Ms. Stone's death, appellant related that as he pulled into the plant at the gate that Ms. Stone met him and asked him about a particular job assignment. After he said he had completed the assignment, she told him that she wasn't sure, but she thought she might be pregnant, and she intended to find out for sure. He claimed that subsequent to that conversation, he responded to a page from Ms. Stone, and she requested that the two meet in a remote location to discuss the matter. He stated that she provided directions to the location.

According to appellant, he met Ms. Stone, and in the course of the conversation that Ms. Stone threatened his "damned kids and wife." He alleged Ms. Stone grabbed him by the shirt and said, "We'll do it my way." Appellant then described how he grabbed Ms. Stone around her throat with his right arm, how he was yelling at her and hitting her with his hand in the head and neck with her fighting him. He then explained that he stood up and started kicking her repeatedly even though she was no longer fighting him. Appellant further stated that he picked up a pipe that happened to be lying there next to him and started hitting her in the back, in the neck, and in the head even though she was completely unresponsive at that point. Appellant then confessed that he put her in the back of his truck, covered her with steel mesh, and drove away from the scene. He drove the body to another location, backed up the truck, took the body out, covered her with steel and sticks, threw the pipe away at the river bridge,

went to the carwash and washed massive amounts of blood out of the truck, and went home where wrestling was on the television. Other testimony established that appellant's beating of Ms. Stone essentially destroyed her head and face.

Appellant first argues that the trial court erred in allowing Lieutenant Dickinson to testify that the victim told him that appellant had committed a battery against her prior to the homicide as hearsay under Arkansas Rule of Evidence 802 and as evidence of a prior bad act under Arkansas Rule of Evidence 404(b). Our supreme court has been constant and adamant that matters pertaining to the admissibility of evidence are left to the sound discretion of the circuit court. *See, e.g., Martin v. State*, 346 Ark. 198, 57 S.W.3d 136 (2001). Moreover, we will not reverse a circuit court's ruling on a hearsay question unless the appellant can show that the circuit court abused its discretion. *See id.*

The State argues that Ms. Stone's statement to Lieutenant Dickinson was admissible as a present sense impression under Arkansas Rule of Evidence 803(3) (2004). It further argues that even if the statement was not admissible as a present-sense-impression, it was nonetheless admissible under the catch-all exception for unavailable witnesses. See Ark. R. Evid. 804(b)(5) (2004). The State emphasizes that the testimony was evidence of appellant's motive and intent, necessary to refute appellant's defense that portrayed Ms. Stone as a vindictive, sexually promiscuous stalker and himself as an innocent victim of her wiles, who only resorted to her horrific murder because she goaded him into it. As the State explained, appellant murdered Ms. Stone, thereby unequivocally prohibiting her from testifying as a witness against him.

The state's argument that Lieutenant Dickinson's testimony was offered to prove motive echoes the reasoning of our supreme court's decision in *Dednam v. State*, 360 Ark. 240, 200 S.W.3d 875 (2005). In *Dednam*, the appellant's sole allegation of error was that the circuit court erred in allowing a police detective to testify to statements made to her by the murder victim with respect to another case, which allegedly constituted a motive for Dednam's acts. While the State is not required to prove motive, the State is entitled to introduce evidence showing all circumstances which either explain the act, show a motive for acting, or illustrate the accused's state of mind. *Id. (citing Richmond v. State*, 302 Ark. 498, 791 S.W.2d 691 (1990)). Where the purpose of

evidence is to disclose a motive for the murder, anything and everything that might have influenced the commission of the act may be shown and the State is entitled to introduce evidence of circumstances that explain the act, show a motive, or illustrate the accused's state of mind. *Hudson v. State*, 85 Ark. App. 85, 145 S.W.3d 380 (2004). But even so, establishing motive does not equate to proving the truth of whether or not an appellant had committed the act complained of in the testimony. *Dednam, supra.*

In this case, it was not necessary for the State to prove the truth of whether appellant had bruised Ms. Stone's arm. A jury determination of whether appellant had bruised Ms. Stone ten days before he killed her pales in comparison with appellant's confession regarding the trauma he inflicted upon Ms. Stone the day he killed her. Where a statement is admitted for a legitimate, non-hearsay purpose, that is, not to prove the truth of the assertions therein, the statement is not hearsay under the traditional rules of evidence and the non-hearsay aspect raises no confrontation-clause concerns. *Dednam, supra*, (*citing Tennessee v. Street*, 471 U.S. 409 (1985) (holding that Street's confrontation-clause rights were not violated by the introduction into evidence of an accomplice's confession for the non-hearsay purpose of rebutting Street's testimony that his confession was coercively derived from the accomplice's statement) (cited by the Supreme Court in *Crawford v. Washington,* 124 S. Ct. 1354 (2004), for the proposition that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted)).

Barrett v. State, 354 Ark. 187, 119 S.W.3d 485 (2003) is also instructive on this issue. There, when the daughter found her mother, she noticed a bruise on her mother's head. Her mother, the murder victim, made the statement to her daughter that following an argument between her and appellant, that appellant had hit her. This statement was made a year and a half before the victim's murder. In the present case, Lieutenant Dickinson testified that the victim came to him ten days prior to her murder and explained to Dickinson that she was having trouble with appellant harassing her at work and that she feared she would lose her job. Dickinson testified that she appeared afraid of appellant. She also told him that she and appellant had argued and during the argument, appellant grabbed her arm, bruising it. She showed Dickinson the bruise on her arm. Regardless of whether the

testimony was hearsay, any error in admission of the statement was harmless. The erroneous admission of testimony does not require reversal if the error is slight and the proof of guilt is overwhelming. *Barrett, supra.* In this case, the proof of appellant's guilt was overwhelming. In order to prove the charge of murder in the first degree the state was required to prove only that with the purpose of causing the death of Ruiz Stone, appellant caused her death. Ark. Code. Ann. 5-10-102(a)(2). Appellant confessed that after beating Ms. Stone he got up from the ground and continued to kick her; then as she lay on the ground unresponsive, he picked up a pipe and proceeded to beat her in the back and head until she was dead. Clearly appellant's confession alone established the elements of murder in the first degree.

Similarly, any error in admitting the testimony as a prior bad act would not warrant reversal under the harmless error analysis. The jury in this case had before it appellant's videotaped confession in which it was not only able to hear, but also see, appellant confessing to his crimes. Additionally, the jury had Dr. Erickson's explanation as the medical examiner who performed the autopsy on what remained of Ms. Stone's body. He testified that that her jaw was fractured in two places, that she suffered multiple fractures to the face and skull from blows that were so severe that they "would have produced extensive deforming injuries," and that her laryngeal cartilage had been fractured." His examination indicated that the murder occurred in the manner that appellant described.

Under these circumstances, the proof of appellant's guilt was overwhelming, and thus, any error in admitting Lieutenant Dickenson's testimony was harmless not warranting reversal. (*see Cobb v. State,* 340 Ark. 240, 12 S.W.3d 195 (2000) (holding any error in admitting allegedly irrelevant testimony that the defendant loved music was harmless in capital murder prosecution where the defendant admitted killing the victim and evidence supported the conviction)). To determine if the error is slight, we can look to see if the defendant was prejudiced. *Id.* (*citing Scherrer v. State,* 294 Ark. 227, 742 S.W.2d 877 (1988) (holding the fact that defendant passed the time watching sex and horror movies was irrelevant, but the error was harmless as the prejudicial effect was minimal and the evidence of guilt so overwhelming)). Here, appellant's confession as to the details of the murder was admitted into evidence. Further, the medical examiner testified that the injuries the victim sustained were consistent with appellant's confession. The victim died of

blunt force trauma to the head and neck. She had a fractured jaw and multiple facial fractures around the cheek and eye area; the face was "severely battered." Accordingly, there was overwhelming evidence of appellant's guilt, and any error in admission of the victim's statement was harmless. *See Cobb v. State*, 340 Ark. 240, 12 S.W.3d 195 (2000).

For his second point on appeal, appellant argues that the trial court abused its discretion when it excluded the testimony of witnesses who would have provided corroboration relating to appellant's *mens rea* at the time of the occurrence. As the State asserts, it does not appear from the record that this argument was made below. It is well settled that an appellant must raise and make an argument at trial in order to preserve it on appeal. *Raymond v. State*, 354 Ark. 157, 118 S.W. 3d 567(2003). Moreover, in light of the overwhelming evidence in this case, it does not appear that there was any abuse of discretion in not allowing the testimony of the witnesses.

As for appellant's third assertion of error, appellant argues that the jury should have been instructed on the lesser included offense of manslaughter. However, in *Kelly v. State*, 80 Ark. App. 126, 91 S.W.3d 526 (2002), we stated that when a lesser-included offense has been the subject of an instruction, and the jury convicts of the greater offense, error resulting from failure to give an instruction on another still lesser-included offense is cured. *See Cooper v. State,* 324 Ark. 135, 919 S.W.2d 205 (1996), *overruled on other grounds by MacKintrush v. State,* 334 Ark. 390, 978 S.W.2d 293 (1998) (quoting *Branscomb v. State,* 299 Ark. 482, 774 S.W.2d 426 (1989); *Harris v. State,* 291 Ark. 504, 726 S.W.2d 267 (1987)). This is commonly referred to as the skip rule. *Id.* (quoting *Easter v. State,* 306 Ark. 615, 816 S.W.2d 602 (1991)). Here, it appears that the jury was given instructions on first and second-degree murder, yet they convicted appellant of first-degree murder. While there may have been evidence to support the giving of a manslaughter instruction, any error here was cured by the jury's convicting him of the greater offense.

Accordingly, we find no error and affirm.

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

PITTMAN, C.J., HART and CABTREE, JJ., dissent.

JOHN MAUZY PITTMAN, Chief Judge, dissenting. I disagree with the majority's holding that the trial court did not

commit reversible error by permitting police lieutenant Jason Dickinson to testify that the victim told him that appellant committed a battery against her. The majority, somewhat confusedly, simultaneously holds that Lieutenant Dickinson's statement was *not* hearsay; that Lieutenant Dickinson's statement *was* hearsay but was admissible under the residual exception; and that it does not matter whether or not the statement was hearsay because the admission of the statement was harmless in light of appellant's admission that he killed the victim. The majority is wrong on all counts.

There was evidence that appellant and the victim worked at a Coca-Cola facility. Although both were married to other people and had families, they had a sexual relationship. Appellant wanted to terminate the relationship; the victim did not and telephoned him repeatedly. Appellant made harassment charges against the victim at work with regard to the telephone calls. Appellant confessed to killing the victim and hiding her body, saying that the murder occurred in the course of a discussion in which the victim threatened his family. The issues at trial went to the events surrounding the homicide and appellant's mental state at that time. Over appellant's hearsay objection, Lieutenant Jason Dickinson was permitted to testify that the victim told him that appellant committed a battery against her approximately ten days before her death. Lieutenant Dickinson's testimony was abstracted as follows:

> On June 13th, Mrs. Stone [the victim] came to the Sheriff's Department and she specifically asked for me. She wanted to advise me of a problem that she was having at work. She advised that she was having problems with a guy by the name of Jason Wooten. She advised me that he had been harassing her and she feared her job was in jeopardy. She appeared to me to be scared of him. She also advised me that she and Jason Wooten had gotten into an argument and that he had grabbed her on the arm and caused a bruise. She showed me the bruise.
>
> She also told me that Jason Wooten had filed a lawsuit against her and Coca-Cola Bottling Company for sexual harassment and she advised me that it wasn't true. She advised that Jason had been following her around. I advised Mrs. Stone that she should go to the Camden Municipal Building and fill out an Affidavit Warrant of Arrest for Battery in the 3rd Degree and also fill out a restraining order to keep him away from her.
>
> . . . .

> I prepared a report of my conversation with Mrs. Stone after the van was found. The reason that I didn't prepare a report immediately is that we get people come in and ask questions like this all the time. They want some kind of guidance as to what to do. We mostly work felony cases. She came in, she knew me, she wanted my advice. I gave her the advice, I really didn't think it was relevant to write a report. I didn't think there was a reason. After she disappeared and after the van was found, I made the report because I felt there was a reason to make one. I don't know if she went to Municipal Court or anywhere else and initiated the action that I suggested that she could do.

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). The majority holds that the decedent's statement to Lieutenant Dickinson was not hearsay because it was not offered to prove the truth of the matter asserted (*i.e.*, that appellant committed a battery against her), but instead simply to establish appellant's motive for killing her. This is preposterous. Certainly, in a proper case, evidence that would otherwise be hearsay may be relevant to motive without regard to the truth of the matter asserted, *see Dednam v. State*, 360 Ark. 240, 200 S.W.3d 875 (2005), and statements proving motive are not excluded by the hearsay rule. *See Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993). However, the fact that the victim made a report concerning alleged activities of appellant to Lieutenant Dickinson could have no bearing whatsoever on appellant's motive in the present case for the simple reason that *there was no evidence that appellant was aware that the victim had made any such report.* In the absence of evidence of such knowledge, the only possible motive to be derived from Lieutenant Dickinson's testimony would be that appellant decided to kill the victim to prevent her from reporting the battery to the police, and so to avoid any possibility of prosecution for third-degree battery, a Class A misdemeanor bearing a maximum penalty of a $1000 fine and a jail term not to exceed one year. *See* Ark. Code Ann. §§ 5-4-201(b)(1) and 5-4-401(b)(1) (Repl. 1997). Even if it were reasonable to conclude that this would motivate any sane person to commit a homicide (and, I submit, it is not), the fact remains that the establishment even of this feeble motive would require the fact finder to believe that appellant did in fact perpetrate a battery on the victim — which is

to say, that it depends on the truth of the matter asserted by the victim to Lieutenant Dickinson. This statement was hearsay.

The majority also holds that Lieutenant Dickinson's statement was in fact hearsay, but was admissible under the residual exception set out in Ark. R. Evid. 805(b)(5), which permits the introduction of:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statements into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Nothing in the record indicates that the State provided appellant with the notice required by this rule. Even had the State done so, this exception is to be narrowly construed, used rarely, and only in exceptional circumstances having circumstantial guarantees of trustworthiness equivalent to those supporting the common-law exceptions to the hearsay rule. *Hill v. Brown*, 283 Ark. 185, 672 S.W.2d 330 (1984). This is not such a case. Here, the testimony was that the victim-declarant told Lieutenant Dickinson that appellant had been harassing her and committed a battery against her during an argument. There are no inherent guarantees of its trustworthiness in the victim's statement; in fact, the opposite is true. According to the victim's statement as related by Lieutenant Dickinson, she was in fear that she would lose her job because appellant had brought a sexual-harassment suit against both her and her employer. Under these circumstances, her statements depicting appellant as an untruthful aggressor in this matter are inherently suspect. Nor is the victim's statement admissible simply because it was contained in a report given to police. By its own terms, the residual exception applies only to statements not specifically covered by any of the other exceptions, and such reports are specifically dealt with in Rule 803(8), which specifically excludes "investigative reports by police" from being admis-

sible under the exception for public reports and records. The victim's statement to Lieutenant Dickinson was not admissible under the residual exception.

Finally, the majority holds that the admission of the statement was harmless in light of appellant's admission that he killed the victim.[1] It is true that an error in the admission of hearsay evidence does not automatically result in a reversal if the error was harmless; where evidence of guilt is overwhelming and the error slight, we can declare the error harmless and affirm. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002) However, to hold that the evidence of guilt in this case was overwhelming is to misunderstand the significance of appellant's admission of homicide under the circumstances of this case. Here, because of the appellant's admission, the focus of his trial was not whether he killed the victim but was instead his state of mind while doing so.

The jury was called upon to decide whether appellant was guilty of first-degree murder or, instead, of the lesser-included offense of second-degree murder. *See McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002). Did appellant act with purposeful intent, his conscious object being the death of the victim? If so, he was guilty of first-degree murder. But if appellant did not consciously intend to cause the victim's death, the crime was at most second-degree murder, even given that appellant's severe beating of the victim was deliberate conduct done with knowledge or awareness that his actions were practically certain to bring about the victim's death. *See id.* It is therefore not enough to say, as the majority does, that there was evidence to show that appellant killed the victim. In *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002), the supreme court found an attorney's representation to be ineffective and his errors (including failure to object to hearsay testimony that the appellant in that case had previously battered the victim) prejudi-

[1] In his videotaped confession, appellant stated that the victim told him at work that she thought she was pregnant with his child, and asked him to meet her at a secluded spot after work to discuss the situation. He stated that he drove his truck to the spot after work and met the victim, who emerged from her Coca-Cola truck and asked appellant what he was going to do about the pregnancy. The appellant stated that when he told the victim that his main priority was his wife and child, the victim said that she could "take care of [his] damned family" and "get rid of them." Appellant further stated that, when the victim grabbed him by the shirt and screamed "we'll do it my way," he snapped, started yelling and screaming himself, and began beating her; and that he continued to strike, kick, and hit her with a pipe until she stopped talking.

cial because the appellant in that case was convicted of first-degree murder rather than second-degree murder in the beating death of his wife. Likewise, the hearsay evidence in the present case that appellant had recently followed and committed a battery upon the victim was prejudicial, and the trial court abused its discretion in admitting it. I would reverse and remand for retrial, and I respectfully dissent.

HART and CRABTREE, JJ., join in this dissent.

JOSEPHINE LINKER HART, Judge, dissenting. I agree with Judge Pittman that the admission of Mrs. Stone's statement through the testimony of Lieutenant Dickerson was inadmissible hearsay that was not subject to any exception, and I would reverse on that point. I write separately, however, because I believe that Wooten's second argument, that the trial court abused its discretion when it excluded the testimony of witnesses that could have provided evidence of his *mens rea*, is at least as strong a basis for reversal.

There is no dispute that this was a particularly heinous crime; it is difficult to imagine a more brutal homicide, or one that more loudly cries out for retribution. However, the fact that Mrs. Stone was so savagely killed does not excuse the trial court, or this court for that matter, from dispassionately applying the law.

It is worth emphasizing that there is but a single disputed element in this case — Wooten's culpable mental state. I disagree with the majority's contention that the act itself provides "overwhelming" evidence of this element; I believe that the manner in which Mrs. Stone was killed was at least as likely to be the product of "extreme emotional disturbance" as the purposeful mental state that the majority apparently finds self-evident. The distinction is not trivial; in this case, it is the difference between first-degree murder and manslaughter.

Accordingly, I find it unacceptable that the majority has affirmed the trial court's decision to prevent Wooten from putting on his complete defense. Without testimony concerning what Mrs. Stone was capable of when she was rejected by a lover, the testimony of Wooten's expert was essentially presented in the kind of theoretical vacuum that makes it easy to be ignored by a jury. The fact that the trial court crippled Wooten's case is even more egregious because it allowed the rank hearsay of Mrs. Stone's statement to police to be an unassailable characterization of

Wooten's relationship with the victim. Whether Wooten's act was that of a cold-hearted brute or a man driven to the brink by a fatal attraction was the jury's call to make. I would reverse and remand this case for the jury to make that call.

I respectfully dissent.

Christina McNair CAMP *v.* Mickey McNAIR, Caree Ogiela and Mark Ogiela, Husband and Wife

CA 05-321 217 S.W.3d 155

Court of Appeals of Arkansas
Opinion delivered November 16, 2005

White & Watson Law Office, by: *Rick Watson* and *Karen Pope Greenaway,* for appellant.

No response.

ANDREE LAYTON ROAF, Judge. Christina McNair Camp appeals from the trial court's order granting appellees Caree and Mark Ogiela, the paternal grandparents, custody of her minor child. On appeal, she argues that the trial court erred by (1) permitting the Ogielas to intervene in the custody proceedings; and (2) awarding custody to the Ogielas when they failed to prove that she was unfit. We reverse and remand.

Christina and Mickey McNair were divorced on September 19, 2003. They have one daughter, Brianna McNair, born May 8, 2003. Following a hearing held on February 20, 2004, the trial court awarded McNair, who was then living with his parents, the Ogielas, custody of Brianna and awarded Christina standard visitation. Christina was not given overnight visitation due to her cohabitation with a man to whom she was not married, but the trial court indicated that if Christina ceased cohabitating, then she could petition for overnight visitation. Christina's circumstance changed, and on July 1, 2004, the trial court lifted that restriction.

Thereafter, the parties agreed in writing that they would alternate custody every three months, and Christina took custody of Brianna on July 2, 2004. She then filed a petition for modification of the custody order on July 26, 2004. An argument ensued regarding Christina's pursuit of custody, and on August 18, 2004, McNair went to Christina's home and demanded that Brianna be returned to his custody. The Springdale Police Department was present, and McNair was taken to jail. On that same day, Caree and Mark Ogiela, Brianna's paternal grandparents, went to Christina's home and took custody of Brianna. According to Christina, the Ogielas indicated that McNair might flee with Brianna, and convinced her to allow them to keep Brianna to prevent McNair from absconding. A few minutes later, the Ogielas served Christina with a petition to intervene in the instant custody proceedings, and they also filed a petition for modification of the custody order. Christina filed a petition for emergency custody, alleging that the Ogielas had refused to return Brianna to her custody and that it was in Brianna's best interest that the trial court modify the custody order and place Brianna in her custody. Christina also filed a response to the Ogielas's petition to intervene and requested that the petition be dismissed.

A hearing on the parties' motions to modify the February 2004 custody order was held on November 8, 2004. McNair admitted that he was no longer in a position to adequately care for and support Brianna and testified that he wanted his parents to have custody of Brianna. He alleged that Christina was continuing to cohabitate with a married man, Craig Sayer. He testified that he had observed Craig and his children at Christina's house, and that he understood from conversations that he had had with Christina that Craig was at her house regularly. McNair also testified that Christina had made it difficult for him to exercise visitation with Brianna and that when she did agree to visitation, she would take Brianna to his parents' house rather than permitting him to pick her up. He was unable to state whether Christina abused alcohol, and merely stated that he did not know. He later stated that his mother, Caree Ogiela, had told him that Christina had been drunk when she returned Brianna after exercising visitation.

Caree Ogiela testified that the Ogielas had taken care of Brianna since August 2004. She stated that, because McNair had indicated that he wanted them to have custody of Brianna, they have been responsible for facilitating visitation with Christina. Caree Ogiela testified that she had to take Brianna to the hospital

several times, once for an upper-respiratory infection. She later admitted that she and a co-worker smoke in an office that is attached to their home. Caree also stated that Brianna has suffered from diarrhea, diaper rash, and other ailments when returning from Christina's custody. She also testified that she had "caught" Christina cohabitating. There was testimony that Craig had been seen at Christina's house as late as 10:30 p.m. and as early at 6:30 a.m. She also stated that she was concerned about Christina's ability to care for Brianna and that, when Brianna was in Christina's care, she was in poor health and her appearance was poor. She stated that, when she visited Christina's home in July, it was hot in the home because Christina's air conditioner was not working; that the toilet was not working, and Christina indicated that she needed to get someone out to fix it; that there were fans on the floor, and Caree was concerned that small children might stick their fingers in the fans; that there were five or six adults and several children living in the home with Christina and Brianna; and that it appeared that two children were sleeping in Brianna's baby bed because there was a pillow at each end of the bed. She further alleged that Brianna had returned from visitation with a bite mark on her back and a handprint on her face, and that occasionally Christina had returned Brianna dirty. Caree also stated that, since this case began, she had done her own "private detective work" and has followed Christina to the liquor store. She admitted that she did not see what Christina purchased; however, she stated that she had smelled alcohol on Christina's breath.

Christina testified that in February, the time of the last court order, she, Craig, her brother, and sister-in-law lived in the same home. Since the February order, she moved to her own home. It is a two-bedroom home. One of the bedrooms is designated for Brianna, and it is decorated for her and there is a crib in that room. Christina denied that she and Craig were cohabitating at her new home, but admitted that Craig and his two daughters had lived with her for a short time. Craig, however, has not lived in her home since July, and his two daughters have not lived in her home since early August. She also testified that Craig had not spent nights at her home since the trial court lifted the overnight-visitation restriction and that he had never spent the night when Brianna was present in her home. She admitted that Craig has come to her house as early as 6:30 a.m.

Regarding the condition of her home, Christina submitted forty-one pictures taken on August 19, 2004, to show the condition of her home. She denied abusing alcohol but admitted that she consumes wine on occasion. During her testimony, Christina referenced the trial court's concern that she had a "history of alcohol problems." She testified that her last alcohol-related offense occurred four years ago and that she no longer consumes beer and never consumes "hard liquor." She testified that she has had steady employment, only missing a few weeks that year. She also discussed times where the Ogielas had denied her visitation with Brianna and denied that she or anyone in her home had abused Brianna. The testimony also showed that Christina had been voluntarily given increased visitation with her other child, Jared.

After the hearing, the trial court commented that, at the time of the February order, it had placed great weight on the fact that Christina admitted that she was cohabitating with a married man. Accordingly, the trial judge placed Brianna in McNair's custody. The trial court found that there had been a material change in circumstances because McNair had left his parents' home and was now himself cohabitating with a woman to whom he was not married. The trial court acknowledged McNair's preference that Brianna be placed with his parents but also acknowledged that, in July, the parties felt that circumstances had changed such that Christina should be given overnight visitation because she had "met the conditions of the previous visitation order and was no longer cohabitating."

Regarding the Ogielas' petition to intervene and to modify the custody order, the trial court specifically found that they had not proved that Christina was still cohabitating, nor had they proved that she was abusing alcohol in Brianna's presence. The court also found that there was insufficient evidence supporting the Ogielas's assertion that Brianna had been abused while in Christina's custody. He found that there were no pictures showing the alleged injuries (bite mark or handprint) or a doctor's report. The trial court found that there was insufficient evidence showing that Christina was responsible for these alleged injuries and that there was no medical evidence showing the existence of the injuries.

However, the trial court commented that Christina had not "stepped up to the plate." The trial judge pointed to the fact that, despite her testimony that she had steady employment, she was behind on her child-support payments. The trial court also dis-

cussed Christina's relationship with Craig, a married man; however, he reiterated that the Ogielas had not shown that the two were cohabitating. Consequently, the trial court found that it was not in Brianna's best interest to be placed in Christina's custody. The trial court's written order states:

> The Court specifically finds that an insufficient period of time has passed since this Court made findings regarding the relative fitness of Christina Camp to serve as primary caregiver and custodian of and for Brianna McNair for this Court to determine that her shortcomings have been overcome; that Christina Camp has failed to cure certain deficiencies found by the Court and set out in prior orders entered herein, and that Christina Camp has failed to assume full responsibility for and demonstrate skills and actions required to be and serve as the primary caregiver and custodian of Brianna McNair.

As a result, the trial court placed Brianna in the Ogielas's custody. It is from this order that Christina appeals.

The standard of review in child-custody appeals is well settled. We review the evidence de novo, but we will not reverse the findings of the court unless it is shown that they are clearly contrary to the preponderance of the evidence. *Dunham v. Doyle*, 84 Ark. App. 36, 129 S.W.3d 304 (2003). We also give special deference to the superior position of the trial court to evaluate and judge the credibility of the witnesses in child-custody cases. *Id.*; *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999). We know of no cases in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great a weight as those involving children. *Watts v. Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986). A finding is clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999).

For her first point on appeal, Christina argues that the trial court erred in permitting Caree and Mark Ogiela to intervene in the custody proceedings because they lacked standing. Christina did not make this argument below, and, in order to preserve an issue on appeal challenging a party's standing, the appellant must have raised the issue below. *See State v. Houpt*, 302

Ark. 188, 788 S.W.2d 239 (1990). Our court has stated many times that it will not consider arguments raised for the first time on appeal, and even constitutional arguments must be raised below. *See Rudd v. State*, 76 Ark. App. 121, 61 S.W.3d 885 (2001). In this case, Christina's response to the Ogielas's motion to intervene urged the trial court to dismiss the petition. However, in her response, she did not argue for dismissal based on lack of standing. Accordingly, this court cannot reach the merits of this argument on appeal. *See Houpt, supra.*

For her second point on appeal, Christina argues that the trial court erred in awarding the Ogielas custody of Brianna where they failed to prove the allegations in their petition for modification of custody that she was an unfit mother. The substantive law on this topic prefers a parent over a grandparent or other third person, unless the parent is proved to be incompetent or unfit. *See, e.g., Dunham, supra*; *Schuh v. Roberson*, 302 Ark. 305, 788 S.W.2d 740 (1990); *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988); *Jones v. Strauser*, 266 Ark. 441, 585 S.W.2d 931 (1979); *Payne v. Jones*, 242 Ark. 686, 415 S.W.2d 57 (1967); *Riley v. Vest*, 235 Ark. 192, 357 S.W.2d 497 (1962). While there is a preference in custody cases to award a child to its biological parent, that preference is not absolute. *Dunham, supra.* Rather, of prime concern, and the controlling factor, is the best interest of the child. *Id.* The rights of parents are not proprietary and are subject to their related duty to care for and protect the child; the law secures their preferential rights only as long as they discharge their obligations. *Id.*

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

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

Further, in *Dunham*, *supra*, this court stated, "The language is strong, requiring the manifestation of indifference to the welfare of the child or abandonment. *Dunham*, 84 Ark. App. at 47, 129 S.W.3d at 311-12. We also stated that the right of natural parents to the custody of their children as against all others is one of the highest of natural rights and that the State cannot interfere with this right simply to better the moral and temporal welfare of the child as against an unoffending parent. *Dunham*, *supra*.

Citing *Dunham*, *supra*, this court held that the evidence in *Moore v. Sipes*, 85 Ark. App. 15, 146 S.W.3d 903 (2004), did not support a finding that the appellant was an unfit parent. Our court stated, "This is not a situation in which appellant has engaged in egregious conduct that would call her fitness into question." *Id.* at 21, 146 S.W.3d at 908. The appellant had moved a great deal, and as a result, her children had attended a number of schools. *Id.* She also had not supervised the children very well, and as a result, the boys had skipped school and stayed out all night on one occasion. *Id.* The evidence, however, showed that the appellant was working and was concerned about the children and attempting to see to their welfare. *Id.* The *Moore* court contrasted the facts of the case before it with the facts of *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000), where the father had only been employed for one week, had never had custody of the child, had failed to support her, and had physically abused the child's late mother.

■ We are not unmindful of the supreme court's recent observations in *Crosser v. Henson*, 357 Ark. 635, 187 S.W.3d 848 (2004), that "determining whether the child is better off with one party versus another is precisely what the court should decide" and that the preference and fitness of the natural parent are "not the absolute determination" in custody matters. However, the Crossers had had custody of the child for nearly six years pursuant to a valid guardianship order during which time the appellee father had in essence abandoned the child. The supreme court noted that the trial court was faced with a custody-modification case, in which the best interest of the child should always be determined rather than simply whether the parent was unfit, and reversed and remanded the case, ordering that the trial court reconsider the matter in light of the correct standard. In the case before us, the trial court made no findings in regard to the Ogielas other than to state that they had "voluntarily undertaken and assumed the responsibility for the child . . . and have been serving in loco

parentis for said child," and that the best interests of the child required that she be placed in the custody of the Ogielas.

In this case, we find that the trial court's decision is clearly erroneous. The trial court did not find that Christina was unfit. In its written order, the trial court stated that insufficient time has passed to determine Christina's "relative fitness" and to determine whether she has overcome her "shortcomings." This statement does not amount to a finding that Christina is unfit.

Moreover, the evidence would not have supported a finding that Christina is unfit. The trial court specifically stated that custody was awarded to McNair at the February hearing because of Christina's cohabitation with a married man. At the November hearing, the trial court specifically found that the Ogielas failed to prove that Christina was continuing to cohabitate. The testimony at the hearing suggested that the trial court also had concerns about Christina's abuse of alcoholic beverages; however, the trial court also found that the Ogielas had failed to show that Christina was abusing alcohol in Brianna's presence. The trial court also found that there was insufficient evidence, medical or otherwise, supporting the allegation that Brianna was being physically abused while in Christina's care.

The trial judge's comments at the conclusion of the hearing make it clear that he was concerned about Christina's continued relationship with a married man and the fact that she was behind on her child support payments. However, this is not a situation in which Christina's conduct is so egregious as to deem her unfit. *See Moore, supra.* Our case law provides that a natural parent must demonstrate a manifest indifference to her child's well being — an indifference tantamount to abandonment. *See Lloyd, supra; see also Dunham, supra.* Indeed, abandonment by the appellee father is precisely what occurred in *Crosser, supra.* The facts of this case in no way support a finding that Christina demonstrated a manifest indifference to Brianna's welfare that rises to the level of abandonment. The facts do show that, after the Ogielas employed subterfuge to take Brianna in late August, Christina consistently attempted to exercise visitation and on one occasion contacted the local police department when the Ogielas refused to let her see her child. Christina at the time of the hearing was employed and residing in a two-bedroom home, where one of the rooms was designated for Brianna; it was nicely decorated and there was a crib in the room for her. Christina testified that the conditions in her

home that caused concern — the air conditioning unit and toilet — had been remedied. Christina also had ceased cohabitating with Craig as a demonstration that her relationship with her child was more important, and while Christina was behind on her child-support payments, the evidence showed that she was current on her obligation through July 2004, when McNair left Brianna with her. It is also telling that McNair agreed in writing to allow Christina overnight visitation and to allow her more visitation time due to her apparent efforts at improving her life and at becoming a more responsible parent. Christina was likewise given more visitation with her other child.

In sum, our long-established case law favors the natural parent over a grandparent, unless the natural parent is unfit. In this instance, the evidence simply does not support a finding that Christina is unfit or that the child would be "better off" with grandparents who had taken her from her mother by subterfuge some three months prior to the hearing in this case. Accordingly, this case is reversed and remanded with directions to the trial court to enter an order not inconsistent with this opinion. Outright reversal is not an appropriate remedy because the previous custody order had placed Brianna in McNair's custody. *See Dunham, supra.* McNair does not appeal from the trial court's order, and the trial court properly found that he was not a proper custodian where he voluntarily relinquished his custody of Brianna. *See id.*

Reversed and remanded.

GRIFFEN, J., agrees.

VAUGHT, J., concurs.

LARRY D. VAUGHT, Judge, concurring. I agree that the trial court should be reversed but write separately to clarify my view of the impact of *Crosser v. Henson*, 357 Ark. 635, 187 S.W.3d 848 (2004). As more fully set forth in my concurring opinion in *Coffee v. Zolliecoffer*, 93 Ark. App. 61 (2005), I believe that our supreme court has abrogated the parental preference in favor of a best interest analysis in which being a fit biological parent is only a factor to be considered, not a preference.

While the majority ably sets forth the reasons why the evidence does not support a finding of unfitness on the part of Christina Camp, that does not end the inquiry. The trial court made no findings of fitness or unfitness, and in fact, made no

findings at all to support its conclusion that it was in the child's best interest for custody to be placed with the Ogielas. The court's conclusion appears to be based only on findings that Christina had not demonstrated that she had the skills to be a primary caregiver and that the Ogielas had "assumed the responsibilities" for the care of the child. Both of these findings are clearly erroneous.

The Ogielas "assumed" responsibility by conning Christina into turning the child over to them — allegedly to protect the child from their own son. Christina complied with all of the court's directives, and she certainly did not abandon the child. The court also found no evidence that Christina was cohabiting or using drugs. Based on the evidence as set forth in the majority opinion, I have no trouble holding that the trial court's best interest conclusion is clearly erroneous — even in light of the *Crosser* decision.

D.B.&J. HOLDEN FARMS LIMITED PARTNERSHIP,
Brouce Holden, Jr., Trust and James R. Holden Trust *v.*
ARKANSAS STATE HIGHWAY COMMISSION

CA 05-316 218 S.W.3d 355

Court of Appeals of Arkansas
Opinion delivered November 30, 2005

[Rehearing denied January 4, 2006.]

Timothy F. Watson, for appellants.

Robert L. Wilson, Chief Counsel, and *William L. Wharton*, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. This condemnation case raises the issue of juror misconduct concerning statements allegedly made by one or more jurors in the jury room, during deliberations, indicating that they had made up their minds concerning the amount of compensation to be awarded. Finding no error, we affirm.

Appellee Arkansas State Highway Commission filed separate declarations of taking and complaints for condemnation on each of two tracts owned by appellants D.B.&J. Holden Farms Limited Partnership; Brouce Holden, Jr., Trust; and James R. Holden Trust (collectively Holden). The trial court, by agreed order, consolidated the two cases. The Commission estimated the condemned property to be worth $138,661 and deposited that amount into the registry of the court.

At trial, the Commission's expert, Tommy Matthews, testified that, in his opinion, the difference in the before and after values of the two tracts was $138,661. Holden's expert, John Conner, Jr., testified that he calculated the difference in the before and after values of the two tracts to be $1,364,932. The jury retired to deliberate but returned five minutes later with a verdict in the amount of $138,779. Judgment was entered on the verdict.

Holden filed a motion for new trial based on jury misconduct and attached affidavits from three jurors. The affidavits recited that juror Helen Sharp made a statement upon entering the jury room to the effect that she had made up her mind as to the amount of compensation to be awarded to Holden and was ready to vote. The affidavits also stated that another juror, Ronny Dale Templeton, had probably made up his mind beforehand. The trial court struck the affidavits as being barred by Ark. R. Evid. 606(b) and denied the motion for new trial. Holden raises two points on appeal: that the trial court abused its discretion in striking the affidavits and that the trial court erred in denying the motion for a new trial.

Holden's first point is that the trial court erred in striking the juror affidavits pursuant to Ark. R. Evid. 606(b). That rule provides as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Following allegations of juror misconduct, the moving party bears the burden of proving that a reasonable possibility of prejudice resulted from any such juror misconduct. *State v. Cherry*, 341 Ark. 924, 20 S.W.3d 354 (2000). This court will not presume prejudice in such situations. *Id.* Jurors are presumed unbiased and qualified to serve, and the burden is on the appellant to show otherwise. *McIntosh v. State*, 340 Ark. 34, 8 S.W.3d 506 (2000);

Esmeyer v. State, 325 Ark. 491, 930 S.W.2d 302 (1996). Whether prejudice occurred is also a matter for the sound discretion of the trial court. *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001).

By its plain language, Arkansas Rule of Evidence 606(b) precludes inquiry into "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon [the juror's] or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict[.]" *See also Butler v. State*, 349 Ark. 252, 82 S.W.3d 152 (2002). A juror "may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Ark. R. Evid. 606(b). The purpose of the rule is to balance the freedom of secret jury deliberations with the ability to correct an irregularity in those deliberations. *Davis v. State*, 330 Ark. 501, 956 S.W.2d 163 (1997). Holden does not allege any improper external influence.

The trial court properly refused to consider the affidavits because they referred to events occurring during the internal deliberations of the jury. *Borden v. St. Louis Southwestern Ry. Co.*, 287 Ark. 316, 698 S.W.2d 795 (1985). Rule 606(b) embodies the public interest in preserving the confidentiality of jury deliberations, *see National Bank of Commerce v. HCA Health Services of Midwest, Inc.*, 304 Ark. 55, 800 S.W.2d 694 (1990), and ensures that jury deliberations remain secret, unless it becomes clear that the jury's verdict was tainted by a showing of extraneous prejudicial information or some improper outside influence. *Watkins v. Taylor Seed Farms, Inc.*, 295 Ark. 291, 748 S.W.2d 143 (1988).

Relying on *State v. Cherry*, *supra*, Holden argues that the supreme court has construed Rule 606(b) as only applying to formal jury deliberations and that such deliberations did not occur in the present case.[1] *Cherry* is distinguishable from the present case. In that case, Cherry was convicted of first-degree murder and sentenced to life in prison. He filed a motion for new trial alleging jury misconduct. During the trial, an alternate juror had informed the trial court that the jurors had been discussing the case during breaks and that some of the jurors had made up their minds

[1] Holden does not argue that the relevant event was Sharp's making up her mind prior to the submission of the case to the jury and that this event occurred in the courtroom, before deliberations began. We express no opinion on this point.

concerning Cherry's guilt before the case was submitted to them. The State argued that there was no precedent for granting a new trial based on juror misconduct when the conduct did not involve extraneous prejudicial materials or improper outside influence. After conducting a hearing, the trial court found that, based on the testimony of the alternate juror, Cherry was entitled to a new trial. On appeal, the supreme court held that Cherry was deprived of a fair trial because some jurors may have made up their minds concerning his guilt before the case was submitted to them. Because the issue arose after the conclusion of the trial, the only appropriate option for the trial court was to grant a new trial.

Unlike *Cherry*, the only evidence of jury misconduct in the present case occurred after formal deliberations had begun. We believe that formal deliberations had begun because the jury had received its instructions and heard the arguments of counsel before retiring to the jury room. *See* Ark. Code Ann. § 16-64-114 (1987). Deliberation in the context of the jury function means that a properly formed jury, comprised of the number of qualified persons required by law, are within the secrecy of the jury room analyzing, discussing, and weighing the evidence which they have heard with a view to reaching a verdict. *Borman v. Chevron USA, Inc.*, 65 Cal. Rptr. 2d 321 (Cal. App. 1997); *Rushing v. State*, 565 S.W.2d. 893 (Tenn. Crim. App. 1977). Under our case law, any inquiry into events occurring in the sanctity of the jury room is prohibited by Rule 606(b). We cannot say that the trial court abused its discretion in striking the jurors' affidavit and, therefore, affirm on this point.

Holden's second point is that the trial court erred in failing to grant the motion for new trial, based on the alleged jury misconduct. Jury misconduct is a basis for granting a new trial under Ark. R. Civ. P. 59(a)(2). *See Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001). The decision whether to grant a new trial under Rule 59(a)(2) is discretionary with the trial court, which will not be reversed absent an abuse of that discretion. *Id.* The burden of proof in establishing jury misconduct is on the moving party. *Id.* The moving party must show that the alleged misconduct prejudiced his chances for a fair trial and that he was unaware of this bias until after trial. *Id.*; *Owens v. State*, 300 Ark. 73, 777 S.W.2d 205 (1989); *Hendrix v. State*, 298 Ark. 568, 768 S.W.2d 546 (1989). The appellant bears the burden of demonstrating that a reasonable possibility of prejudice resulted from the

alleged improper conduct. *See Kail v. State*, 341 Ark. 89, 14 S.W.3d 878 (2000); *Griffin v. State*, 322 Ark. 206, 909 S.W.2d 625 (1995).

Without the juror affidavits, Holden cannot prove jury misconduct. *Waterfield v. Quimby*, 277 Ark. 472, 644 S.W.2d 241 (1982). Further, Holden cannot show prejudice from the alleged misconduct. The length of time of jury deliberation is not, of itself, a ground for a new trial. *Dovers v. Stephenson Oil Co.*, 354 Ark. 695, 128 S.W.3d 805 (2003); *Wingfield v. Page*, 278 Ark. 276, 644 S.W.2d 940 (1983); *Breitenberg v. Parker*, 237 Ark. 261, 372 S.W.2d 828 (1963). As the supreme court stated in *Breitenberg*:

> The fact that the jury returned a verdict in about eight minutes after having the case submitted to them does not indicate to us that Beach did not receive a fair trial when the issues of fact were so clearly drawn. It is true that a verdict should be the result of dispassionate consideration and the jury, if necessary, should deliberate patiently until they reach a proper conclusion concerning the issues submitted to them. Yet where the law does not positively prescribe the length of time a jury shall spend in deliberation, the courts will not apply an arbitrary rule based upon the limits of time.

237 Ark. at 265, 372 S.W.2d at 831 (quoting *Beach v. Commonwealth*, 246 S.W.2d 587 (Ky. 1952)). The Commission's expert testified that the difference in the before and after values of the two tracts was $138,661. The jury could have reasonably relied on this testimony in arriving at its verdict. We affirm on this point.

Affirmed.

HART and GLADWIN, JJ., agree.

Rose A. DORRIS *v.*
TOWNSENDS of ARKANSAS, INC.

CA 05-292 218 S.W.3d 351

Court of Appeals of Arkansas
Opinion delivered November 30, 2005

Murphy, Thompson, Arnold & Skinner, by: *Tom Thompson*, for appellant.

Womack, Landis, Phelps, McNeill & McDaniel, by: *Richard Lusby*, for appellees.

JOHN MAUZY PITTMAN, Chief Judge. The appellant filed a claim for workers' compensation benefits asserting that she sustained a compensable gradual onset injury to her left shoulder while shoveling ice in the course of her employment by appellee. At the hearing, appellant changed her contention to allege that the injury to her left shoulder was caused by a specific event rather than gradual onset. The Arkansas Workers' Compensation Commission denied benefits, finding that appellant failed to prove by a preponderance of the evidence that she sustained an injury to her left shoulder resulting from a specific incident, and thus failed to prove the elements necessary to establish a compensable specific incident injury. On appeal, appellant contends that the Commission's finding is not supported by substantial evidence. We do not agree, and we affirm.

■ In reviewing decisions of the Arkansas Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999). Where, as here, the Commission has denied a claim because of the claimant's failure to meet his burden of proof, the substantial evidence standard of review requires that we affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Williams v. Arkansas Oak Flooring Co.*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979).

■ Gradual onset injuries are compensable only under limited conditions under the Arkansas Workers' Compensation Law; in contrast, accidental injuries, caused by a specific incident and identifiable by time and place of occurrence, are generally compensable. *Compare* Ark. Code Ann. § 11-9-102(4)(A)(i) and (ii) (Supp. 2005). In finding that appellant failed to prove that her injury was the result of a specific incident, the Commission relied upon the testimony of Ms. Faye Shales, appellee's medical department supervisor. Ms. Shales stated that she helped appellant file the first report of injury on October 16, 2001, and that appellant described the injury to her as something that gradually happened to her shoulder after shoveling ice the previous month. The Commission also relied upon evidence that the worker's compensation forms completed and signed by appellant stated that this was a gradual onset injury.

The appellant testified at the hearing that she was injured by a specific incident in August during which, while pushing hard with her shovel against the ice, she felt a sudden pain in her shoulder as if someone had hit her and that she immediately reported this to the nurse but that it was not recorded. She also stated that she subsequently returned to the nursing station almost every day with complaints of shoulder pain until Ms. Shales ultimately helped her fill out the injury report on October 16,

2001. Finally, appellant stated that she did not know what "gradual onset" meant and that she put that on the injury report because she was instructed to do so by Ms. Shales.

The question of the sufficiency of the evidence in this case turns largely upon the credibility of the witnesses. The Commission is not required to believe the testimony of the claimant or any other witness. The testimony of an interested party is always considered to be controverted. *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 811 (1998). Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Arkansas Department of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993). It is the responsibility of the Commission to draw inferences when the testimony is open to more than a single interpretation, whether controverted or uncontroverted, and when it does so, its findings have the force and effect of a jury verdict. *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998). Although appellant's testimony quite clearly would have supported a finding that her injury was the result of a specific incident, the question on appeal is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo*. *CDI Contractors v. McHale*, 41 Ark. App. 57, 848 S.W.2d 941 (1993). On this record, we cannot say that no reasonable, fair-minded persons could have reached the conclusion arrived at by the Commission, and we must therefore affirm.

Affirmed.

GLADWIN, ROBBINS, and BIRD, JJ., agree.

NEAL and BAKER, JJ., dissent.

OLLY NEAL, Judge, dissenting. I respectfully dissent from the affirmance of this case because I believe that appellant's left shoulder injury was identifiable by time and place of occurrence. Thus, I would reverse and remand for an award of benefits.

The issue here is whether reasonable minds could reach the result found by the Commission. *See Swaim v. Wal-Mart Assoc., Inc.*, 91 Ark. App. 120, 208 S.W.3d 837 (2005). In *Edens v. Superior*

Marble & Glass, 346 Ark. 487, 58 S.W.3d 369 (2001), the supreme court held that Ark. Code Ann. § 11-9-102(4)(A)(i) only requires that the claimant prove that the occurrence of the injury is capable of being identified. It does not require that the exact date be identified. *Id.* Accordingly, the Court held that the claimant's ability to provide an exact date of her injury was not fatal to the claim, arguably because all of the dates considered were reasonably close in proximity, and thus, reasonably susceptible to identification as to a time and place.

In the instant case, the ALJ's opinion, which was adopted by the Commission, provided in part as follows:

> [Claimant] contends that she was using a shovel to break up ice in August of 2001, when she experienced the immediate onset of pain in her left should[er], which she reported to the plant nurse. However, the testimony of Faye Shales [sic], the plant nurse, contradicts the claimant's testimony. In this regard, Ms. Shales [sic] testified that the claimant reported a gradual onset of left shoulder pain. Workers' compensation forms completed and signed by the claimant also state that the condition was a gradual onset injury[.]

There is also contrary evidence provided by Schales's testimony. Schales testified that:

> I helped Rose Dorris fill out the first report of injury, and I signed it on October 16, 2001. The report states gradual onset and August 2001. *I wrote the note about gradual onset.* And later in the report it states that the accident occurred while the employee was using a shovel to chip ice, to cool the chicken feet down. I wrote that information, based on the information given to me by Rose. Rose told me that the pain started when she was shoveling ice.... If Ms. Dorris says that she came in and said something to me about her shoulder bothering her before October 16, 2001, I would believe her.... Every employee has a daily log. If an employee comes in with a complaint of an ache or pain that's not related to a specific incident, I don't always report it. Just because the log doesn't reflect an occasion in August of 2001 of Ms. Dorris doesn't mean that she didn't come in and complain. *I knew prior to this litigation that she was complaining of a specific accident;* I knew before the form "N" was filled out. When I helped her fill out the "N" form, I wrote in gradual onset. I'm not sure if Rose Dorris even knows what that means. *The only thing she told me was that she was using a shovel to chip ice up to cool feet down.* We talked about gradual onset, if it was a specific

> incident or if it was something that just gradually started happening with her shoulder, and she told me it was gradual onset.... *On form "N," Rose states that she was using a shovel to chip ice up to cool feet down, and to me, that would indicate a specific incident.*

(Emphasis added.)

In addition to this testimony, there was also testimony from several other persons that would indicate that appellant's injury was identifiable by time and place of occurrence. Appellant's supervisor, David Kunkel, testified that appellant came to him and told him that she had hurt her shoulder while shoveling the ice. Also, Dr. J.D. Allen's deposition testimony indicated that he first saw appellant for a left rotator cuff injury in November 2001. He stated that his notes showed she was there for a recheck, but that he had not seen her for that problem before and that it was only used to indicate that she was not a new patient. Dr. Allen admitted that he was not a good narrator but that he did remember appellant talking about an incident in which she was doing something with a shovel. He acknowledged that appellant filled out the paperwork and noted that she hurt herself while shoveling ice at work. The injury date found on the paperwork was October 16, 2001—the date that Schales assisted appellant in completing the Form N.

I believe that this case turns on whether reasonable minds, given this contrary testimony, could have reached the decision of the Commission. Although the Form N was signed on October 16, 2001, Faye Schales recognized that the form provided that appellant hurt her shoulder while shoveling partially frozen ice. This form further provided that appellee was notified of the accident in "Augest" [sic]. The other form, filled out by Schales, also indicated the date of "8/2001" as the date appellee was notified of the injury and that appellant hurt her left shoulder while she was in the foot room shoveling ice. Both Kunkel and Dr. Allen recalled appellant telling them that she hurt her left shoulder at work while shoveling ice. Furthermore, Dr. Allen's notes from November 2001 indicated that appellant presented "with a three-month history of left shoulder pain," placing appellant's injury in August 2001.

For the foregoing reason, reasonable minds could not reach the decision of the Commission; therefore, I respectfully dissent.

BAKER, J., joins.

Dunn L. JOHNSON, et al. *v.* J.C. LANGLEY, et al.

CA 05-354 218 S.W.3d 363

Court of Appeals of Arkansas
Opinion delivered November 30, 2005

Smith Stag, L.L.C., by: *Stuart Smith, Michael G. Stag,* and *Amber E. Cisney*; and *Boswell, Tucker & Brewster*, by: *Ted Boswell*, for appellants.

Anderson, Murphy & Hopkins, L.L.P., by: *Randy P. Murphy* and *Jason J. Campbell*; and *Armstrong Allen PLLC*, by: *Richard M. Edmonson*, for appellees.

JOHN B. ROBBINS, Judge. This is an appeal from an order of the Union County Circuit Court denying appellants'[1] motion for a temporary restraining order. Appellants unsuccessfully

[1] Dunn L. Johnson, Eddie Johnson, Annie Powell, Janis Austin, Barbara Ann Carroll, John Carroll, Lavern Carroll, Jesse Dunn, Byron Goodwin, Derrick Goodwin, Jo Nell Goodwin, Willie Ruth Graham, Bobby R. Johnson, Danny Adam Johnson, Drusella Lannette Johnson, Earl Johnson, Jr., Earnest Johnson, Harvey Lee Johnson, Herbert Johnson, Jr., Horace Johnson, James Johnson, Jerry Wayne Johnson, Jesse Norris Johnson, Jimmie L. Johnson, Johnnie B. Johnson, Karen Johnson, Linda Anne Johnson, Reggie Johnson, Ricky Johnson, Ronnie Johnson, Sammy Johnson, Thomas Johnson, Virdie Johnson, Jr., Wade Johnson, Willie Aaron Johnson, Willie L. Johnson, Wordie B. Johnson, Lilly Mae Lias, Pearlie Ann Livingston, Jeanette Massey, Sharon Ann Moore, Essie Mae Rankin, Renese Goodwin Smith, Francine Johnson Wood, Lethell Johnson Woods, Mac Clinton Dunn, and Gloria Livous.

sought an order prohibiting appellees J.C. Langley, individually and d/b/a J.C. Langley Oil Company, by and through his guardians Jerry Langley and Janice Warwick, and Klote Powell, from cleaning up or remediating damage to appellants' real property allegedly caused by appellees' oil-and-gas-production activities. We dismiss this appeal.

Appellants own real property in Union County on which appellees operate mineral leases. On November 22, 1999, appellants sued appellees, alleging that they had contaminated their real property with hazardous substances. They sought damages and a judgment declaring that the leases had been abandoned or had expired and an injunction prohibiting appellees from cleaning up the property without their consent. Appellees notified appellants on October 1, 2004, that they intended to begin cleaning up the property. On October 12, 2004, appellants moved for a temporary restraining order preventing appellees from conducting any cleanup until they responded to appellants' discovery requests, including the submission of a cleanup plan, and until the court determined whether adequate safeguards could be imposed to protect appellants' property rights. In response, appellees argued that appellants had an adequate remedy at law by way of money damages and denied that appellants would be irreparably injured by their cleanup activities. Appellees asserted that they were entitled to continue operating under the leases in a reasonable manner, including the right to maintain the property.

On December 3, 2004, the circuit court entered an order (signed on December 2, 2004) denying appellants' request for a temporary restraining order but imposing certain guidelines for the parties to follow relating to remediation of the site. The court stated that it would not establish the standards by which appellees must remediate and that it would not reach the issue of whether the leases were active until the trial; until then, the leases would be considered active, entitling appellees access to the property.

On December 13, 2004, appellees moved to amend the order for clarification of matters relating to operation and maintenance of the wells. On December 20, 2004, appellants objected to appellees' motion to amend and moved for reconsideration. On January 19, 2005, a hearing was held on the motions. At the hearing, the circuit judge said that he had mistakenly included language regarding site closure in the order, giving a detailed explanation of how he would amend it. The record, however, does not include an order implementing those changes.

Appellants filed their notice of appeal on February 2, 2005, stating that they appealed from the December 2, 2004 order and the order "resulting from the January 19, 2005 hearing (order not yet signed) . . . ." On February 8, 2005, appellants filed a motion for extension of time for filing the record on appeal, stating that the court reporter was unable to complete the transcript within the thirty days required by Ark. R. App. P. – Civil 5(a), and that the "time to file the record on appeal has not yet expired, as the order being appealed was entered in this court on January 19, 2004 [sic]." They asked for an extension of sixty days or until March 21, 2005, to file the record. On March 21, 2005, the circuit court entered an order granting a two-weeks' extension or until April 5, 2005, to file the record. The record was filed with the supreme court clerk on March 30, 2005.

Arkansas Rule of Appellate Procedure – Civil 5(a) states that, when an appeal is taken from an interlocutory order under Ark. R. App. P. – Civ. 2(a)(6), the record must be filed with the supreme court clerk within thirty days from the entry of the order. If any extension of this thirty-day period is sought, Ark. R. App. P. – Civ. 5(b)(1) provides that the circuit court must enter the order of extension within thirty days after the order appealed from is entered. The record contains no order filed on January 19, 2005, nor does it include any order resulting from the hearing held on that date. Thus, the thirty days for filing the record or entering an order granting an extension ran on January 3, 2005, thirty days after the December 3, 2004, order. Therefore, the March 21, 2005 order was untimely, and this appeal must be dismissed. *See Larry v. Grady Sch. Dist.*, 362 Ark. 65, 207 S.W.3d 451 (2005).

Dismissed.

BIRD and GRIFFEN, JJ., agree.

Tatum GANGI *v.* Jody EDMONDS

CA 04-831 218 S.W.3d 339

Court of Appeals of Arkansas
Opinion delivered November 30, 2005

Terrence Cain and *Skarda Law Firm*, by: *Cecily Skarda*, for appellant.

J. Slocum Pickell, for appellee.

SAM BIRD, Judge. Appellant, Tatum Gangi, appeals an order entered by the Lincoln County Circuit Court on April 7, 2004, which granted the petition of appellee, Jody Edmonds, to change the name of the parties' minor child from Gangi to Edmonds and to modify visitation, and which denied appellant's motion for an increase in child support. The order incorporated by reference a letter opinion written by the circuit court on February 26, 2004. Appellant presents two issues for our review. First, appellant argues that the circuit court erred in granting the surname change as it was not in the best interest of the child. Second, appellant argues that the trial court abused its discretion in denying her request for an increase in child support. We reverse the order changing the child's surname, and we dismiss the appeal of the order denying an increase in child support.

Change of Surnames

In *Huffman v. Fisher,* 337 Ark. 58, 987 S.W.2d 269 (1999) (referred to in this opinion as *Huffman I),* our supreme court applied the best-interest analysis when a party sought to change a child's surname. The court enumerated the following factors that a trial court should consider in determining a child's best interest:

> (1) the child's preference; (2) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (3) the length of time the child has borne a given name; (4) the degree of community respect associated with the present and proposed surnames; (5) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and (6) the existence of any parental misconduct or neglect.

Id. at 68, 987 S.W.2d at 274.

Where a full inquiry is made by the trial court regarding the implication of these factors and a determination is made with due regard to the best interest of the child, the trial court's decision will be upheld where it is not clearly erroneous. *Carter v. Reddell,* 75 Ark. App. 8, 52 S.W.3d 506 (2001). A finding is clearly erroneous when, although there is evidence to support it, upon reviewing the entire evidence the court is left with a definite and firm conviction that a mistake has been committed. *Id.* The burden of proof is on

the moving party to demonstrate that the name change is in the best interest of the child. *Matthews v. Smith*, 80 Ark. App. 396, 97 S.W.3d 418 (2003).

After purporting to apply the six *Huffman I* factors, the trial court found that it was in the best interest of the child that his surname be changed to Edmonds. However, from our examination of the record in this case, it does not appear that the trial court considered three of the six factors at all, finding Factors 1 and 3 to be inapplicable, and finding that no evidence was presented as to Factor 4. Furthermore, it appears that the trial court misapplied Factor 2 by effectively imposing upon appellant the burden of proving that changing the child's surname will not negatively harm the child's relationship with her. Finally, the court's findings as to the remaining two factors (Factors 5 and 6) are clearly erroneous in that they are not supported by any evidence, much less a preponderance of it.

Our view of the trial court's analysis of the six *Huffman I* factors is as follows:

1. *The child's preference.* The trial court concluded that because the child "is barely two years of age at this time . . . his preference . . . is not a factor that will be considered by the court." Although it is understandable that there would not be an abundance of evidence on the issue of a twenty-seven-month-old child's choice of names, the court erred in ignoring the evidence relating to this factor that was presented. It was undisputed that the child had been known as Dawson Gangi since his birth, and there was undisputed evidence that the child would answer "Dawson Gangi" when he was asked, "Dawson, what is your name?" Contrary to the conclusion of the trial court, we believe that there is significant evidence on this issue in that the child knows his name and is able to tell people what it is; and it is no great leap, and does not require resort to speculation, to logically conclude that Dawson Gangi would prefer to be known to others by the same name as he knows himself. The court erred in finding this evidence, which was the only evidence presented on this factor, to be insignificant.

2. *The effect of the name change on the preservation and development of the child's relationship with each parent.* The trial court made two findings regarding Factor 2: first, that there was no evidence that the name change would negatively harm the child's relationship with his mother; second, that there was evidence that chang-

ing the child's surname would strengthen his bond with his father. The first finding misses the mark. This factor of *Huffman I* requires the consideration of evidence that a child's name change will preserve and develop the child's relationship with each parent. As already noted, the burden of proof is on the party seeking to change the child's name. The trial court effectively reversed the burden of proof by requiring appellant to produce evidence that the name change would *not* negatively harm the child's relationship with her, and then found that there was no such evidence. That was error.

The trial court's second finding under Factor 2 is also erroneous. The trial court did not identify any evidence it had considered in finding that the name change would strengthen the child's bond with his father, appellee does not refer to any evidence in the record that supports the trial court's finding, and we have searched the record in vain for any such evidence. The *only* evidence even mentioned by appellee on the issue of changing the child's name was appellee's testimony that he had "a lot of pride" in his name, it had "always been important to me that my son has my name," and "he will know that I am his father." Nor did appellee present any evidence to suggest that his bond with his son will be any less preserved or developed if his son's name were not changed. The trial court's findings as to the second *Huffman I* factor are clearly erroneous.

3. *The length of time the child has borne his present surname.* The only evidence presented on this issue is that the child's name had been Gangi from the time of his birth twenty-seven months earlier, and that it was long enough for him to know and recognize his name. For reasons expressed above under our discussion of Factor 1, the court erred in disregarding this evidence.

4. *The degree of community respect associated with the present and proposed surnames.* The trial court found that there was no evidence either way on this issue. This is inaccurate. While we agree that there was no such evidence relating to the Gangi name in Benton County, where appellant's family resides, there was an abundance of negative evidence bearing on appellee's name in Lincoln County, where appellee resides. Appellee testified to a wide range of driving violations and alcohol offenses, admitting that he had "a deplorable driving record," having "totaled a truck," having "three or four accidents and tickets"on his record, and incurring a DWI in 2002 that resulted in the suspension of his driver's license. He admitted to having been charged with resisting arrest and

obstructing government operations, and he admitted to having been charged in 2003 with disorderly conduct when attending a bachelor party. He even admitted guilt to the allegation that he had on several occasions let his then-less-than-two-year-old son sit on his lap and "drive" his truck from his house to that of his parents. While claiming to be a full-time student, appellee admitted that in his preceding school year he failed all of his courses one semester and that the next semester he dropped all of his courses but one, receiving a D grade in the one course that he did not drop.

In addition to these admissions by appellee, appellant testified to appellee's history of marijuana and alcohol abuse, initially in Fayetteville and later in Lincoln County. Even if the trial court assigned little weight or credibility to this testimony, as it was entitled to do, there was still ample evidence for the court to consider in determining the degree of community respect associated with appellee's surname. We do not understand how the trial court could conclude that "there was no evidence" that the Edmonds surname "would be anything other than respected" in Lincoln County. There was no evidence introduced as to what degree of community respect, if any, the Edmonds surname had in the Star City community, and we note that it was appellee's burden to produce such evidence.

5. *The difficulties, harassment, or embarrassment that the child may experience for bearing the present or proposed surname.* The trial court found this factor significant, stating that it was adopting the logic of this point as discussed in *Huffman v. Fisher*, 343 Ark. 737, 38 S.W.3d 327 (2001) (*Huffman II*). In *Huffman II*, however, the supreme court noted that evidence was presented that supported the trial court's decision. That evidence consisted of the testimony of the primary school principal in the town where the Huffmans and Fishers resided to the effect that, in her school, thirty-five percent of the children were from single-parent households, of which twenty-seven percent bore their father's surname and only eight percent bore their mother's surname. The principal testified that carrying a mother's surname could potentially lead to ridicule and embarrassment for the child. The supreme court's discussion in *Huffman II* focused on the evidence presented of the effect in Wynne, Arkansas, of a child's taking its mother's or father's surname; the testimony of each party's expert witness, a child psychologist and a primary-school principal, as to potential harm from ridicule of the child's peers; and the appellate court's defer-

ence to the trial court's superior position to judge the credibility and weight of the experts' testimony.

Here, the trial court stated:

> Should [the child] continue to bear his mother's name, everyone would certainly know that his parents had not been married or that the identity of his father was unknown. Certainly, either of these prospects would likely cause embarrassment for him in the future. On the other hand, should he bear his father's surname, the normal supposition would be that his parents had merely divorced.

The trial court did not discuss any evidence, expert or otherwise, in support of these conclusory statements. Nor does appellee point to any evidence that could support these findings. In our view, the trial court's finding regarding the fifth *Huffman* factor is not supported by any evidence and is, therefore, erroneous.

6. *The existence of any parental misconduct or neglect.* It appears to us that the trial court erroneously applied this factor. The evidence clearly shows a consistent theme in this case of appellee's misconduct and neglect toward appellant and the child.

After becoming pregnant in Fayetteville, appellant moved with appellee to Star City when three pounds of marijuana were seized at the Fayetteville apartment appellee had shared with roommates. In Star City, appellee engaged in verbal abuse of appellant throughout her pregnancy, saying that her mother was a whore, that "nothing could come better from her than a whore," and "Lord, I hope this isn't a girl." When appellee broke his promise to quit selling drugs and to let appellant continue with college, she went to her parents' home in northwest Arkansas. Appellee did not see appellant during the last three months of her pregnancy, including during her hospitalization for a couple of days when the baby was not moving, although at one point he was in Fayetteville and was involved in an incident at a bar. Appellant asked him to attend her scheduled delivery, which he did; however, he was two hours late, stayed about an hour before leaving to celebrate with friends, visited the next day for only thirty minutes before leaving for a party in Russellville, and did not see appellant again for a month.

Appellant moved back to Star City a month and a half after the child was born because appellee promised her that he would not do drugs anymore. He broke this promise, using crystal

methamphetamine and marijuana with his friends, and he did not get a job. The couple lived together but he was rarely there, made little money, and hardly ever went to class; he took her car keys so that she and the baby could not go anywhere. On Super Bowl Sunday in 2002, appellee was drinking and had friends over who smoked marijuana in the front yard; appellant let it be known that she wanted them to leave. Appellee shook her while she was holding the baby, told her that she had ruined everything, and continued to shake her despite her requests to put the baby down.

In May 2002, after finding a photograph of a male friend of appellant's from Fayetteville among her belongings, appellee put appellant's belongings in garbage bags and put her and their five-month-old baby out of the house at two o'clock in the morning. She had no money and obtained formula from a neighbor. Friends in Jefferson County took her in until her father drove from Bentonville to get her. While appellant lived in Bentonville, appellee telephoned and threatened harm to her father if he showed up in Star City. In the year preceding trial, appellee gave the child no gifts or clothing, except for a t-shirt that he later wanted back.

After appellant married, appellee was involved in a verbal incident with the couple in front of a Cracker Barrel restaurant. Appellee cursed and pointed aggressively while holding the baby, he pulled the child out of appellant's grasp before giving him to her, and appellee spit in appellant's husband's direction and "flipped him off." In an incident mentioned earlier in this opinion, appellee was observed driving a vehicle with the child in his lap instead of in a car seat in September 2003.

In her brief to this court, appellant characterizes the above evidence as an "avalanche of misconduct." We agree with appellant that the evidence supports her position that appellee exhibited parental misconduct and neglect such as to weigh heavily against changing the child's surname to that of his father.

While the trial court seems to have been impressed that appellee initiated the court action to establish his paternity, it ignores the fact that appellee initially urged appellant to abort the child, which she refused to do. The trial court also ignored that appellee, after initiating the paternity action, in which he alleged that he "believed" that he was the child's father but sought DNA testing to confirm it, accused appellant of deceiving him into believing he was the father, and he contended that the real father

was a friend of appellant's from Fayetteville whose photograph resembled the baby. Far from seeking to establish paternity for the purpose of accepting his responsibility as the child's father, it appears that appellee sought to use the paternity action as a means to establish that he was not the father of appellant's child.

Although the trial court relied on *Huffman I* as the basis for its decision to change the child's surname, it disregarded facts that distinguish it from the *Huffman* cases. In the *Huffman* cases, the child's parents were teenage high school students residing in Wynne, Arkansas, where they and the child continued to reside. Here, when the child was conceived, the parents were students at the University of Arkansas in Fayetteville, with appellee's residence being Star City in Lincoln County and appellant's residence being Bentonville in Benton County. They did not begin cohabiting in Star City until after appellant had become pregnant in Fayetteville and appellee agreed to settle down, stop drinking and using drugs, and get a job. Unfortunately, he did not do any of those things. When appellee's boisterous life style continued, and after tolerating three months of physical and verbal abuse from appellee, appellant left Star City and returned to her family home in Bentonville where she remained until the child was born. Although the trial court notes that appellee attended the child's birth, it ignores that he was two hours late for what was to have been a scheduled birth, remained for only a little more than an hour, and returned the next day for thirty minutes before leaving for Russellville to attend a party and football game. He did not see appellee or the baby again for almost a month.

When the child was six weeks old, appellant agreed to move back to Star City and reside with appellee in reliance upon appellee's promise that he would quit drinking and using drugs and would attend school at the University of Arkansas at Monticello. He did not keep his promise. After about three months, appellee discovered the above-mentioned photograph of appellant's Fayetteville friend, noted the friend's resemblance to the baby, proclaimed to his and appellant's parents that he was not the child's father, and threw appellant out of the house at 2:00 a.m. one morning in early May 2002. They have not resided together since that date.

We note that appellee did not initiate the present action to change the child's name until the child was almost twenty months old, and that appellee alleged, as his only bases for such a change, that he had maintained a loving and close relationship with the

child, and that appellant had married and the child no longer bore the surname of either parent. However, there was evidence that, although appellant had married a man named Baker, she had adopted the name "Gangi-Baker" as her surname for the purpose of retaining her identity with the child's surname. Furthermore, the marriage of a child's mother and her consequent assumption of her husband's surname, as is customary in this state, should not provide a basis for changing the child's surname to that of his father, where no such consequence may be triggered by the father's marriage.

Child Support

For her second point on appeal, appellant argues that the trial court abused its discretion when it denied her motion to increase appellee's child-support obligation. Her motion requesting increased child support was denied in an order filed January 23, 2004, but appellant did not appeal from that order. Rather, appellant filed her notice of appeal on April 26, 2004, appealing only from the April 6, 2004, order relating to the change of her child's surname. Her notice of appeal does not mention the January 23, 2004, order that denied her request for increased child support. Arkansas Rule of Appellate Procedure–Civil 4(a) (2004) requires that a notice of appeal be filed within thirty days from the entry of the order appealed. Appellant's notice of appeal was untimely to appeal the order denying an increase in child support. Therefore, we lack jurisdiction to review that order, and we must dismiss that appeal.

Reversed in part, and dismissed in part.

HART, GLOVER, and CRABTREE, JJ., agree.

GRIFFEN and ROAF, JJ., dissent.

WENDELL GRIFFIN, Judge, dissenting. Unfortunately, the majority has assumed the role of a "super trial court." The role of an appellate court is to review the lower court's proceedings for error, not make its own findings of fact. As a result, appellate judges must sometimes conclude that, while we might have decided a case differently, the trial court decision must be affirmed under the applicable standard of review. In today's opinion, the majority has neglected the applicable standard of review. I must respectfully dissent.

In *Huffman v. Fisher*, 337 Ark. 58, 987 S.W.2d 269 (1999) (*Huffman I*), our supreme court held that a circuit court's findings regarding a name-change petition are reviewed under the clearly-erroneous standard. In other words, the circuit court's ruling must be upheld unless "the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Id.* at 69, 987 S.W.2d at 274 (citing *RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986)). Further, a reviewing court is supposed to defer to the circuit court's superior position to judge the credibility of the witnesses and weigh their testimony. *Huffman v. Fisher*, 343 Ark. 737, 38 S.W.3d 327 (2001) (*Huffman II*). The standard of review in traditional cases of equity, such as domestic-relations proceedings, contemplates that the reviewing court may disagree with the circuit court's decision but is obligated to affirm it unless clear error exists.

As stated in the majority opinion, when considering whether a change in a minor child's surname is in the best interest of that child, a court should consider at least the following factors:

> (1) the child's preference; (2) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (3) the length of time the child has borne a given name; (4) the degree of community respect associated with the present and proposed surnames; (5) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and (6) the existence of any parental misconduct or neglect.

Huffman I, 337 Ark. at 68, 987 S.W.2d at 274.

1. The child's preference. The majority finds error in the circuit court's ruling that the child was too young to have a preference because he had been known as "Dawson Gangi" all of his life and that, when asked his name, he responds "Dawson Gangi." Not only has the majority substituted its own judgment for that of the circuit court's when analyzing this factor, it has disregarded that in *Huffman II*, the circuit court also found that the child, age three-and-one-half years at the time, was too young to have an opinion as to which name he preferred. The supreme court affirmed the circuit court's decision to change the child's surname to that of the father. The majority does not hide the fact that it is assuming the role of fact-finder when it states:

> Contrary to the conclusion of the trial court, we believe that there is significant evidence on this (child preference) issue in that the child knows his name, is able to tell people what it is; and it is no great leap, and does not require resort to speculation, to logically conclude that Dawson Gangi would prefer to be known to others by the same name as he knows himself. The court erred in finding this evidence, which is the only evidence presented on this factor, to be insignificant.

This reasoning is flawed for at least two reasons. First, while the majority finds error in the circuit court's decision to find the evidence on the child-preference factor insignificant, the circuit court actually declared that it was not going to consider the factor because of Dawson's age. Had the circuit court considered the factor regardless of Dawson's age, it might have agreed with the majority; however, that was a decision for the circuit court to make, and given Dawson's age, the circuit court's finding was not clearly erroneous.

Further, by declaring that Dawson would prefer the surname Gangi simply because he knows himself by that name, the majority engages in rank speculation. The majority cites no testimony or authority to support its conclusion. Aside from the fact that there is no proof showing why the child's preference is what the majority imagines it to be, the majority does not explain why its rationale would not essentially always make the preference of two-year-old children binding on circuit courts entrusted with determining whether it would be in the best interest of such children to grant petitions to change their surnames. While I agree that the circuit court should not disregard evidence dealing with the child's preference, the fact that a circuit court comes to the conclusion that a factor is not relevant is not the equivalent to a court not considering the factor at all. *See Bell v. Wardell*, 72 Ark. App. 94, 34 S.W.3d 745 (2000). There is no reason to make the child's preference more than what *Huffman I* made it to be: one factor among six that circuit courts should consider when determining whether it would be in the child's best interest to grant a petition to change a child's surname.

2. *The effect of the name change on the preservation and development of the child's relationship with each parent.* The majority finds error in the circuit court's finding and opines (1) that the circuit court effectively reversed the burden of proof by requiring appellant to produce evidence that the name change would not negatively harm the child and (2) that the circuit court did not identify any

evidence that it had considered in finding that the name change would strengthen Dawson's bond with his father. However, the majority misconstrues the circuit court's findings.

The circuit court merely found that there was no evidence that the surname change would negatively harm the child's relationship with appellant. That finding is both logically permissible and factually substantiated. The majority has cited no authority that forbids a party who seeks to prove that a surname change will not harm the relationship between the child and a parent from meeting its burden by proving that no harm in the relationship between the child and a parent is likely to occur. Proof by the petitioner that no harm is likely to result in the relationship between the child and a parent by the surname change does not reverse the burden of proof; however, such proof might induce a party opposing the petition to produce evidence to the contrary. The circuit court's statement regarding this point did not operate to reverse the burden of proof; it was simply an assessment of the proof on this matter.

The majority does acknowledge appellee's feelings regarding the bond that he would have with Dawson by Dawson having his surname. This court should be mindful of the circuit court's analysis of this factor in *Huffman II*:

> Jacob spends the majority of his life with the maternal side of his family. No proof was offered which would indicate that a surname change from Huffman [the mother] to Fisher [the father] would have a detrimental effect on Jacob's relationship with his mother and her family. Nick did testify that he felt Jacob would form a second connection to him if he had the name Fisher. There would be no detrimental effect on Jacob concerning the preservation of his relationship with either Nick or Kara if his name was changed to Fisher.

Huffman II, 343 Ark. at 744, 38 S.W.3d at 330. If *Huffman II* was affirmed, then I see no reason why this court should reverse with similar evidence before it on this factor.

3. The length of time the child has borne his present surname. The majority finds error in the circuit court's ruling because Dawson had borne his surname for twenty-seven months, long enough for him to recognize his name. Again, the majority is substituting its own judgment for that of the trier-of-fact. This court has previously affirmed a name-change petition when the child was four

years old, stating that there would be little stigma if the child's surname were changed prior to the child's attendance in kindergarten. *See Carter v. Reddell*, 75 Ark. App. 8, 52 S.W.3d 506 (2001). Even in the original *Huffman* cases, the child had his prior surname for three-and-a-half years before the circuit court granted the petition for a name change on remand from the supreme court. I acknowledge that the *Huffman* litigation had been pending the entire life of the child, while appellee did not initiate name-change proceedings until Dawson was twenty months old. Again, the circuit court's finding on this point was not clearly erroneous, only different from what the majority (and appellant) prefer.

4. The degree of community respect associated with the present and proposed surnames. Out of all of the factors, the majority's analysis of this factor is most puzzling. The majority has elected to search the record for evidence of this factor *despite appellant's concession in her brief that neither party presented any evidence regarding the reputation of either family name in their respective communities.* However, the majority now finds that there was ample evidence for the circuit court to consider this factor based on evidence of appellant's driving, criminal, and academic histories. Nevertheless, this factor refers to the degree of *community respect.* The majority has cited no evidence proving lack of community respect for the Edmonds name in Lincoln County. Yes, the majority has listed appellee's prior bad acts. But, there was no evidence that the community knew about that conduct, let alone viewed the conduct as a curse on the Edmonds name. If there was no evidence that the community knew about any of these acts, then how exactly is this factor implicated? I see no reason to find that the circuit court's ruling was clearly erroneous in its analysis of this factor.

5. The difficulties, harassment, or embarrassment that the child may experience for bearing the present or proposed surname. The majority holds that the evidence did not allow for an inference similar to what was affirmed in *Huffman II*; in other words, the majority holds that it was error for the circuit court to conclude that Dawson would suffer difficulties by bearing his mother's surname. Without conceding that the circuit court's analysis of this point was improper — because it does not require speculation to assume that a child with the mother's surname would receive questions about his familial status — I still do not agree that it is the majority's role to act as fact-finder and reverse this case based on the different conclusions reached.

The majority appears to be impressed by the fact that appellant had adopted the name "Gangi-Baker"; however, the trial court also considered the following testimony on the issue:

> APPELLEE'S COUNSEL: Would you state your name, please.
>
> APPELLANT: Tatum Mae Gangi.
>
> COUNSEL: All right. And is it Baker now?
>
> APPELLANT: No, sir.
>
> COUNSEL: Okay. I thought at one point you were married.
>
> APPELLANT: Yes, sir, I am married. I kept — I'm retaining my last name.
>
> COUNSEL: Okay.
>
> APPELLANT: Gangi. It's a family name.
>
> COUNSEL: Okay. Well, the reason I — okay. Were you — did you take the name of Baker at one time?
>
> APPELLANT: No. I got married. I haven't changed my name. My social security is still Tatum Gangi.
>
> COUNSEL: Okay. Do you go by the name of Baker?
>
> APPELLANT: Some people call me Mrs. Baker. Some people — a lot of people still call me Tatum Gangi. I'm self-employed with my business and it is all Tatum Gangi.
>
> . . .
>
> COUNSEL: Okay. The reason I asked about your name is, is that — are you aware that there have been pleadings filed by you in this case under the name of Tatum Baker? Are you aware of that?[1]

[1] The majority ignores several court documents where appellant is referred to as "Tatum Baker." These documents include an affidavit dated September 29, 2003 (just a little over a month prior to the November 10, 2003, hearing), wherein appellant refers to herself as "Tatum Baker."

APPELLANT: Well, I, all of a sudden, was being addressed as Tatum Baker from the other side, and I just — no, but I've seen Tatum Baker, and I still see Tatum Gangi on the sheets that come from the courtroom. They come in both forms.

COUNSEL: But you — and when you sign off on documents, do you sign off as Tatum Gangi?

APPELLANT: Yes, Tatum Gangi *or Tatum Baker. On my checkbook, I sign Tatum Baker,* but sometimes I sign Gangi too.

COUNSEL: Okay. The reason I asked is —

APPELLANT: For work.

COUNSEL: — is you remember the motion for ex parte order for drug testing that was filed the beginning of last month.

APPELLANT: Um-hum.

COUNSEL: You were seeking to have Mr. Edmonds drug tested. Do you remember that?

APPELLANT: Um-hum.

COUNSEL: That was filed under the name Tatum Baker. Do you remember that?

APPELLANT: Yes, I do.

COUNSEL: *And do you remember also that the affidavit that you attached to the motion was signed not as Tatum Gangi, but as Tatum Baker. Do you remember that?*

APPELLANT: *Yes.* For all — for all intents and purposes, retaining my child's name to be Dawson Gangi, I'm keeping the name Gangi, and I will no longer ever again go by Tatum Baker.

COUNSEL: Okay. But you have gone —

APPELLANT: I have, yes, sir.

. . .

COUNSEL: When were you married, by the way?

APPELLANT: February the 8th.

COUNSEL: Okay. *And when did you stop using the name Baker?*

APPELLANT: *Stop. I've only used it a — I don't — I use both. I've always used both.*

(Emphasis added.)

Appellant may have stated that she went by "Tatum Gangi," but when confronted with evidence to the contrary, she admitted that she went by both Gangi and Baker. It does not take speculation to recognize the difficulties posed to a child with a surname unlike that of both parents. The circuit court was not clearly erroneous when it found that Dawson would have fewer difficulties if he assumed his father's surname.

6. *The existence of any parental misconduct or neglect.* The majority spends more space addressing this point than any other. A person reading only the majority opinion would think that the circuit court failed to consider any of the evidence on this point. On the contrary, the circuit court was very mindful of it:

> The Court has had opportunity to observe the parties as they testified and has also been able to assess their credibility. The Court finds that [appellee] has successfully explained [appellant's] allegations concerning his alleged misconduct and the Court accepts those as adequate. The Court further will accept his assurances that he will not transport Dawson without being properly restrained in a car seat in the future.

The circuit court could have interpreted the testimony as the majority has in this case; however, it did not do so, choosing to accept appellee's explanations of the allegations. The majority completely ignores appellee's testimony that he has had his driving privileges restored, that he will no longer allow Dawson to sit in his lap while he drives, that he denied all other allegations of misconduct, and that he

told the circuit court that appellant repeatedly threatened to move Dawson out of state to thwart his visitation. In other words, the majority shows absolutely no deference to the circuit court's determinations of credibility and the weight to be afforded testimony, as we are bound to do. *See Huffman II, supra.*

Conclusion

The majority has found that the circuit court committed reversible error as to each of the six *Huffman* factors. In each instance, the majority is not content to reverse and remand to the circuit court for reconsideration based on what it deems to be a correct analysis. Rather, the majority has installed itself as a "super trial court" for the purpose of deciding whether the name-change petition should be granted. Respectfully, the idea that appellate judges might have reached a different decision had they been presiding at trial should not be the standard for holding circuit-court findings-of-fact clearly erroneous. Because I believe that the circuit court's decision should be affirmed, or at least remanded for further consideration in light of any alleged error, I respectfully dissent.

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

Clifton Robert WARNER *v.* STATE of Arkansas

CA CR 05-452 218 S.W.3d 330

Court of Appeals of Arkansas
Opinion delivered November 30, 2005

Robert Scott Parks, Deputy Public Defender, for appellant.

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

WENDELL L. GRIFFEN, Judge. Clifton Robert Warner appeals from his conviction for rape. He argues that the trial court erred in allowing testimony regarding a hearsay statement that the victim made and erred in determining that the victim, who was seven years old at the time of the trial, was competent to testify. We disagree and affirm.

Appellant is not related to the victim but was living with the victim's family at the time the alleged abuse occurred. The victim, K.P., who was then five years old, alleged that appellant touched her on the inside of her "pee pee" with his finger. K.P. initially confided in her uncle, Billy Powell, while visiting Powell and his family in Oklahoma. She later disclosed the events to the Children's Advocacy Center in Little Rock, Arkansas.

Based on K.P.'s allegations, appellant was charged with rape as a habitual offender. During pre-trial proceedings, appellant made an oral motion in limine to exclude the hearsay testimony of

K.P.'s second cousin, Debbie Pulliam, regarding an incriminating statement made by K.P. after the alleged event. The trial court held a hearing and denied appellant's motion on the ground that K.P.'s statement qualified as an excited-utterance exception to hearsay pursuant to Ark. R. Evid. 803(2). At the subsequent jury trial, Pulliam testified that when K.P. saw her sister getting into a truck in which the defendant was a passenger, K.P. shouted, "Robert, don't you hurt my sister like you hurt me."

The issue of K.P.'s competency arose during the trial. When the State attempted to call her as a witness, she initially indicated in the jury's presence that she did not know the difference between the truth and a lie. The court then conducted a *sua sponte* hearing outside of the jury's presence. After subsequent questioning of K.P., the court was ultimately convinced that she was competent. K.P. thereafter testified that appellant touched her on the inside of her "pee pee" with his finger and that it made her feel "scared" and "all shaky." She also identified appellant in court as the offender. The jury found appellant guilty and sentenced him to serve twenty years in the Arkansas Department of Correction. This appealed followed.

I. Witness Competency

Although appellant challenges the trial court's determination that K.P. was competent to testify in his second point on appeal, we address this issue first before considering any evidentiary errors. The question of the competency of a witness is a matter lying within the sound discretion of the trial court and in the absence of clear abuse, we will not reverse on appeal. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002). Any witness is presumed to be competent unless proven otherwise. *Id.*; Ark. R. Evid. 601. The party alleging that a witness is incompetent has the burden of persuasion. *Clem, supra.* The issue of the competency of a witness is one in which the trial judge's evaluation is particularly important due to the opportunity he is afforded to observe the witness and the testimony. *Clem, supra.*

A witness's competency may be established by the following criteria: (1) the ability to understand the obligation of an oath and to comprehend the obligation imposed by it; or (2) an understanding of the consequences of false swearing; or (3) the ability to receive accurate impressions and to retain them, to the extent that the capacity exists to transmit to the fact finder a

reasonable statement of what was seen, felt, or heard. *Clem, supra.* As long as the record is one upon which the trial judge could find a moral awareness of the obligation to tell the truth and an ability to observe, remember, and relate facts, we will not hold there has been a manifest error or abuse of discretion in allowing the testimony. *Clem, supra.*

Further, in a case involving the rape of a child, the trial court is in the best position to determine the child's intelligence and understanding of the need to tell the truth. *Conley v. State*, 20 Ark. App. 56, 723 S.W.2d 841 (1987). In determining the competency of a child witness, the trial court will examine the child's testimony in its entirety and will not solely rely on the preliminary questioning. *Id.*

The competency hearing proceeded as follows:

COURT: Would you tell me what your name is?

A: [K.P.]

COURT: And what is your last name?

A: [K.P.]

COURT: And how old are you [K.P.]?

A: Seven.

COURT: Eleven?

A: Seven.

COURT: Seven, okay and [K.P.] do you know what the truth is?

A: Yes.

COURT: Do you know what a lie is?

A: Um hum —

COURT: You don't, you don't know the difference? What do you think the truth is?

A: The truth is —

COURT: I'm sorry?

A: — what Robert did. The truth is what Robert did.

COURT: Well, what's a lie?

A: I don't know the lie.

COURT: I'm sorry?

A: I don't know the lie.

COURT: You don't know what, you don't lie or you don't —

A: I don't know it.

COURT: You don't know it, you didn't do it.

A: I don't know the lie.

. . .

Prosecution Examination:

Q: Hey [K.P.], when we talked about this today do you know the difference between the truth and a lie?

A: No.

Q: Are you going to tell the truth today?

A: Yes.

Q: Okay, are you — you know, we talked about raising your right hand and having to tell the truth?

A: Yes.

Q: Okay.

Q: Are you satisfied, Judge?

COURT: No.

Q: Hey, [K.P.], do you know what a lie is, do you know that a lie is not telling the truth?

A: Yes.

Q: And do you know that the truth means to tell what really happened?

A: Yes.

Q: And that you just have to answer us truthfully?

A: Yes.

[Bench conference held outside of the hearing of the jury.]

COURT: Counsel, approach. She doesn't know.

PROSECUTOR: Judge, she does.

COURT: Well, she's not saying she does.

PROSECUTOR: She knows, we talked to her about telling the truth and you know, that she can't lie on the witness stand. She says that we're asking her if she's going to lie.

COURT: Well, she doesn't understand, I . . .

. . .

Prosecution Examination:

Q: Hey, [K.P.], that nice man up there you were just talking to?

A: Um hum.

Q: Do you see he has a robe on, what color is that robe?

A: Black.

Q: It's black, if I told you that the robe that the Judge has on was green, would that be the truth or a lie?

A: I don't know.

Q: Would I be telling the truth if I said that robe was black?

A: You'd be telling the truth.

. . .

Q: Hey, [K.P.], do you have any pets?

A: Yeah.

Q: You do, what kind of pets do you have?

A: I've got one that's a Pomeranian.

. . .

Q: Is a Pomeranian a dog or a cat?

A: It's a dog.

Q: If you told me that your Pomeranian was a cat would that be the truth or would that be a lie?

A: A lie.

Q: And if you told me your Pomeranian was a dog, would that be the truth or would that be a lie?

A: The truth.

. . .

Q: If you told me [K.P.] that the Judge's robe was black, would that be the truth or a lie?

A: Truth.

Q: If you told me [K.P.] that the Judge's robe was green, would that be the truth or a lie?

A: A lie.

Q: What about my suit, [K.P.], what color is this?

A: Black.

Q: If you told me that this suit was yellow, would that be the truth or a lie?

A: A lie.

Q: Okay, and if you told me it was black, would that be the truth or a lie?

A: Truth.

Q: Okay.

. . .

Defense Examination:

Q: And we talk about the truth and lies sometimes too, okay, if I told you that it was the truth that the Judge's robe was green, would that be the truth?

A: No.

Q: Okay, sometimes Jackson [his son] and I play a game, I'll tell you something, I hate to tell on Jackson, one time Jackson said that his Daddy was a dummy, now, what did Jackson say?

A: He said his daddy was a dummy.

Q: Okay.

COURT: I didn't hear it.

Q: What did you say.

COURT: What did you say?

A: He said his name was a dummy.

Q: Do you know that's the truth?

A: No.

Q: But I told you it was the truth didn't I?

A: Yes.

Q: Just because I say it, does that make it the truth?

A: No.

Q: Okay.

. . .

DEFENSE: Judge, if I might. Your honor, I noted the Court's consternation. [K.P.]'s initial responses to the questions were that she did not know the difference between a truth and a lie and she stuck to that assertion several times. Now, in all fairness, she was able to name her colors and differentiate between your robe being black and green and Shane's coat being blue and black or whatever, but I'm not firmly convinced that she truly appreciates the difference between the truth and telling a lie. I think she figured out what we wanted her to say. And I think she sort of got the game of the questions, that this is different so I said a lie, this is the same so I say the truth, but I don't — I didn't detect that synthesis level knowledge of falsehood versus truth and I'm not prepared to stipulate to her competency at this time. I'd ask the Court to make a ruling.

. . .

COURT: [K.P.] is competent to testify. She was able to grasp several important points, one of them being just because someone said something was true it's not, doesn't make is true. Did a good job there, [prosecutor].

PROSECUTOR: Thanks.

COURT: And also she was able to distinguish between fact and fiction and I find her to be competent. . . .

Appellant asserts that K.P. was incompetent to testify because she stated several times that she did not know what a lie is and because there was no evidence indicating that she understood the consequences of false swearing or that she had a moral awareness of the obligation to tell the truth. His argument does not persuade.

K.P. originally testified that the truth is what appellant did, and that she did not "know the lie." She also stated that she did not know the difference between the truth and a lie. However, upon further questioning, she indicated that she understood that "the truth" means to tell what really happened and that she knew that a lie is not telling the truth.

In addition, her subsequent responses indicated that she knew the difference between the truth and a lie, as shown in the questions concerning the color of the judge's robe, the attorneys' suits, and her pet Pomeranian dog. While appellant's attorney argued below that K.P. had merely figured out "the game of the questions" that "same" equals "truth" and "different" equals "lie" and that K.P. had merely demonstrated knowledge of different colors, her responses went far beyond that. Rather, her responses established that she knew the difference between the truth and a lie, or as the trial court stated, between fact and fiction.

While appellant also asserts that there was no evidence to indicate that K.P. understood the consequences of false swearing, that is of no moment, because a witness's competency can be established by an understanding of the consequences of false swearing, *or* by the ability to understand the obligation of an oath and to comprehend the obligation imposed by it, in other words, by an awareness of the moral obligation to tell the truth, *or* the ability to receive, retain, and transmit accurate impressions. *Modlin v. State*, 353 Ark. 94, 110 S.W.3d 727 (2003); *Clem*, *supra*. The *Modlin* court specifically stated that it was not necessary for the witness in that case to understand the nature of an oath, the legal concept of false swearing, or why he was holding up his hand because his testimony demonstrated a moral awareness of the obligation to tell the truth and an ability to observe, remember, and relate facts.

Similarly, here, K.P. demonstrated awareness of her moral obligation to tell the truth and her ability to receive, retain, and transmit accurate impressions. She stated that she was going to tell the truth and she remembered the discussion about swearing an

oath to tell the truth, which the prosecutor referred to as "raising your right hand and having to tell the truth." She further indicated that she knew a lie is not telling the truth, that the truth means to tell what really happened, and that she was required to answer truthfully.

In addition, as indicated by her answers to the questions posed to her by defense counsel's questions concerning his son calling him a "dummy," K.P. demonstrated her ability to receive, retain, and transmit accurate impressions and demonstrated that she understood that simply because a statement is made does not mean the statement is true. Certainly, her questions regarding her pet dog and regarding the "dummy" statement indicated more than a mere comprehension that "same equals true" and "different equals lie."

In sum, when all of K.P.'s testimony is considered in its entirety, it is apparent that the record is one upon which the trial judge could find that she possessed moral awareness of the obligation to tell the truth and an ability to observe, remember, and relate facts. *Modlin, supra*; *Clem, supra*. As such, we hold that the trial court did not abuse its discretion in allowing K.P. to testify.

II. Excited Utterance

Appellant further argues that the trial court erred in admitting Pulliam's testimony pursuant to the excited-utterance exception to hearsay. This rule, found at Ark. Rule Evid. 803(2) allows the admission of a statement that relates to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition. The testimony at issue is Pulliam's testimony that on August 2, 2002, several weeks after the abuse was disclosed, K.P. shouted at appellant, "Robert, don't you hurt my sister the way you hurt me" when her sister got into the vehicle in which appellant was a passenger.

For the excited-utterance exception to apply, there must be an event which excites the declarant and the resultant statement must be uttered during the period of excitement and must express the declarant's reaction to the event. *Moore v. State*, 317 Ark. 630, 882 S.W.2d 667 (1994). The factors to consider in determining whether a statement is an excited utterance include: (1) the age of the declarant, (2) the physical and mental condition of the declarant, (3) the characteristics of the event, (4) the subject matter of the statement. *Id.* (*citing United*

States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980)). The lapse of time between the startling event and the out-of-court statement, although relevant, is not dispositive whether a statement is an excited utterance. *Id.* In order for this exception to apply, it must appear that the statement was spontaneous, excited or impulsive, rather than the product of reflection and deliberation. *Peterson v. State*, 349 Ark. 195, 76 S.W.3d 845 (2002). It is within the trial court's discretion to determine whether a statement was made under the stress of excitement or after the declarant has calmed down and had an opportunity to reflect. *Moore, supra.*

Appellant challenges the admission of Pulliam's testimony on the grounds that: 1) K.P.'s statement was not made under the stress of the "startling event," because too much time had elapsed between the rape and K.P.'s statement, and 2) Pulliam's testimony was so inconsistent that it was an abuse of discretion to admit it. We hold that the trial court did not abuse its discretion in admitting Pulliam's testimony.

It is not precisely clear when the abuse occurred in this case. K.P. testified that she was five years old when the abuse occurred. She first reported the abuse during the early part of July 2002. According to Billy Powell, K.P.'s uncle, she came to visit his family near the July 4 holiday. He testified that she reported the incident to him during the second day of her visit.[1]

The testimony is also unclear regarding when K.P. returned to Arkansas. Billy testified that K.P. stayed approximately two weeks. Vonda Powell, K.P.'s mother, testified that K.P. had been back approximately one week before K.P. saw appellant on August 2 incident. Pulliam, by contrast, testified that K.P. returned to Arkansas on August 1, 2002.

In any event, Pulliam testified that on August 2, 2002, she, Vonda, K.P., K.P.'s sister Jordan, and Pulliam's two children were riding in Pulliam's vehicle on the way to the Children's Advocacy Center. According to Pulliam, the rape allegations had not been discussed with K.P. that day and K.P. was unaware of the reason they were visiting the Center. She further testified that K.P. had

[1] The record is not clear regarding when Billy Powell reported the abuse to the family, when the family reported the abuse to the police, or whether appellant was allowed to remain in K.P.'s household after the allegations were made.

not seen appellant that day, and to the best of Pulliam's knowledge, K.P. had not seen appellant since her return (which appellant does not dispute).

Prior to seeing appellant, K.P. was laughing and joking with Pulliam's son, who was in the back seat with her. Pulliam stopped in the road when they met Linda Powell's vehicle. Linda is Pulliam's aunt and K.P's grandmother. Appellant was in the passenger seat of Pulliam's vehicle. Pulliam and Linda, who conversed for approximately one minute with their windows down, agreed that Jordan and Pulliam's daughter would go to Linda's house. Pulliam testified that when K.P. saw Jordan getting into the vehicle in which appellant was seated, K.P. removed her seatbelt, jumped between the bucket seats into Pulliam's lap, stuck her head out of the driver's side window and yelled, "Robert, don't you hurt my sister like you hurt me."

Pulliam further testified that K.P. repeated the statement four or five times, and that she was "very upset" and that "tears [were] coming out of her eyes, streaming." She returned K.P. to her seat and began to drive away, but had to pull over to soothe and comfort her.

On these facts, we hold that the trial court did not err in admitting Pulliam's testimony. First, appellant is simply wrong in asserting that the exciting event must be the crime itself. For support, he erroneously relies on cases in which the startling event *was* the crime itself but ignores authority affirming the admission of statements made in relation to an event that was *not* the crime itself.

For example, in *George v. State*, 306 Ark. 360, 813 S.W.2d 792 (1991), the Arkansas Supreme Court affirmed the admission of a child sexual abuse victim's statement as an excited utterance where, following a nightmare, the child told her mother that the defendant had bitten her on her genital area. In that case, as here, it was not certain how much time had passed between when the abuse had occurred and when the startling event occurred. The victim in *George* had been enrolled in the defendant's day-care program from September 1988 through September 1989, but returned on occasion through October 1989, and visited with the *George* defendant and his wife on October 31, 1989. The victim was willing to see the defendant two weeks prior to Halloween but did not want to visit him on Halloween.

In *George*, the two-and-a-half year old victim awoke from a nightmare on November 2, 1989, complaining that there were dinosaurs in her room that might bite her. When her mother

tried to allay her daughter's fears, the victim insisted, "Yes, there's dinosaurs in there and they are going to bite me and they are going to bite me like [the *George* defendant] bites me." When asked by her mother what she meant, the victim stated, "He bites me on my tee tee" and then pointed to her genital area. The *George* court held the victim's statements were admissible as excited utterances because "they were made at an unusually late hour following a nightmare that clearly terrified the victim." *Id.* at 366, 813 S.W.2d at 796.

Thus, it is clear under *George* that the startling event may be something *other than* the crime alleged. To that extent, appellant's reliance on cases in which our courts have excluded statements regarding abuse as excited utterances because too much time had passed between the abuse and the statement is misplaced. Instead, the issue for this court is whether K.P.'s observance of her sister getting into a vehicle with K.P.'s alleged rapist was a startling event, and whether K.P.'s statement was made in response to that event, while she was under the stress of that event.

We are convinced that a sexual abuse victim's observance of her sister getting into a vehicle with the alleged rapist only a few weeks after the victim had disclosed the abuse would be even *more* startling than the victim merely having a seemingly unrelated nightmare, as occurred in *George*. Further, the evidence is clear that K.P. was responding to the stress of seeing appellant and seeing her sister get into the vehicle with him. Pulliam testified that the issue of the rape had not been discussed that day, and that, to the best of her knowledge, the August 2 incident marked the first time after K.P.'s return from Oklahoma that K.P. had seen appellant. Prior to seeing appellant, K.P. was laughing and joking with her cousin in the back seat. However, when K.P. realized that her sister was getting into the same vehicle as appellant, her demeanor markedly and immediately changed. She left her seat, jumped into Pulliam's lap, and repeatedly yelled at appellant not to hurt her sister the way he had hurt her. K.P. was also shaking and crying and had to be comforted. On these facts, there is no doubt that K.P.'s response was immediate and that it was made under the stress of the event of seeing her sister get into the vehicle with the alleged rapist.

Appellant also argues that the trial court erred in admitting Pulliam's testimony because her testimony was inconsistent in some respects. However, this argument is to no avail,

because it is well-settled that it is the job of the jury, as fact finder, to weigh inconsistent evidence and make credibility determinations. *Harmon v. State*, 340 Ark. 18, 8 S.W.3d. 472 (2000). Further, a witnesses's inconsistent testimony does not render it insufficient as a matter of law. *Id.* As the State notes, although some of the peripheral details were difficult for Pulliam to recall, such as whether she had planned to meet Linda Powell, Pulliam's account of K.P's statement and response to the event were consistent. As such, we hold that the trial court did not err in admitting Pulliam's testimony.

Affirmed.

ROBBINS and BIRD, JJ., agree.

Glenn ESKOLA *v.* LITTLE ROCK SCHOOL DISTRICT
and Municipal League Workers' Compensation Trust

CA 05-434 218 S.W.3d 372

Court of Appeals of Arkansas
Opinion delivered November 30, 2005

Gary Davis, for appellant.

J. Chris Bradley, for appellees.

DAVID M. GLOVER, Judge. Appellant, Glenn Eskola, appeals the Workers' Compensation Commission's denial of his request for additional benefits on the basis that his claim was barred by the statute of limitations. We affirm the Commission's decision finding that appellant's claim is barred by the statute of limitations.

The facts are not in dispute. Appellant, a former math teacher and football coach at J.A. Fair High School, sustained a compensable injury to his right shoulder on September 15, 1998, during football practice. Appellant saw the team doctor, Dr. Richard Nix, who treated appellant with muscle relaxers, cortisone injections, and physical therapy. In June of 1999, appellant's shoulder was still symptomatic, and he completed and filed the AR-C form for a workers' compensation claim on June 17, 1999. When he completed that form, appellant checked both the "initial benefits" box and the "additional benefits" box.

At the time he completed the AR-C form, appellant had not received any workers' compensation benefits.

Reviewing his AR-C form, appellees accepted the claim as compensable, and appellant was treated at that time by Dr. Reed Kilgore, who ultimately recommended surgery on his shoulder. Appellant, who had retired by this time, did not have the surgery performed at that time because of various demands on his time, including volunteering and assisting his nephew in constructing his house. Later, in May 2003, when appellant contacted the workers' compensation carrier about the surgery, he was informed that the statute of limitations had run on the claim. Appellant elected to have the surgery performed on June 13, 2003.

The administrative law judge found that appellant's claim was barred by the statute of limitations, and the Commission affirmed the ALJ's opinion. Appellant now appeals, arguing that the statute of limitations "is tolled when a benefit claim has been filed before the expiration of two years from the date of an injury and remains tolled unless a dismissal is obtained."

Arkansas Code Annotated section 11-9-702(a)(1) (Repl. 2002) provides the time limitations for filing an *initial claim* for workers' compensation:

> A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commis-

> sion within two (2) years from the date of the compensable injury. If, during the two-year period following the filing of the claim, the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter.

Subsection (a)(4) provides, "If, within six (6) months after the filing of a claim for compensation, no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, be dismissed without prejudice to the refiling of the claim within limitation periods specified in subdivisions (a)(1)-(3) of this section."

Arkansas Code Annotated section 11-9-702(b)(1) (Repl. 2002) sets forth the time limitations for filing *claims for additional compensation*:

> In cases where any compensation, including disability or medical, has been paid on account of an injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation or two (2) years from the date of the injury, whichever is greater.

Subsection 11-9-702(d) provides, "If, within six (6) months after the filing of a claim for additional compensation, no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, be dismissed without prejudice to the refiling of the claim within limitation periods specified in subsection (b) of this section."

There is no question that appellant filed for initial benefits within two years of his injury, and appellees began paying for his medical treatment through workers' compensation after he filed his AR-C form on June 17, 1999. According to appellant, prior to filing the AR-C form, he filed his medical claims with his health insurance, and no workers' compensation benefits were paid prior to June 17, 1999. It is also undisputed that appellees last paid compensation on May 8, 2000, and that appellant did not inquire about payment for his shoulder surgery until May 2003.

Appellant argues that *Spencer v. Stone Container*, 72 Ark. App. 450, 38 S.W.3d 909 (2001), is applicable in this case. However, in that case, the appellant made a timely request for additional

compensation that was never acted upon, which effectively tolled the statute of limitations with regard to that claim. In the present case, appellant filed one claim and simultaneously checked both the *initial benefits* box *and* the *additional benefits* box. A claim request cannot be considered to be both an initial request for compensation and an additional request for benefits at the same time — an initial request must be paid before an additional request can be made. It is undisputed that no workers' compensation benefits had been paid prior to appellant filing his claim form in June 1999; therefore, the June 1999 claim was a request for *initial* benefits. Appellant then requested surgical benefits in May 2003, which, because compensation had previously been paid, was a request for *additional* benefits.

Appellant argues that his surgical request is a continuation of initial benefits and that the statute of limitations was tolled because appellees never asked the Commission to dismiss his claim, even though appellees voluntarily accepted the claim as compensable and the Commission was never involved in the case until appellant inquired about surgery in May 2003. Appellant makes much of the fact that appellees never moved to dismiss the claim, but as appellees correctly point out, they would not have asked for the claim to be dismissed because they accepted it as an *initial* request for benefits for a compensable injury. Furthermore, the statutes do not absolutely require that the claim be dismissed; they merely state that the claim *may* be dismissed upon motion from either party and notice to all parties.

In *Petit Jean Air Service v. Wilson,* 251 Ark. 871, 475 S.W.2d 531 (1972), Associate Justice George Rose Smith, speaking for our supreme court, rejected the appellee's argument that the claims were never finally disposed of because the doctors did not make final determinations of the extent of disability, therefore tolling the statute of limitations. The supreme court held:

> It is true that claims had been filed with the commission, but such filing is by no means comparable to the lodging of a formal complaint in a court of law. Court cases, almost without exception, are contested; and even those that are allowed to go by default are eventually terminated by an affirmative order of court. By contrast, hardly one compensation case in fifty is controverted. Uncontroverted claims, such as this one, make up the vast majority of all claims that are filed. Such claims are not ordinarily brought to the attention of the commission nor acted upon by it in any way

> whatever. The insurance carrier pays the claim to the satisfaction of all concerned, and that is the end of the matter.

251 Ark. at 874, 475 S.W.2d at 534. The supreme court further held, "It is plainly the better rule to put upon the claimant the burden of filing his claim for *additional compensation* within the time allowed by the statute. In our opinion, that view of the matter gives effect both to the letter and to the spirit of the law." 251 Ark. at 875, 475 S.W.2d at 534. (Emphasis added.)

In this case, appellant suffered a compensable injury on September 15, 1998; he filed one request for compensation, the *initial* request, on June 17, 1999; and his last benefits paid were on May 8, 2000. Two years from the date of injury would have been September 15, 2000. One year from the last payment of benefits would have been May 8, 2001; this would be the applicable limitations period because it is greater than two years from the date of the compensable injury. Appellant did not request his shoulder surgery until May 2003, which was clearly more than one year after the last payment of benefits. Therefore, the statute of limitations had run on appellant's claim, and the Commission's decision denying the claim for additional benefits was correct.

Affirmed.

GRIFFEN, VAUGHT and ROAF, JJ., agree.

HART and CRABTREE, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. The majority holds that appellant's claim for medical benefits related to his shoulder surgery was untimely because, as provided in Ark. Code Ann. § 11-9-702(b)(1) (Repl. 2002), he failed to file a claim for *additional* compensation either within one year from the last payment of compensation on May 8, 2000, or within two years from his September 15, 1998, injury. The majority's reliance on this statute is misplaced, however, as the shoulder surgery was part of his *initial* claim for compensation. Appellant's claim was timely because, as provided in Ark. Code Ann. § 11-9-702(a)(1), appellant filed his initial compensation claim on June 17, 1999, within two years from the date of his September 15, 1998, injury.

Following his injury and his filing of his initial claim for compensation, appellant was seen by Dr. Reed Kilgore, who noted on December 27, 1999, that appellant would undergo

diagnostic tests to determine whether he needed either "open rotator cuff surgery" or "arthroscopic subacromial decompression with possible distal clavicle resection." Dr. Kilgore noted on March 8, 2000, that if appellant had "multiple recurrences" of pain, he would "probably require distal clavicle resection." On May 8, 2000, Dr. Kilgore wrote that appellant understood that he might need "AC resection arthroplasty for complete and permanent relief of his symptoms" and that if he had "worsening," he would "require arthroscopy and AC distal clavicle resection, which he can schedule if he wishes." According to appellant, he continued to have problems with his shoulder. On June 13, 2003, Dr. John Yocum performed an "[a]rthroscopy of the right shoulder with arthroscopic repair of SLAP lesion and arthroscopic Bankart repair with debridement of labral tear."

The majority does not dispute that appellant filed a timely initial claim for compensation. Further, the medical records noted above established that, within months after appellant filed his claim, he was considered a candidate for surgery. Thus, I would conclude that appellant's initial claim for compensation remained open, as surgery was not performed even though he was a candidate for surgery. In the case relied on by the majority, *Petit Jean Air Service v. Wilson*, 251 Ark. 871, 475 S.W.2d 531 (1972), a claim for additional compensation was held to be untimely where, following the filing of his initial claims for compensation, the claimant received final lump-sum settlement and was seen for the last time by every examining physician, and the claimant then filed his claim for additional compensation after the time for filing such a claim had run. Certainly, the claimant's initial claim for compensation ended after he received his settlement and was seen for the last time by his physicians, and thereafter, the claimant would have to file a timely claim for additional compensation. In the case at bar, however, there was no lump-sum settlement, and appellant's physician had not released him. Rather, appellant's initial claim for compensation remained open because appellees knew that appellant was a surgical candidate and because appellees had not sought dismissal of the claim as permitted by Ark. Code Ann. § 11-9-702(a)(4) and by W.C.C. Rule 13 (Mar. 1982). *See Johnson v. Triple T Foods*, 55 Ark. App. 83, 929 S.W.2d 730 (1996). Consequently, I would reverse and remand for consideration of the merits of appellant's claim.

I respectfully dissent.

CRABTREE, J., joins.

McDONALD MOBILE HOMES, INC.,
d/b/a Harrison Home Center *v.*
BANKAMERICA HOUSING SERVICES

CA 05-544 218 S.W.3d 376

Court of Appeals of Arkansas
Opinion delivered November 30, 2005

[redacted]

[redacted]

James D. Sprott, P.A., by: *James D. Sprott* and *Huckabay, Munson, Rowlett and Moore, P.A.*, by: *Beverly A. Rowlett*, for appellant.

Matthews, Sanders & Sayes, by: *Doralee Chandler* and *Mel Sayes*, for appellee.

DAVID M. GLOVER, Judge. McDonald Mobile Homes, Inc., d/b/a Harrison Home Center, appeals from a judgment entered by the Carroll County Circuit Court for appellee BankAmerica Housing Services. We reverse the circuit court's decision and remand for further proceedings consistent with this opinion.

This case had its origin in a contract entered into by appellant and Charles Copeland and his wife, Elinor Copeland (now deceased), on April 28, 1997, whereby appellant sold a purportedly new manufactured home to the Copelands for $80,201.50. Saturn Housing, LLC, manufactured the home. The Copelands gave a cash down payment of $4350 and financed the balance. The installment contract provided that any holder of the contract would be subject to all claims and defenses that the Copelands could assert against appellant. It also set forth the following assignment provision regarding appellee, which was described as the "Creditor":

> With respect to this retail installment contract ("contract") signed by one or more buyers ("Buyer"), SELLER represents and warrants that: (1) Buyer's credit statement submitted herewith is completely accurate unless otherwise specified; (2) Buyer is legally competent to contract at the time of Buyer's execution of this contract; (3) this contract arose from the bona fide sale of the merchandise described in this contract; (4) the downpayment was made by Buyer in cash unless otherwise specified and no part thereof was loaned directly or indirectly by Seller to Buyer; (5) any trade-in, or other consideration, received as any part of the downpayment is accurately described on page 2 and has been valued at its bona fide value, and any amount owed on such trade-in or other

> property is accurately described on page 2 and has been paid off by Seller prior to or contemporaneously with the assignment of this contract to Creditor; (6) there is now owing on this contract the amount set forth herein; (7) this contract and any guaranty submitted in connection herewith is in all respects legally enforceable against each purported signatory thereof; (8) Seller has the right to assign this contract and thereby to convey good title to it; (9) in the event of any claim or defense asserted by any Buyer, or any heirs or assigns of Buyer, with respect to the Manufactured Home or other property or consideration transferred pursuant to this retail installment contract, Seller agrees that it will indemnify and hold Creditor harmless from all such claims and defenses as well as from all costs reasonably incurred by Creditor in connection therewith, including but not limited to reasonable attorney fees and court costs; and (10) in accordance with the Fair Credit Reporting Act, Seller has notified Buyer that this contract is to be submitted to Creditor.
>
> For value received, Seller hereby assigns to Creditor all its rights, title and interest in this contract and the property which is the subject matter hereof and authorizes Creditor to do everything necessary to collect and discharge same. All the terms of any existing written agreements between Seller and Creditor governing the purchase of contracts are made a part hereof by reference, it being understood that Creditor relies upon the above warranties and upon said agreements in purchasing this contract.

This provision related to a 1994 agreement between appellant and appellee's predecessor in interest, Security Pacific Housing Services, a Division of Bank of America FSB, whereby appellee agreed to purchase retail installment contracts, security agreements, and the related promissory notes from appellant. That contract contained the following provisions:

> 4. With respect to each Account purchased by SPHS, Dealer represents, warrants and agrees that:
>
> . . . .
>
> b. the Account and each guaranty and/or additional collateral agreement in connect therewith shall be legally enforceable by SPHS as assignee against each purported signatory thereof;
>
> . . . .

j. the manufactured home and related services have been furnished to the satisfaction of Customer and all obligations of warranty to Customer either express or implied have been and will continue to be fulfilled by Dealer.

5. As additional consideration for the purchase of any Account in accordance with the terms of this Agreement, Dealer agrees to repurchase upon demand of SPHS, any Account wherein the purchaser fails to pay SPHS by reason of breach of warranty, misrepresentation with respect to the equipment sold, or failure on the part of Dealer to provide adequate service regarding such manufactured home sold at retail.

6. In the event of breach of any one or more of the warranties set forth in Paragraph 4 or 5 above, or should Dealer fail to perform any obligations to SPHS under this Agreement, Dealer shall, upon demand, repurchase without warranty or representation, expressed or implied, any Account then owned by SPHS which is affected by such breach, and will promptly pay SPHS therefore [sic] the amount then remaining to be paid by the Customer thereunder less any unearned finance charge thereon; but such obligation on part of Dealer shall not preclude SPHS from enforcing, at SPHS's election, any other remedies available by reason of such breach. Upon such payment by Dealer, the applicable accounts shall upon written request be reassigned by SPHS to Dealer without recourse to SPHS.

7. Upon SPHS's request, and within thirty (30) days thereafter, Dealer shall repossess and transport, or make arrangements to repossess and transport, to a location designated by SPHS, collateral covered by Accounts in default and accept as reimbursement therefor a maximum amount of the actual out-of-pocket costs incurred. Dealer shall, at no cost to SPHS, store and protect such repossessed collateral until resold. Dealer agrees to resell repossessed collateral at SPHS's request at a price to be established by SPHS, in its sole discretion, and to accept as reimbursement therefor a maximum amount of 10% of the selling price. Dealer agrees to indemnify and save SPHS harmless from *any and all claims which may be made* upon SPHS in connection with, or as a result of, any efforts, or conduct by Dealer, or Dealer's agents, in endeavoring to obtain possession of any collateral, it being understood and agreed that any efforts, which Dealer or Dealer's agents may make shall be for Dealer's own benefit, at Dealer's risk, and not as an agent of SPHS. SPHS

shall have the sole right to commence collections on all Accounts and Dealer agrees not to accept the return of nor make any substitution of collateral except with SPHS's prior written consent.

8. Dealer shall indemnify and hold SPHS harmless for any and all claims, damages and costs (including attorney's fees) which may be made upon SPHS in connection with or as a result of, any breach by Dealer of any of the terms of this Agreement, or any claim which, if true or proven, would constitute such a breach, or by reason of Dealer's repossession of any manufactured home, whether such repossession is at the direction of SPHS or otherwise.

. . . .

14. Dealer's liabilities shall not be affected hereunder by any settlement, extension, forbearance, variation in terms, discharge, release of the obligations of buyer or any other person (by operation of law or otherwise) which SPHS may grant a buyer or any other person in connection with any account(s).

The contract between the Copelands and appellant was assigned to appellee, to whom the Copelands sent their payments. The home was delivered on May 16, 1997. Immediately after moving into the manufactured home, the Copelands found numerous defects with it. After unsuccessfully attempting to obtain satisfaction from appellant, the Copelands eventually stopped making their payments to appellee. On September 10, 1999, appellee sued the Copelands for the full balance due, $83,501.31, and requested "immediate possession to be made permanent on final judgment, for sale of the unit in conformity with the Uniform Commercial Code and judgment for the difference between the debt and amount produced, for costs, fees, and all other proper relief." In an attached affidavit, appellee's attorney stated that the value of the mobile home was approximately $67,159. In response, the Copelands asserted the defenses of set-off, fraud in the inducement, and breach of warranty. They filed a counterclaim against appellee and a "cross-claim" against appellant, revoking their acceptance of the mobile home; rescinding the contract; asserting misrepresentation, breach of warranty, and deceptive trade practices; and seeking damages. In its answer to the counterclaim, appellee asserted that it was entitled to "contribution or indemnity from others. . . ."

On December 8, 1999, the circuit judge entered an order awarding possession of the mobile home to appellee. In an amended complaint filed January 27, 2000, appellee stated that the mobile home had been repossessed and that the balance due, including repossession expenses, was $86,705.25.

On February 4, 2000, appellant filed a third-party complaint against Saturn. On November 22, 2000, appellee filed a cross-claim against appellant and Saturn, in which it stated:

> 7. McDonald mobile homes signed a Dealer's Agreement with BankAmerica Housing Services, attached hereto as Exhibit "A" and incorporated herein by this reference. This agreement states that McDonald agrees to indemnify and hold BankAmerica Housing Service[s] harmless from any and all claims, damages and costs, including attorney's fees, which may be made upon BankAmerica Housing Services in connection with or as a result of any breach by McDonald of any terms of the Dealer's Agreement; that the Dealer's Agreement defines a breach to include failure of the purchaser to BankAmerica Housing Services by reason of breach of warranty or failure on the part of the dealer to provide adequate service regarding such manufactured homes sold by McDonald.
>
> 8. BankAmerica Housing Services is entitled to Judgment over and against McDonald for indemnity for all claims, damages and costs, including attorney's fees, which Copelands may recover against BankAmerica Housing Services in this lawsuit, or BankAmerica may demand repurchase of the Copelands' contract with BankAmerica, which is affected by any breach on the part of McDonald.

In an amended counterclaim and cross-claim filed May 24, 2002, Mr. Copeland asserted that appellee, under the terms of the contract between the parties, was subject to each of the claims and defenses set forth therein, including rescission and cancellation.

The circuit judge severed the claims involving appellee, and Mr. Copeland's claims against appellant and Saturn were tried to a jury. The jury returned a verdict on interrogatories finding that the mobile home did not conform to express warranties given by appellant and Saturn and that Mr. Copeland had been damaged in the amount of $6550. The jury allocated forty percent of the total responsibility for the compensatory damages against appellant and sixty percent to Saturn. It awarded $10,000 in punitive damages

against appellant and $30,000 in punitive damages against Saturn. The court entered judgment on the verdict on June 27, 2002, and awarded an attorney's fee against appellant and Saturn in the amount of $9600. Appellant satisfied Mr. Copeland's judgment against it.

On July 10, 2002, the court entered an order stating that, upon mutual motions for voluntary nonsuit, all claims between the Copelands and appellee would be dismissed without prejudice. The court also denied appellant's motion to dismiss appellee's cross-claim and stated: "The Court further Orders that the cross-claim of BankAmerica Housing Services against McDonald Mobile Homes, Inc., d/b/a Harrison Home Center and Saturn Housing, LLC, remains pending and the Court, despite McDonald's objection, hereby severs the cross-claim for trial at a future date. This Order is entered Nunc Pro Tunc."

On July 23, 2002, appellee moved for summary judgment, stating that no appeal had been filed from the jury's verdict against McDonald and that, because of appellant's agreement to repurchase any account where the purchaser failed to pay appellee by reason of breach of warranty and/or misrepresentation, appellant was estopped to raise any defenses it might have with regard to those issues. Appellee requested judgment against appellant in the amount of $75,845.50, representing appellee's payments to Greentree Financial Services, the loan servicer, of $59,640 and to appellant of $16,205.50 for its equity. Appellee attached a copy of the jury's verdict on interrogatories and its agreement with appellant and argued that appellant's breach of warranty and material misrepresentations had been conclusively determined. In response, appellant contended that the motion for summary judgment should be denied because the only prayer for relief in appellee's cross-claim against it on November 22, 2000, sought no judgment for deficiency against appellant. It argued that there was

> simply no claim pending against this [appellant] for a deficiency judgment, or any other judgment, for that matter. The original claim was for indemnity as to any judgment that might be awarded AGAINST BankAmerica, but no indemnity could apply where Copeland dismissed all claims against BankAmerica. Therefore, no claim [is] presently pending against [appellant] and [appellee] is most certainly not entitled to a judgment, summary or otherwise, for damages it has not sought, pled, and proven.

On August 16, 2002, appellee amended its cross-complaint against appellant, stating:

> 1. That on September 1, 1994, [appellant] entered into a contractual agreement, whereby [appellant] agreed to repurchase customer's account in the event the customer failed to make payments to [appellee] by reason of breach of warranty and/or misrepresentation.
>
> 2. That [appellant], in the event of a determination of breach of warranty and/or misrepresentation, is obligated by contract to repurchase defendant Copeland's account with [appellee] in the amount of $75,845.50.

In its August 30, 2002 answer to the amended cross-complaint, appellant denied having entered into a contract as described by appellee and moved to dismiss for failure to state facts upon which relief could be granted. It also stated: "Further, the Amendment to Cross-Complaint seeks monetary judgment while seeking to enforce a specific agreement to repurchase a contract between [appellee] and [appellant], an opportunity that has never been given to [appellant]." Appellant also asserted laches and estoppel on the ground that appellee had failed to notify appellant of its actions in repossessing the collateral, holding it for sale, and selling it at public or private sale, or of any balance due, rendering it impossible for appellant to mitigate any possible damages by repurchasing the mobile home and using its expertise to sell it at a more reasonable price. Appellant stated that appellee had never asked it to repurchase the contract and, by failing to notify appellant of its actions, rendered it impossible for such a repurchase to occur. Appellant also alleged that appellee had failed to sell the collateral in a commercially reasonable manner in violation of the UCC and had sold it for less than its true market value. Additionally, appellant argued that, even if such a contractual relationship existed between the parties, appellee was under an obligation to mitigate its damages, which it had failed to do by settling with Mr. Copeland.

On June 23, 2003, appellee filed a second amended cross-claim, stating:

> 6. The Retail Installment Contract contains an Assignment by Seller wherein the Seller, McDonald, agrees to indemnify the Creditor, BankAmerica, from all claims asserted by the buyer and

> defenses as well as from all costs reasonably incurred by BankAmerica in connection therewith, including attorney fees.
>
> 7. [Appellant], in the event of a determination of breach of warranty and/or misrepresentation, is obligated by contract to repurchase Defendant Copeland's account with BankAmerica Housing Services in the amount of $75,845.50.

The same day, appellee filed an amended motion for summary judgment on the basis of appellant's agreement to repurchase following the buyer's breach and to indemnify appellee from all claims and defenses asserted by the buyer.

In its July 10, 2003 answer to the second amended cross-complaint, appellant again moved to dismiss for failure to state facts upon which relief could be granted. It alleged that the manufactured home time sales agreement was, at least as interpreted by appellee, unconscionable because appellee had repossessed the mobile home with no notice to appellant or any request that appellant repurchase it. In response to the amended motion for summary judgment, appellant argued that appellee had failed to mitigate its damages, sell the collateral in a commercially reasonable manner, or give appellant the opportunity to repurchase the contract. Appellant also contended that appellee's voluntary dismissal of its claims against the Copelands barred a judgment against appellant.

This case was tried to the circuit judge, who entered judgment for appellee in the amount of $60,360.11 on February 11, 2004. Appellant filed its first notice of appeal on February 25, 2004. On February 9, 2005, we dismissed the appeal because the claims involving Saturn had not been determined. On March 18, 2005, the circuit court dismissed appellee's cross-claim against Saturn without prejudice, thereby solving the finality issue. On April 6, 2005, appellant filed its second notice of appeal.

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 his findings are clearly against the preponderance of the evidence. *Taylor v. George*, 92 Ark. App. 264, 212 S.W.3d 17 (2005). 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.*

Appellant does not dispute that it breached its warranties to the Copelands but raises the following points on appeal: (1) the

trial judge erred in refusing to dismiss appellee's cross-claim against appellant after appellee and Mr. Copeland nonsuited their claims against each other; (2) the trial judge erred in failing to find that appellee's recovery was barred because it failed to notify appellant of the sale and to sell the collateral in a commercially reasonable manner; (3) as interpreted by the trial judge, the contract between appellant and appellee was unconscionable. Because of our disposition of the first and second points on appeal, we need not reach appellant's third point.

Appellant first argues that, after appellee and Mr. Copeland dismissed their claims against each other, the trial judge should have dismissed appellee's claim against appellant. It asserts that appellee had only prayed for indemnity in the event that Mr. Copeland obtained a judgment against it, and after those claims were dismissed, appellee could no longer be considered a co-party within the meaning of Ark. R. Civ. P. 13(g), which states: "[P]ersons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20 [which concern the joinder of parties]."

We disagree with appellant. Appellee's cross-claim also recited that appellee might demand that appellant repurchase the contract. Instead of dismissing appellee's claim against appellant, the trial judge severed it for trial at a later date, as permitted by Ark. R. Civ. P. 18(b)(1), which provides: "Any claim against a party may be severed and proceeded with separately." Also, Ark. R. Civ. P. 42(b) states that, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, the judge may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue. The trial judge has extensive discretion in deciding whether to order severance of claims or issues. *Carpetland of N.W. Ark., Inc. v. Howard*, 304 Ark. 420, 803 S.W.2d 512 (1991). Additionally, appellee later amended its cross-claim to include a request that appellant repurchase Mr. Copeland's account in the amount of $75,845.50. Ark. R. Civ. P. 15 vests broad discretion in the trial judge to permit amendments to pleadings and the exercise of that discretion by the trial judge will be sustained unless it is manifestly abused. *Wingfield v. Page*, 278 Ark. 276, 644 S.W.2d 940 (1983). We cannot say that the circuit judge abused his discretion in this matter.

Appellant's second argument, however, is more persuasive. It asserts that the trial judge erred in refusing to apply the UCC and that appellee's failure to notify it of the sale of the collateral and its failure to prove that the sale was commercially reasonable should have barred its right to recover any deficiency from appellant. Because the sale of the collateral occurred on March 12, 2001, we refer to the statutes that were in effect on that date. Arkansas Code Annotated section 4-9-501 (Repl. 1991) provides:

> (1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose, or otherwise enforce the security interest by any available judicial procedure.... The rights and remedies referred to in this subsection are cumulative.
>
> . . . .
>
> (3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (§ 4-9-504 and § 4-9-505), and with respect to redemption of collateral (§ 4-9-506), but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:
>
> (a) Section 4-9-502(2) and § 4-9-504(2) insofar as they require accounting for surplus proceeds of collateral;
>
> (b) Section 4-9-504(3) and § 4-9-505(1) which deal with disposition of collateral;
>
> (c) Section 4-9-505(2) which deals with acceptance of collateral as discharge of obligation;
>
> (d) Section 4-9-506 which deals with redemption of collateral; and
>
> (e) Section 4-9-507(1) which deals with the secured party's liability for failure to comply with this part.

It is apparent that section 4-9-501(3) limits the parties' freedom of contract. *See* James J. White & Robert S. Summers, *Uniform Commercial Code* § 34-1 (4th ed. 1995).

Arkansas Code Annotated section 4-9-504 (Repl. 1991) states 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. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods, no other notification need be sent. In other cases, notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations, he may buy at private sale.

Under the UCC, once the collateral has been disposed of, the debtor remains liable for any deficiency. Ark. Code Ann. § 4-9-504(2) (Repl. 1991); *Greenlee v. Mazda Am. Credit*, 92 Ark. App. 400, 214 S.W.3d 290 (2005). However, a creditor may be barred from seeking a deficiency judgment if the sale of the collateral was not commercially reasonable. *Id.* The creditor bears the burden of proving that the sale proceeded in a commercially reasonable manner. *Id.* Whether the sale of collateral was conducted in a commercially reasonable manner is essentially a factual question. *Id.* It is recognized that a seller of chattel paper with recourse has a financial stake in the creditor's disposition or sale of

the collateral that is similar to the debtor's possible liability for a deficiency. James J. White & Robert S. Summers, *Uniform Commercial Code* § 34-13 (4th ed. 1995). For example, in *City Nat'l Bank of Fort Smith v. Unique Structures, Inc.*, 49 F.3d 1330 (8th Cir. 1995), the Court of Appeals held that a mobile home dealer that had sold installment contracts "with recourse," thereby assuming liability for payment in the event of default by the buyer, did not have to pay a deficiency to the bank because the bank failed to prove that its sales of the collateral were commercially reasonable.

In *Norton v. Nat'l Bank of Commerce of Pine Bluff*, 240 Ark. 143, 398 S.W.2d 538 (1966), *overruled on other grounds*, *First State Bank of Morrilton v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987), the Arkansas Supreme Court held that a car dealer was a "debtor" within the meaning of Ark. Stat. Ann. § 85-9-504(3) (now found in section 4-9-504) and, therefore, entitled to notice of the sale of collateral.[1] The car dealer took a note and conditional sales contract from a buyer and assigned it to a bank, promising that it would repurchase the note and contract if the buyer defaulted. After the buyer defaulted, the bank sold the car without notice to the dealer. The supreme court held that the dealer was one who, under the statute, was a debtor and, because the amount obtained in the sale fixed his pecuniary liability, was entitled to notice as a matter of simple fairness. The court also held as ineffective under Ark. Stat. Ann. § 85-9-501(3) Norton's purported waiver of his right to notice of the sale by signing a printed assignment of the conditional sales contract (prepared by the bank) that recited that Norton waived all notices to which he might otherwise have been entitled. Based on that statute and the court's interpretation of it in *Norton*, we hold that the trial judge in this case was wrong in concluding that appellee was not required to follow the UCC and sell the collateral in a commercially reasonable manner.

Under Arkansas law, inadequacy of sale price, alone, is not dispositive of whether a sale was commercially reasonable. *Greenlee v. Mazda Am. Credit, supra.* 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.* The trial court is

[1] Arkansas Code Annotated section 4-9-105(1)(d) (Supp. 1999) defines "debtor" as: "the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper."

required to consider evidence regarding the reasonableness of the method, time, manner, and place of the disposition of the collateral. *Id.* Commercial reasonableness requires that the secured party act in good faith to maximize returns on collateral. *Eagle Bank & Trust Co. v. Dixon*, 70 Ark. App. 146, 15 S.W.3d 695 (2000). Testimony by a witness without personal knowledge of the activities surrounding the sale or disposition of the property is not sufficient. In *Greenlee*, the creditor submitted no evidence of the value of the collateral, its condition, or the manner of the sale, other than the statement contained in a computer printout that the disposition had occurred at an "auction," or how the sale was advertised, and we reversed the trial court's award of a deficiency judgment. Although appellee presented evidence of its usual procedure, which included sending notice to dealers, it offered no information about the advertising or solicitation of bids, the value of the collateral, or whether appellant was actually notified about the sale. Because *Norton*, and thus the UCC, apply to this case, appellee was required to demonstrate that the sale was commercially reasonable. However, the trial judge did not make any findings on whether the sale was commercially reasonable because he erroneously believed that the UCC did not apply in this situation. We therefore reverse and remand this case for further proceedings on the issue of whether the sale was commercially reasonable.

Reversed and remanded.

NEAL and VAUGHT, JJ., agree.

The KROGER COMPANY *v.* Sharon SMITH

CA 05-320 218 S.W.3d 359

Court of Appeals of Arkansas
Opinion delivered November 30, 2005

Barber, McCaskill, Jones & Hale, P.A., by: *Michael Emerson*, and *Spicer, Flynn & Rudstrom, PLLC*, by: *Mildred L. Sabbatini*, for appellant.

Charles P. Allen, Jr., for appellee.

TERRY CRABTREE, Judge. Appellant Kroger Company appeals a judgment in favor of appellee Sharon Smith in the amount of $58,828.53. Smith had filed a complaint against Kroger in negligence after Smith injured her knee when her shopping cart tilted over while she was taking groceries to her car. Smith predicated her claim of negligence on the dual contentions that Kroger had a duty to assist her to her car and that it had a duty to warn her of the danger associated with a person of her size pushing a fully-loaded shopping cart. Kroger appeals the denial of its motion for a directed verdict in which it argued that it had no duty to assist or warn. Kroger's arguments have merit, and we reverse on both issues.

On July 22, 1997, Smith, then age twenty-three and a woman of small stature, went to the Kroger grocery store in Helena with her young daughter and cousin. Smith purchased a month's worth of groceries that the courtesy clerk sacked and placed into a shopping cart, or what the parties refer to as a "bascart." According to Smith, the cart was filled with twenty-five to thirty bags of groceries with two cases of soft drinks underneath. The courtesy clerk pushed appellee's cart aside and spoke with the cashier a moment before moving to another lane to sack groceries for Smith's cousin. Smith testified that she waited a moment, while the cashier and clerk were speaking, and then proclaimed, "I guess I'll have to take my own groceries out." Smith was not sure whether the courtesy clerk heard her comment. Smith then exited the store pushing the cart with her daughter in it. She proceeded down a ramp to the parking lot, but the cart tilted over when she was half-way down the ramp. Smith unsuccessfully attempted to aright the cart, and it landed on her knee.

Smith did not recall stepping on anything slippery or observe that there was anything wrong with the cart or the ramp. She stated that she did not request assistance with her bags and said that she had no reason to believe that she would encounter any difficulties in taking her groceries to the car. She believed that the cart fell over because it was overloaded and top heavy.

In support of her claim that appellant owed a duty to assist her in taking her groceries to the car, Smith introduced into evidence a written job description for courtesy clerks, which provided in part:

> Customer Service — Courtesy Clerks greet customers and respond to their questions and requests in a courteous and helpful way.

> Moving bags to the customer's car — Courtesy Clerks must avoid getting in the way of cars in the parking lot. They must also help the customer avoid approaching cars.

Kenneth Mister testified on behalf of Kroger. He had worked for Kroger for thirty years and was the store manager in Helena at the time of Smith's accident. He testified that the duties of a courtesy clerk included sacking, cleaning floors and restrooms, assisting customers as needed, and cleaning the parking lot. He said that taking customers' bags to their vehicles was not an absolute duty and that eighty percent of their customers carried their own bags to their cars. If assistance was requested, he said "we would try to assist with this request." Mister further testified that the store attempts to maintain enough clerks to sack, keep the lot clean, and to take out groceries when requested, but that there were not enough clerks to take every customer's bags to their car. He was not aware of any similar accidents happening over the course of his employment.

Appellant's arguments on appeal stem from the denial of its motions for a directed verdict. Appellant argues that the evidence fails to establish that it had a duty to assist appellee to her car or to warn her of any dangerous condition.

In addressing the issue of whether a directed verdict should have been granted, we must view the evidence in the light most favorable to the party against whom the verdict is sought and give it the highest probative value, taking into account all reasonable inferences deducible from it. *Martin v. Hearn Spurlock, Inc.*, 73 Ark. App. 276, 43 S.W.3d 166 (2001). If there is any substantial evidence to support the verdict, we must affirm the trial court. *Arkansas Kraft v. Cottrell,* 313 Ark. 465, 855 S.W.2d 333 (1993).

To establish a prima facie case of negligence, the plaintiff must show that she sustained damages, that the defendant was negligent, and that such negligence was the proximate cause of the damages. *Id.* We have defined negligence as the failure to do something which a reasonably careful person would do. *Martin v. Hearn Spurlock, Inc., supra.* The mere fact that a person slips and falls does not give rise to an inference of negligence. *Arkansas Kraft v. Cottrell, supra.* In order to prove negligence, there must be a failure to exercise proper care in the performance of a legal duty that the defendant owed the plaintiff under the circumstances surrounding them. *Costner v. Adams,* 82 Ark. App. 148, 121 S.W.3d 164 (2003).

The law is quite settled that a property owner has a general duty to exercise ordinary care to maintain the premises in a reasonably safe condition for the benefit of invitees. *Morehart v. Dillard Dep't Stores,* 322 Ark. 290, 908 S.W.2d 331 (1995). The question of whether a specific duty is owed is always a question of law and never one of fact for the jury. *See VanDeVeer v. RTJ, Inc.,* 81 Ark. App. 379, 101 S.W.3d 881 (2003). The owner is not an insurer of the safety of invitees on his premises, but his liability to an invitee must be based upon negligence. *Ollar v. George's Place,* 269 Ark. 488, 601 S.W.2d 868 (1980).

In *Lytle v. Wal-Mart Stores, Inc.,* 309 Ark. 139, 827 S.W.2d 652 (1992), there was testimony that it was the duty of Wal-Mart employees to assist its customers. Ms. Lytle asked for but did not receive assistance from an employee to retrieve a folder on a top shelf. So, Ms. Lytle climbed onto a lower shelf to reach the item. She lost her balance and fell, fracturing her ankle. The court rejected the argument that the store's policy of assisting customers gave rise to a duty of care. The court said that, although the employee may have been remiss in the duty to render courteous service, discourtesy does not translate into a legal liability.

In *Crenshaw v. Doubletree Corp.,* 81 Ark. App. 157, 98 S.W.3d 836 (2003), Mr. Crenshaw was a guest at the Doubletree Hotel who was taken by the hotel's van to a restaurant. He fell when he stepped out of the van onto the street. Although the driver of the van had assisted Crenshaw and his wife in getting out of the van the night before, the court found no duty on the part of the hotel to provide such assistance. Also in *Ark. La. Gas Co. v. Stracener,* 239 Ark. 1001, 395 S.W.2d 745 (1965), the court held that the gas company's practice of locking and tagging meters did not give rise to a legal duty to do so.

The most analagous case we have found is the decision of the Illinois Supreme Court in *Mick v. The Kroger Co.,* 224 N.E.2d 859 (Ill. 1967). There, the grocery store had a routine policy of maintaining a carry-out service for its customers. On the day in question, Ms. Mick was told that there was no one to assist her, and she carried out a thirty-pound bag of groceries herself. She fell and was injured. The issue before the court was "whether a merchant can be said to have a duty to assist customers in carrying large packages of groceries by virtue of the fact that it customarily

did so." The court answered the question in the negative, holding that the store's policy did not create a legal obligation. The court said:

> Apart from the deviation from custom, the only evidence it [lower appellate court] discussed are the facts that the bag of groceries involved in this suit was both large and heavy and that plaintiff told defendant's checkout boy that the bag was too heavy for her. This proof is, however, insufficient to create a duty upon defendant to carry her bag. When told that no assistance was available, plaintiff did not have to attempt to carry out the bag. She could have waited for her husband to return and carry out the groceries for her as she said he occasionally had done. She could have also placed the groceries in a cart which clearly was available for use. Plaintiff voluntarily purchased the groceries and chose to carry out a bag which she says she felt was too heavy for her, even though alternative courses of action were available.

Id. At 152-53.

In light of the case law in Arkansas that policy does not translate into a legal duty, and persuaded by the decision of the Illinois Supreme Court in *Mick,* we cannot conclude that Kroger had a duty to assist Smith to her car. In our estimation, Smith chose to take the heavily-laden cart out herself when she could have waited and asked for assistance. We hold that, as a matter of law, the trial court erred in denying Kroger's motion for a directed verdict.

We also hold that Kroger had no duty to warn Smith of any danger associated with handling a fully-loaded cart. The duty to warn an invitee of a dangerous condition applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls and the like, in that they are known to the invitor but not known to the invitee and would not be observed by the latter in the exercise of ordinary care. *Ethyl Corp. v. Johnson,* 345 Ark. 476, 49 S.W.3d 644 (2001); *Jenkins v. Hestand's Grocery,* 320 Ark. 485, 898 S.W.2d 30 (1995). There is no duty to warn where the dangerous condition is known or obvious to the invitee. *Van DeVeer v. RTJ, Inc., supra.* In this instance, Smith herself purchased the large quantity of groceries that were loaded into the shopping cart. If there were any danger, it was an obvious one,

such that there was no duty to warn. *See, e.g., Ethyl Corp. v. Johnson, supra* (no duty to warn of potential danger of moving a large trash receptacle).

Reversed.

BAKER and ROAF, JJ., agree.

Stephen WITHERS *v.* STATE of Arkansas

CA CR 03-1144 218 S.W.3d 386

Court of Appeals of Arkansas
Opinion delivered November 30, 2005

William H. Craig, for appellant.

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

TERRY CRABTREE, Judge. A Pulaski County jury found appellant, Stephen Withers, guilty of two counts of theft by receiving, one a class B felony and the other a class C felony. As a

result, he was sentenced as an habitual offender to respective terms of twenty-eight and twenty years in prison, to be served consecutively. The sole issue raised on appeal is whether there is sufficient evidence to support the class C felony conviction. Specifically, appellant argues that the evidence is not sufficient to support a finding that the card found in his possession was a "credit card." We affirm as modified.[1]

On May 6, 2002, Sam McFaddin discovered that his recently-purchased 2002 GMC Z-71 Extended Cab pickup truck was missing from his garage. Early on the morning of May 8, 2002, the home of Jack Lankford was burglarized. Mr. Lankford's wallet was among several items that were stolen.

On May 8, 2002, officers with the Little Rock Police Department observed Mr. McFaddin's truck, which had been reported as stolen, in the area of 26th and Rock Streets. They initiated a stop of the vehicle, but the vehicle continued onward for several blocks. Eventually, an individual jumped out of the truck, while it was still moving, and ran a short distance before being apprehended and arrested by the police. Appellant was identified as the individual who had been driving and had alighted from the truck. At booking, appellant's wallet was found to contain a bank card issued to Mr. Lankford. By felony information, appellant was charged with theft by receiving of Mr. McFaddin's truck, a class B felony, and theft by receiving of Mr. Lankford's bank card, as a class C felony.

At trial, Mr. Lankford referred to the card as a "bank card" and identified the State's exhibit as his "One Bank check card bearing my name and account number." The exhibit, a photograph of the front side of the card, reveals that it is a check card issued by One Bank, which bears a VISA imprint. Before Mr. Lankford could cancel the card, it was used to make a fifty-dollar purchase at a Texaco station.

Appellant moved for a directed verdict on the ground that the evidence would not support a conviction of theft by receiving as a class C felony because it was not proven that the card was a "credit card." The trial court denied the motion, and the jury

[1] This case originated as a no-merit appeal pursuant to Rule 4-3(h) of the Rules of Appellate Procedure – Criminal and has twice been before us. In an unpublished opinion dated January 12, 2005, we remanded for the record to be supplemented. In an unpublished opinion handed down on April 27, 2005, we ordered rebriefing in adversary form on the issue that is the subject of this appeal.

found appellant guilty as charged. Appellant contends on appeal that the trial court erred in denying his motion for a directed verdict.[2]

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Peterson v. State,* 81 Ark. App. 226, 100 S.W.3d 66 (2003). When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State, and only evidence supporting the verdict will be considered. *Smith v. State,* 352 Ark. 92, 98 S.W.3d 433 (2003). We affirm a conviction if substantial evidence exists to support it. *Edmond v. State,* 351 Ark. 495, 95 S.W.3d 789 (2003). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Smith v. State, supra.*

At the time the offense was committed in this case, Arkansas Code Annotated section 5-36-106(a) (Repl. 1997) provided that a person commits the offense of theft by receiving if he receives, retains, or disposes of stolen property of another person, knowing that it was stolen or having good reason to believe it was stolen. Subsection (e)(2)(B) of the statute provided that the offense was a class C felony if the stolen property was a "credit card."

Appellant's contention is that the card in question was a "debit" card, not a "credit" card, and thus the conviction is not supported by substantial evidence because the version of § 5-36-106 in effect at the time of the offense made theft by receiving a class C felony only if the card was a credit card. Before considering whether there is substantial evidence to support the conviction as a class C felony, we must first decide if appellant's proposed interpretation of the statute is correct.

The basic rule of statutory construction to which all other interpretive guides must yield is to give effect to the intent of

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[2] The State maintains that appellant's argument is not preserved for appeal because the error complained of is a sentencing error to which appellant raised no objection at sentencing. We disagree with the State's position that appellant's argument involves an error in sentencing. Appellant's argument is that the evidence is not sufficient to support his conviction of theft by receiving as a class C felony because there is no substantial evidence that the card in question was a credit card, an element that the State was required to prove to sustain the conviction as a class C felony under Ark. Code Ann. § 5-36-106(e)(2)(B) (Repl. 1997). Appellant moved for a directed verdict on this basis, and we consider this the appropriate means to challenge the sufficiency of the evidence.

the legislature. *Thomas v. State,* 315 Ark. 79, 864 S.W.2d 835 (1993). Penal statutes are strictly construed and all doubts are resolved in favor of the accused. *Benson v. State,* 86 Ark. App. 154, 164 S.W.3d 495 (2004). We also observe that sentencing is controlled by statute and that sentencing is in accordance with the statute in effect at the time of the commission of the offense. *Cody v. State,* 326 Ark. 85, 929 S.W.2d 159 (1996).

As previously noted, § 5-36-106(e)(2)(B) (Repl. 1997), in effect at the time of the offense, provided that theft by receiving of a "credit card" was a class C felony. We observe that in 2001, the legislature amended Ark. Code Ann. § 5-37-207, titled "Fraudulent use of a credit card," to also criminalize the fraudulent use of a debit card.[3] Likewise, in 2003, after the date of the offense in this case, the legislature amended the theft of property statute, Ark. Code Ann. § 5-36-103, and the theft by receiving statute, Ark. Code Ann. § 5-36-103, to include theft of a debit card, and theft by receiving of a debit card, as class C offenses.[4] The 2003 act also amended Ark. Code Ann. § 5-36-105 to make the theft of property lost, mislaid, or delivered by mistake a class B misdemeanor if the property was a debit card.[5] Thus, it is clear that the legislature recognizes that there is a distinction between credit cards and debit cards and that they are not one and the same thing. Strictly construing the statute, as we must, we conclude that, at the time the offense was committed in this case, theft by receiving of a credit card was designated as a class C felony, but that theft by receiving of a debit card was not.

We next decide whether there is substantial evidence to support a finding that Mr. Lankford's card was a credit card. In his testimony, Mr. Lankford referred to the card as a "bank card." Although the card bears a VISA imprint, on its face it also shows that it is a check card. It was the State's burden to prove that the card was a credit card. *See Hughes v. State,* 3 Ark. App. 275, 625 S.W.2d 547 (1981). On this record, we are left to speculate

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[3] Act 1142 of 2001, § 1, now codified at Ark. Code Ann. § 5-37-207(a) (Supp. 2005).

[4] Act 838 of 2003, §§ 1 and 3, now codified, respectively, as Ark. Code Ann. § 5-36-103(b)(2)(D)(ii) (Supp. 2005) and Ark. Code Ann. § 5-36-106(e)(2)(B)(ii) (Supp. 2005).

[5] Act 838 of 2003, § 2, now codified as Ark. Code Ann. 5-36-105(b)(2)(B)(ii) (Supp. 2005).

whether the card was in fact a credit card. Therefore, we cannot say that there is substantial evidence to support appellant's conviction for theft by receiving as a class C felony. As per appellant's request, we reduce the conviction to a misdemeanor in accordance with Ark. Code Ann. § 5-36-106(e)(3). *See Cannon v. State,* 265 Ark. 270, 578 S.W.2d 20 (1979); *Hughes v. State, supra.*

Affirmed as modified.

BAKER and ROAF, JJ., agree.

Elery DENDY *v.* STATE of Arkansas

CA CR 05-67 218 S.W.3d 322

Court of Appeals of Arkansas
Opinion delivered November 30, 2005

Darrel Blount, for appellant

Mike Beebe, Arkansas Attorney General, by: *Clayton K. Hodges*, Assistant Attorney General, for appellee.

KAREN R. BAKER, Judge. A Garland County jury convicted appellant Elery Dendy of nine counts of forgery in the second degree, and he was sentenced to the Arkansas Department of Correction for ninety years. The appellant argues on appeal that the trial court erred in denying his motions to suppress evidence and a statement, as well as his motion for a directed verdict. We agree that the trial court erred in denying the appellant's motions to suppress and reverse and remand.

On January 14, 2004, officers of the Hot Springs Police Department were in the area of the home of appellant Elery Dendy for the purpose of locating a stolen car and a suspect in the theft. The appellant was not a suspect. While the police officers were

questioning an individual who was standing in the appellant's yard concerning the theft of the car, the appellant came outside his home and stood on his front porch. Detective Chapmond testified that he observed that the appellant had paper in his hand when he stepped outside his door — paper that Chapmond identified as blank stock often used for the printing of checks. When questioned as to the purpose of the check stock, the appellant told Chapmond that he was printing gift certificates for a local company and provided the phone number of the company for verification. Another Hot Springs police officer testified that this information was indeed verified in a phone call to the company. The appellant then additionally offered to show the detectives his "artwork" and went inside his home. Chapmond followed the appellant inside the home, testifying variously that he "interpreted," "assumed," or deduced by implication that the appellant invited him into the home. The appellant denies that he invited the detective inside his home, pointing to the fact that as a four-time convicted felon he was not in the habit of inviting police officers into his home. He instead asserted at trial that his intent was simply to retrieve a printed gift certificate to additionally convince the detectives of his legitimate use of the check stock.

Chapmond testified that after he entered the home he observed a check partially inside an envelope and several crumpled checks in a trash can. He then obtained written consent from the appellant to search the home. Further search revealed what Chapmond testified appeared to be fake identification cards, which he said may have included those in the name of Bill Clinton, James Dean, Marilyn Monroe, Eddie Murphy, Elvis Presley, and perhaps Richard Nixon.

The appellant's motion to suppress evidence seized pursuant to the warrantless entry was denied by the trial judge after a hearing, and the appellant was convicted in a jury trial of nine counts of forgery in the second degree. The jury was presented with evidence of the appellant's prior convictions and sentenced him as a habitual criminal to a term of thirty years and a one thousand dollar fine for each of the nine counts. The trial judge ran three of these counts consecutively and the remaining six counts concurrently with the first three — for a total period of incarceration of ninety years. Appellant presents three arguments on appeal: 1) that the trial court erred when it denied the appellant's motion to suppress items seized during a search of his home; 2) that the trial court erred in allowing into evidence a statement taken from

the appellant at the Hot Springs Police Department; 3) that the trial court erred in denying the appellant's motion for a directed verdict. We agree that the trial court erred when it denied the appellant's motion to suppress the evidence and statement and therefore reverse and remand.

Although the appellant's last point on appeal concerns the trial court's denial of his motion for a directed verdict, we address this point first due to double jeopardy considerations it is a "general rule that, when an appellant challenges the sufficiency of the evidence, we address that issue prior to all others." *Misskelley v. State*, 323 Ark. 449, 458, 915 S.W.2d 702, 707 (1996) (citing *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984)). When a defendant makes a challenge to sufficiency of evidence of the evidence on appeal, we view the evidence in the light most favorable to the State. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003). The test for determining sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial; substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture; only evidence supporting the verdict will be considered. *Id.* When a challenge to sufficiency of the evidence is reviewed, the conviction will be affirmed if there is substantial evidence to support it. *Id.*

The appellant specifically argues that the State failed to prove that he possessed forged checks with the intent to defraud, and that without the establishment of this essential element there was not sufficient evidence to sustain his conviction. The appellant points to fact that some of the checks were found in a wastebasket and that "one does not discard checks if he intends to use them to defraud others." We find this argument unconvincing. In this case appellant made a statement to the police admitting that he had been engaged in a forgery scheme and that his price for forged checks varied according to the amount of the check. A person forges a written instrument if he "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." Ark. Code Ann. § 5-37-201(a) (Repl. 1997). We find that there was substantial evidence to sustain the appellant's conviction based on his confession to police, combined with the forged checks found in his home.

We now turn to appellant's remaining points on appeal concerning the denial of his motions to suppress the evidence seized in the search of his home and his subsequent statement. In reviewing the trial court's denial of a suppression motion by the trial court, we make a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicions or probable cause, giving due weight to inferences drawn by the trial court. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003).

A warrantless entry into a private home is presumptively unreasonable under the Fourth Amendment and Article 2, § 15 of the Arkansas Constitution. *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Katz v. United States*, 389 U.S. 347 (1967); *Griffin v. State*, 347 Ark. 788, 67 S.W.3d 582 (2002); *Scott v. State*, 347 Ark. 767, 67 S.W.3d 567 (2002); *Butler v. State*, 309 Ark. 211, 829 S.W.2d 412 (1992). This presumption of unreasonableness may be overcome if the law enforcement officer obtained the consent of the homeowner to conduct a warrantless search. *See Holmes v. State*, 347 Ark. 530, 65 S.W.3d 860 (2002) (citing Ark. R. Crim. P. 11.1; *Hillard v. State*, 321 Ark. 39, 900 S.W.2d 167 (1995)). The Arkansas Supreme Court, however, has established that the State has a heavy burden to prove by clear and positive testimony that consent to search was freely and voluntarily given. *Holmes*, *supra*; *Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999); *Scroggins v. State*, 268 Ark. 261, 595 S.W.2d 219 (1980). Any consent given must be unequivocal and may not usually be implied. *Holmes*, *supra*; *Norris*, *supra* (citing *U.S. v. Gonzalez*, 71 F.3d 819 (11th Cir. 1996)); *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). Further, the State must prove by clear and positive testimony that the consent to enter and search was unequivocal and specific. *See id.*; *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004).

The Arkansas Supreme Court's decision in *Holmes* addressed the issue of a warrantless entry into a home and whether consent was given based on implied or inferred consent. The court in *Holmes* examined the testimony of a law enforcement officer who admitted that he did not receive a verbal invitation, but instead that an individual "opened the door and stepped back; she may have nodded." *Holmes*, 347 Ark. at 540, 65 S.W.3d at 865—66. The court held that this testimony was not clear and positive, and therefore it was insufficient to prove that consent was given; the trial court erred in denying a motion to suppress evidence. *Id.* The

State argues in its brief that the holding of *Holmes* is that the burden of showing consent to enter a residence by clear and positive testimony requires "some verbal communication of permission" and that this burden is met here by the testimony of Detective Chapmond. The State is wrong on both counts. First, this is not an accurate statement concerning the holding of *Holmes* on consent to enter a residence. The court in *Holmes* did not explicitly require verbal communication of permission. The court stated that there was "uncertainty and lack of clarity" intended by non-verbal actions in that case, and without clear and positive testimony that provided clarity beyond inference, the trial court erred in not granting a motion to suppress. *Id.* Second, Detective Chapman's testimony did not demonstrate verbal communication of permission to enter in the present case.

It is the State's burden to prove by clear and positive testimony that consent to enter the appellant's home was unequivocal and specific. Yet, the consent asserted by the State here is, like *Holmes*, based solely on inference.

Detective Chapmond's testimony at both the suppression hearing and at trial is far from unequivocal. When Chapmond testified at the suppression hearing he stated that the appellant offered to show him the "artwork" on the gift certificates — which Chapmond said that he assumed to mean that the appellant was "proud of his work and wanted to show it off" — and when the appellant turned around and entered the house, Chapmond believed he was, in effect, invited in. In subsequent examination at the suppression hearing, Chapmond also testified that when the appellant offered to show him the artwork he "interpreted it" as artwork on a computer, and that based on this interpretation he followed the appellant inside the house without an actual invitation. Chapmond stated that could not remember the appellant's exact words or even whether "he invited me inside his house, but I took it as an invitation."

The motion to suppress was denied, and at trial Chapmond continued to describe the warrantless entry with testimony that can in no way be reasonably characterized as unequivocal and specific consent. Chapmond variously stated that he "took it as an invitation to come inside;" that he "construed [the appellant] saying, 'I'll show you the artwork,' as an invitation to come into his house and look at his computer;" and he "took it as an invitation to enter the home." The appellant testified at trial that after detectives called the local company and verified he was

making gift certificates that "I told [Champond] to wait and I'd show him. I turned and walked back into my house and to my desk. When I turned around, there were three officers standing in my house." The appellant then noted that as a previously convicted felon he was not predisposed to invite police officers into his home. He further testified that Chapmond executed a search warrant on the appellant's home several months previously, and thereafter Chapmond had returned to the home approximately five times and on none of these occasions did he invite Chapmond inside.

The State attempts to give weight to Chapmond's characterization of the warrantless entry by attempting to show that the only reasonable interpretation of the appellant's offer to show the detectives his gift certificate artwork was that is was an invitation to enter the house. The only alternative interpretation, the State argues, would be would the ridiculous explanation that the appellant intended for Chapmond to remain on the porch while the appellant disassembled and unplugged his computer, carried it outside on the porch, and then reassembled it to show Chapmond an example of the gift-certificate artwork. The State, however, ignores a more reasonable interpretation that the appellant intended to go inside his home and retrieve printed copies of his artwork — previously printed gift certificates. This is what the appellant not only contends he intended, but also what he testified that he actually stated to the detectives prior to their entry.

The issue of the credibility of the testimony is not for this court to decide however, because we will not second-guess credibility determinations made by the factfinder. *Hale v. State*, 343 Ark. 62, 31 S.W.3d 850 (2000); *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000); *McCoy v. State*, 325 Ark. 155, 925 S.W.2d 391 (1996). Instead, the relevant issue is whether the testimony and evidence of consent to a warrantless entry was sufficiently established. This requirement has not been met. Chapmond's testimony — consisting entirely of interpretations and assumptions — does not rise to the standard required of providing clear and positive testimony that the appellant unequivocally and specifically consented to the detectives' entry into the home. *See Holmes, supra*; *Norris, supra*; *Brown, supra*; *Stone, supra*. Detective Chapmond's warrantless entry into the appellant's home was illegal based on the totality of the circumstances.

The State argues that even if the warrantless entry was illegal, this defect was cured by the appellant's signature of a

consent-to-search form, and therefore all evidence seized following that consent, as well as a statement made shortly thereafter at the police station, should not be suppressed. Again, we disagree.

The Arkansas Supreme Court cited directly from *Wong Sun v. United States*, 371 U.S. 471 (1963), in its holding in *Keenom v. State,* 349 Ark. 381, 390–91, 80 S.W.3d 743, 748–49 (2002), stating that:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Thus, we must determine whether the evidence seized after the appellant's written consent and statement was obtained by exploitation of the illegal warrantless entry into the appellant's home, or whether there was some intervening or attenuating event "sufficiently distinguishable to be purged of the primary taint." *See Wong Sun, supra.*; *United States v. Ramos*, 42 F.3d 1160 (8th Cir. 1994); *Stone v. State,* 348 Ark. 661, 74 S.W.3d 591 (2002); *Brewer v. State*, 271 Ark. 810, 611 S.W.2d 179 (1981). Additionally, any intervening event or attenuation must be weighed against the seriousness of the police misconduct. *Brown v. Illinois*, 422 U.S. 590 (1975). Illegal entry by law enforcement officers into the homes of citizens is the "chief evil" the Fourth Amendment is intended to protect against and therefore is of the highest degree of seriousness. *Payton v. New York*, 445 U.S. 573 (1980); *see Holmes*, 347 Ark. at 537–38, 65 S.W.3d at 864; *See also Brown*, 356 Ark. at 468–69, 156 S.W.3d 722 at 728 (noting Arkansas constitutional provisions and caselaw emphasizing dangers to liberty posed by illegal warrantless entries and searches).

Here, there was no break in time or other intervening event between the illegal warrantless entry into the appellant's home, his written consent to search the home, and his written statement. Therefore, the primary taint of the unlawful warrantless entry into the appellant's home had not been sufficiently attenuated or purged. Under these circumstances, the fruits of the consensual search and written statement were poisoned by the officers' unlawful warrantless entry. Accordingly, we conclude the trial

court erred in failing to suppress both the evidence seized in the search of appellant's home and his statement at the police station.

Reversed and remanded.

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

BIRD and CRABTREE, JJ., dissent.

SAM BIRD, Judge, dissenting. The majority has concluded that appellant's convictions must be reversed because the evidence relied upon by the State to prove his guilt was obtained as a result of a constitutionally unreasonable search of appellant's residence. I disagree with this conclusion because, in my opinion, appellant consented to the search. Therefore, I would affirm appellant's convictions.

I begin my discussion by noting that it does not appear to me that the majority opinion accurately reflects the suppression-hearing testimony of Detective Chris Chapmond. For example, the majority opinion omits Chapmond's direct-examination testimony that when appellant was standing on his front porch explaining to Chapmond what he was doing with the blank check stock, appellant explained that he was making gift certificates, and that appellant "invited me inside to show me the artwork on the computer." The majority opinion also omits Chapmond's direct-examination testimony that, after making this statement, appellant turned and entered his residence, whereupon Chapmond followed appellant inside and observed appellant sit down at his computer. Further, the majority omits Chapmond's cross-examination testimony that "[appellant] invited me in," by words to the effect that, "I will show you the artwork, it's on my computer." Finally, the majority opinion omits Chapmond's re-direct testimony, "I could not see the computer from the porch and he did not offer to bring it to the door." Because it failed to consider much of Detective Chapmond's testimony on the crucial issue of consent to search, it is not surprising that the majority has reached the wrong result in this case.

In my opinion, the appellant, by his words and conduct, consented to Chapmond's entry into his residence. It therefore follows that the statement obtained from Dendy following his arrest was not "fruit of the poisonous tree." Thus, I respectfully dissent from the opinion of the majority that the evidence seized from Dendy's home and his statement to police should have been suppressed.

As the majority opinion correctly observes, the State's case is based entirely upon evidence that was obtained as a result of a warrantless search of appellant's residence, and upon appellant's statement to police that followed the search. Also correctly noted by the majority is the well-established premise that warrantless searches are presumptively unreasonable, but that the presumption is overcome by evidence of the owner's consent to the search.

In concluding that the search in the case now before us was unreasonable and without consent, the majority opinion relies primarily on *Holmes v. State*, 347 Ark. 530, 65 S.W.3d 860 (2002). However, I believe that *Holmes* is factually distinguishable from this case. In *Holmes*, Faulkner County sheriff's officers responded to a domestic violence call at Perry Holmes's residence. As the officers turned into the driveway, Holmes and another man came out of the house and they were taken into police custody. One of the officers, David Srite, then observed a woman, identified as Rosa Beth Allen, standing in the doorway of Holmes's house, and Srite decided to question her about Holmes. When the officer asked Allen if there was anywhere they could talk, she opened the door, stepped back, and "may have nodded," gestures that Srite interpreted as Allen's invitation to come into the house. Upon entering the house, Srite discovered illegal drugs and drug paraphernalia. Srite then went back outside and asked Holmes to sign a consent-to-search form, which he did. An ensuing search of Holmes's residence led to the discovery of marijuana, marijuana "roaches," marijuana seeds, and methamphetamine, and to three charges of possession against Holmes.

In a motion to suppress the evidence that resulted from the search, Holmes specifically argued, among others things not pertinent here, that Allen had not consented to the search of his residence. The trial court denied Holmes's motion, and Holmes entered a conditional guilty plea, reserving the right to appeal from the denial of his suppression motion.

On appeal, Holmes again argued that Allen's conduct in opening the door, stepping back, and nodding when asked by Srite if there was anywhere they could talk, did not constitute a consent to search. The supreme court agreed with Holmes, stating:

> To conclude that Allen's actions amounted to an invitation to Srite's entry would be to "sanction entry into the home based upon inferred consent," which we are loathe to do. Also, Srite conceded

> that Allen "appeared to be under the influence," which added to the uncertainty and lack of clarity of what Allen intended by her actions.

Holmes, 347 Ark. at 540, 65 S.W.3d at 866. In making this decision, the *Holmes* court relied upon *Martin v. State,* 328 Ark. 420, 944 S.W.2d 512 (1997), *Meadows v. State*, 269 Ark. 380, 602 S.W.2d 636 (1980), and *Norris v. State*, 338 Ark 397, 993 S.W.2d 918 (1999) (citing *United States v. Gonzalez,* 71 F.3d 819 (11th Cir. 1996), none of which limit the validity of consent to a warrantless search to situations involving an express invitation to enter. I agree that *Holmes* and the cases cited therein hold that "consent to an invasion of privacy must be proved by clear and positive testimony, and this burden is not met by showing only acquiescence to a claim of lawful authority"; and I agree that *Holmes* appears to also hold that, in addition to being clear and positive, the testimony must establish that the giving of consent to enter must be unequivocal and specific. However, I do not agree, as the majority opinion seems to imply, that in determining whether consent has been given, a police officer is not permitted to draw any inferences from the language or conduct of the person purporting to grant consent, and I do not agree that the testimony presented here does not meet the *Holmes* standards.

Unlike in *Holmes*, here an officer was in the area of appellant's residence looking for a suspect in an unrelated matter when appellant came outside. Detective Chapmond saw appellant standing in his doorway with blank check paper and asked him what he was doing. Appellant responded that he was making gift certificates, and he said something to the effect of "Let me show you the artwork on my computer." At that point, appellant turned around and went inside, and the officer followed him and observed appellant take a seat in front of his computer. The officer stated that he interpreted appellant's statement as "an invitation." I believe that this is sufficient evidence from which the trial court could have concluded that appellant clearly, positively, and unequivocally invited Detective Chapmond to enter his residence to look at something on his computer.

Furthermore, unlike in *Holmes*, in this case appellant knew that the police were not investigating criminal activity at his residence, so he could not have believed that he was merely acquiescing to a claim of lawful authority. Nor did appellant, who testified at the suppression hearing, suggest that the officers asked him for permission to enter his house. Rather, he testified that the

officers merely walked into his house and asked him what he was doing, contradicting the officer's testimony that appellant invited them in to see the artwork on his computer. We defer to the factfinder's resolution of issues of credibility and weight to be given to conflicting testimony. *See Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004). Also, unlike in *Holmes*, here there is no evidence that appellant was "under the influence" such as to create any uncertainty or lack of clarity as to what appellant intended by his words and actions of appellant's actions. Finally, unlike in *Holmes*, here we have evidence of words actually spoken by appellant which can be reasonably interpreted to be an invitation, not just an ambiguous nod of the head.

Once the officers had lawfully entered appellant's residence, they lawfully seized items in plain view, *see Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998), and appellant thereafter gave written consent to search his home. I also believe that appellant's statement to police was properly allowed into evidence because it was not derived from an unlawful entry into his home. Where the entry was not illegal, the statement cannot be the "fruit of the poisonous tree." *See Baird v. State*, 357 Ark. 508, 182 S.W.3d 136 (2004). I would therefore affirm the trial court's decision to deny appellant's motion to suppress evidence.

CRABTREE, J., joins.

Kevin MEINS *v.* Judy C. MEINS (Shook)

CA 05-415 218 S.W.3d 366

Court of Appeals of Arkansas
Opinion delivered November 30, 2005

Hubert W. Alexander, for appellant.

Dover Dixon Horne PLLC, by: *W. Michael Reif*, for appellee.

ANDREE LAYTON ROAF, Judge. Kevin Meins appeals from the trial court's modification of his visitation with his two minor children, in which his daily weekday visitations were terminated and his visitation was reduced to alternate weekends. Kevin alleges that the trial court erred in allowing certain expert testimony under the medical-hearsay exception and alleges that the evidence does not support the modification of his visitation rights. We affirm.

Kevin Meins and Judy Meins were divorced in July 2003. Judy received full custody of the couple's two children, Kaleb and Lindsey, while Kevin received certain visitation rights outlined in the decree. Kevin's visitation included picking the children up from school each afternoon and taking them to his home, where Judy would pick them up after she left work at about 5:00 p.m.

The decree listed several requirements concerning visitation. The most pertinent provisions are as follows:

> h. For all periods of visitation Defendant (Judy) will call Plaintiff (Kevin) prior to picking up the minor children. Plaintiff will have the minor children ready to leave and allow the minor children to go to Defendant's vehicle. There shall not be any contact between the parties during the exchange of the children.
>
> i. Neither party will make any disparaging remarks about the other in the presence of the minor children.
>
> j. During all periods of visitation and in the presence of the minor children Plaintiff shall not consume any alcohol. . . .
>
> m. Each party is enjoined and restrained from doing, attempting to do, or threatening to do any act injuring, mistreating, molesting or harassing the other party.
>
> 5. Plaintiff shall make an appointment with Dr. Harley J. Harber for treatment of anger management counseling, substance abuse counseling and assessment for medication as well as individual counseling. . . .

Subsequent to the divorce, the after-school visitation arrangement ran smoothly for a while. Judy, however, began to believe that Kevin had not followed some of the terms of the divorce decree and that Kevin had personal issues constituting a material change in circumstances that warranted an amendment of the visitation terms. Judy filed a motion for contempt, in which she accused Kevin of violating the terms of the decree and of making disparaging remarks about her and her new husband in front of the children. At the hearing, the trial court allowed, over Kevin's hearsay objections, certain expert testimony of social worker, Lisa Doan, under the medical exception to hearsay. Ms. Doan had provided therapy to Lindsey, who suffered from self-esteem issues, and Kaleb, who has Tourette's Syndrome, anxiety issues, and ADHD.

Ms. Doan testified that the children exhibited anxiety and confusion over the current relationship of their parents. She testified that the children told her that Kevin had made certain disparaging remarks, including saying that their stepfather, Glen Shooks, had slept with their mother before marriage and that he had a "black" heart and should not be allowed around them. Ms. Doan also testified that, in addition to defying the divorce decree by walking the children to Judy's car, Kevin would confuse the children when he would include Judy in his goodbye "I love yous." Ms. Doan said that the children then had difficulty understanding the divorce and why their mother could not love their father.

Additionally, Ms. Doan testified that, on one occasion, she had spoken with Kevin over the telephone, and he was slurring his words and being argumentative. She stated that Kevin's drinking scared Kaleb, who had related to her a story about a time when his father almost had a car accident after he had been drinking. Lindsey told Ms. Doan that her father "acted weird" when he drank. Ms. Doan expressed her concern over the conflict that the children were experiencing and suggested that it needed to stop. She recommended that Kevin seek counseling and assistance so that he could get his life together and also suggested a neutral setting for transferring the children.

Judy testified that Kevin intimidated her when he would bring the children out to the car. Although the divorce decree required Kevin to have no contact with Judy, he would walk the children to the car, carry their backpacks, and strap them into their

seatbelts. He would then tell the children that he loved them and would sometimes tell Judy that he loved her too.

In 2004, Kevin was convicted twice for DWI. After the second conviction, he received a sentence of seven days of community service and his license was suspended until February 28, 2006. Kevin failed to complete his community service requirement and was jailed for ten days. Despite having a suspended license, Kevin still picked up the children after school. Judy testified that she had personally seen Kevin driving the children around after his license was suspended.

Judy also indicated that she had spoken to Kevin on several occasions when he was intoxicated and that he had spoken to and interacted with his children while he was intoxicated. She testified that on the day of her wedding to Glen Shook, Kevin left a message on the family answering machine calling Glen "white trash" and a "m***** f*****."

Judy also testified that Kevin had called her vulgar names in front of the children, had called her a liar, and had told the children that she did not love them and only did things to make herself happy, causing the children to become extremely nervous and anxious. Judy's sister also testified that Kevin had made disparaging remarks about Judy in front of the children. Additionally, Judy suggested that Kevin failed to give Kaleb his medication during weekend visitations.

Kevin testified that, after his license was suspended, his mother drove him to pick up the children after school. Kevin admitted that he did walk the children to Judy's car and stated that he told Judy "I love you" in order to demonstrate that people could still care about each other even though everything had "gone to hell." Kevin accused Judy of having an affair with her current husband while both were still married and said that they lived in the same house with the children for about six months before they actually got married. Kevin said that he nevertheless did not then contest the custody arrangement because of his DWI conviction.

Kevin admitted to leaving a derogatory message on Judy's answering machine on the day of Judy's wedding, but he claimed that Glen was a bad person who ran a porn site and who was on his fifth wife and had mistreated all his wives and children. Kevin also admitted that he had driven the children with no license, on those occasions when his parents were out of town. He denied that he

failed to give his son his medication. Kevin asserted that he had been receiving treatment for anger, depression, alcoholism, and ADD, but did not see the doctor specified in the divorce decree because he felt more comfortable going to his own doctors. Kevin also testified that he only had a problem with alcohol on occasion and that he was "working on fixing" that problem. Kevin also claimed that he had only walked the children to the car on two occasions to communicate with her about the children after Judy asked him to stop.

Kevin's mother testified on his behalf and claimed that Judy's bringing escort cars to pick up the children had negatively affected the children. She said that she had had confrontations with these people and had made police reports each time she noticed a car waiting outside her house. Kevin's mother admitted that Kevin walked the children to the car, carried their backpacks, and buckled them into their safety belts. She also admitted that Kevin had a difficult time adjusting to Judy's new marriage and had resorted to using alcohol, but stated that he did not currently have an alcohol problem and that he had his anger under control. In addition, she testified that Kaleb did not get his medication during the weekends because she and Kevin felt he did not need it on the weekends.

The trial judge found Kevin in contempt for violating the court order by walking the children to Judy's car and continuing to have contact with her. The trial court further concluded that the on-going problems between the parties warranted modification of visitation, especially in light of Kevin's continued use of disparaging remarks. The trial court eliminated Kevin's weekday visitations and allowed him only alternate weekends. The court ordered Kevin to provide proof of the installation of an interlock ignition device on his car before he could personally drive the children; until then, someone else had to pick them up. The trial court also ordered Kevin to give Kaleb all of his medication and gave Kevin thirty days to go to the court-specified doctor for counseling. Kevin now appeals.

Kevin first argues that the trial court erred when it considered expert testimony about statements the children made to the social worker under the medical-hearsay exception. The trial court has broad discretion when it comes to the admissibility of evidence. *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997). The appellate court will not reverse the lower court's ruling on either the admissibility of expert testimony or on a

hearsay question unless the appellant can show that the court abused its discretion. *Id.* In order to show abuse of discretion, the appellant must demonstrate that the trial court acted improvidently, thoughtlessly, or without due consideration. *Carew v. Wright*, 356 Ark. 208, 148 S.W.3d 237 (2004). Additionally, the appellate court will not reverse an evidentiary ruling absent a showing of prejudice. *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998).

Hearsay is defined as "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) (emphasis added). In this case, Ms. Doan's expert testimony included testimony about statements the children had made to her. Over Meins's objection, the trial court stated that it would allow Ms. Doan to testify about what the children told her regarding their father's disparaging remarks under the medical diagnosis or treatment exception. The court further stated that this portion of her testimony would go towards "the weight of the evidence, not necessarily the truth."

In this instance, the trial judge allowed Ms. Doan's testimony under the medical diagnosis or treatment exception. Rule 803(4) of the Arkansas Rules of Evidence specifically excludes from the hearsay rule those statements given by a declarant "for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." The basis for this exception is the patient's strong motivation to be truthful in giving statements for diagnosis and treatment. *Carton v. Mo. Pac. R.R.*, 303 Ark. 568, 798 S.W.2d 674 (1990). We do not agree that Ms. Doan qualified as a medical expert or that the testimony at issue was admissible pursuant to the medical exception or possessed the same degree of reliability.

However, the testimony was generally admissible under Rule 703; we will affirm a trial court when it has reached the right result although it announces the wrong reason. *See Nettleton Sch. Dist. v. Owens*, 329 Ark. 367, 948 S.W.2d 94 (1997); *Almobarak v. McCoy*, 84 Ark. App. 152, 137 S.W.3d 440 (2003). According to Rule 703 of the Arkansas Rules of Evidence, an expert may base an opinion on facts or data otherwise inadmissible,

as long as the facts or data are of the type reasonably relied on by experts in that particular field. It is well settled that Rule 703 allows an expert witness to form an opinion based on facts learned from others despite its being hearsay. *Carter v. St. Vincent Infirmary*, 15 Ark. App. 169, 690 S.W.2d 741 (1985); *Ark. State Highway Comm'n v. Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985). In addition, although this rule is not intended to give an expert witness license to merely repeat hearsay for the sake of putting such information before the trial court, "an expert must be allowed to disclose to the trier of fact the basis of facts for his opinion, as otherwise the opinion is left unsupported in midair with little if any means for evaluating its correctness." *Lawhon v. Ayres Corp.*, 67 Ark. App. 66, 992 S.W.2d 162 (1999); *Schell, supra.* In this case, both sides stipulated that Ms. Doan was an expert witness. The children's statements to Ms. Doan about the remarks their father made about their mother and stepfather helped form the basis of her opinion that the animosity between Kevin and Judy caused the children to be stressed and that visitation exchanges should occur on neutral territory.

Moreover, we note that Judy and her sister both testified, without objection, to disparaging remarks they heard Kevin make in front of the children, and Kevin himself admitted to making certain disparaging remarks. Even when hearsay is erroneously admitted, the appellate court will not reverse if the hearsay evidence is cumulative of other evidence admitted without objection. *See Madden v. Aldrich*, 346 Ark. 405, 585 S.W.3d 342 (2001); *Thompson v. Perkins*, 322 Ark. 720, 911 S.W.2d 582 (1995). In this case the evidence was also cumulative of the testimony of other witnesses.

Kevin also argues that the trial court erred when it modified his visitation by eliminating his weekday visits. In this regard, the trial court maintains continuing jurisdiction over visitation and may modify or vacate those orders at any time when it becomes aware of a change in circumstances or of facts not known to it at the time of the initial order. *Stellpflug v. Stellpflug*, 70 Ark. App 88, 14 S.W. 3d 536 (2000). Visitation is always modifiable; however, courts require more rigid standards for modification than for initial determinations in order to promote stability and continuity for the children and in order to discourage repeated litigation of the same issues. *Hass v. Hass*, 80 Ark. App. 408, 97

S.W.3d 424 (2003). The party seeking a change in the visitation schedule has the burden to demonstrate a material change in circumstances that warrants a change in visitation. *Id.* The best interests of the children are the main considerations. *Id.* There are several factors to take into consideration when determining reasonable visitation, including (1) the wishes of the children; (2) the capacity of the party desiring visitation to supervise and care for the child; (3) problems of transportation and prior conduct in abusing visitation; (4) the work schedule or stability of the parties; and (5) the relationship with siblings or other relatives. *Id.*

In the present case, however, there was ample evidence presented to suggest that a change in circumstances warranted modification of visitation. Ms. Doan and Judy testified that the animosity between Kevin and Judy caused Lindsey and Kaleb a great deal of stress; and Ms. Doan suggested that some type of modification would be in the best interest of the children and that it was necessary to keep the parties on neutral territory during pick up and drop off. In addition, Kevin accumulated two DWI convictions after the divorce and had his drivers' license suspended. Other testimony also established that Kevin had issues with alcohol and that he frightened the children when he was under the influence. The evidence also reflected that Kevin had failed to seek help for his anger and alcohol issues from the court-ordered physician. Kevin also admitted to making disparaging remarks and disobeying the decree by repeatedly walking the children to Judy's car. Based on the evidence, we cannot say that the trial court erred in finding that there had been a change in circumstances and that it would be in the children's best interests to modify Kevin's visitation rights eliminating the daily visits so as to lessen the need for contact between the parties.

Affirmed.

CRABTREE and BAKER, JJ., agree.

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

E 04-385 218 S.W.3d 317

Court of Appeals of Arkansas
Opinion delivered November 30, 2005

[Rehearing denied January 4, 2006.*]

* CRABTREE, J., would grant rehearing.

Cynthia A. Barton and *H. Edward Skinner;* and *Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.*, by: *Hermann Ivester* and *Laney G. McConnell*, for appellant.

Alan Pruitt, for appellees.

ANDREE LAYTON ROAF, Judge. Appellant Southwestern Bell Telephone appeals from the November 8, 2004 Board of Review's decision granting unemployment benefits under Ark. Code Ann. § 11-10-513(c) (Supp. 2003) to appellee Stephen Barkley, who voluntarily participated in a work-force reduction process. On appeal, Southwestern Bell argues that the Board's decision that Barkley left his employment after it "asked for volunteers"

for a permanent work force reduction is not supported by substantial evidence and that it amounts to an erroneous construction of Ark. Code Ann. § 11-10-513(c). We affirm.

Barkley, who began working for Southwestern Bell in 1974, ended his employment as a cable-splicing technician on July 8, 2003, after participating in Southwestern Bell's Voluntary Severance Program ("VSP"). Southwestern Bell's collective bargaining agreement requires it to offer eligible employees the opportunity to sign up for a voluntary severance package when it determines that there is a surplus of employees in a certain area and that a work force reduction will be necessary. Participation in this VSP is based on seniority, and the most senior employees are allowed to participate until the workgroup that contains a surplus is reduced by the required number of employees. Southwestern Bell will only begin to lay off employees when not enough eligible employees participate in the VSP, and it will begin with the least senior employee first.

Southwestern Bell announced a surplus in Paragould in the summer of 2003. Barkley was employed in Jonesboro, but Paragould is within his force adjustment area. According to Barkley, there was not a surplus within his particular workgroup, but he was eligible for the VSP because there was a surplus within his force adjustment area. He requested a "Voluntary Candidate Request Form" from his manager and filled it out on May 9, 2003, stating that he wished to participate in the VSP. Barkley then received a "Voluntary Severance Candidate Request Conditional Offer," which stated that his form had been received and that the company was trying to establish a pool of voluntary severance candidates. The letter explained that Southwestern Bell was trying to determine if Barkley would be willing to accept an offer should a match be made for his position. The letter also stated that, if Barkley decided he was willing to accept the offer and sign the form, his decision was irrevocable.

Barkley signed this document on June 30, 2003. He testified that he had applied for the VSP and had been made conditional offers on prior occasions but that he did not accept the offers at those times because he was not "ready to go." In this instance, Southwestern Bell offered Barkley a severance payment of $46,700, a lump sum pension payment of approximately $244,000, and a $4000 payment for vacation days not taken. Barkley decided to take the offer, and Southwestern Bell matched him with another employee in Paragould, who would have lost his job had Barkley not accepted the voluntary severance offer. Barkley testified that

his job was not in jeopardy at that time and that he could have continued to work at Southwestern Bell if he had not participated in the VSP. According to Barkley, it was "general knowledge" within the company that the VSP was available once there was an announced surplus. He stated that no one at Southwestern Bell approached him and asked him to volunteer.

Allen Jay Simmons, Barkley's workgroup manager, testified that Barkley was one of the employees in his workgroup and that Barkley asked to fill out the "Voluntary Candidate Request Form" after the surplus was announced within his force adjustment area. He corroborated Barkley's testimony that Barkley's job was not at risk. According to Simmons, he kept the VSP forms on his desk so that an employee could request the form, fill it out, and send it in. He stated that the employee from Paragould who was matched with Barkley had taken over Barkley's position in Jonesboro.

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

Southwestern Bell appealed the Appeal Tribunal's decision to the Arkansas Court of Appeals, arguing that the Board's decision was not supported by substantial evidence and that it amounted to an erroneous construction of § 11-10-513(c). This court reversed and remanded the case so that the Board could make a finding as to whether, and if so, in what manner, Southwestern Bell asked for volunteers pursuant to § 11-10-513(c). Upon remand, the Board of Review, in its opinion dated November 8, 2004, found that Southwestern Bell did ask for volunteers within the plain meaning of § 11-10-513(c) and held that Barkley was entitled to unemployment benefits. Southwestern Bell now appeals the decision of the Board of Review, arguing again that the Board's decision was not supported by substantial evidence and that it amounted to an erroneous construction of Ark. Code Ann. § 11-10-513(c).

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

Arkansas Code Annotated section 11-10-513(a)(1) (Supp. 2003) states that "an individual shall be disqualified for benefits if he or she voluntarily and without good cause connected with the work left his or her last work." The legislature, however, added a new subsection to this statute that became effective on April 11, 2003, which states:

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

(Emphasis added.)

Southwestern Bell does not dispute the fact that it had declared a surplus in certain workgroups, but it argues that there was no evidence that it "asked for volunteers" for the VSP, as is required under Ark. Code Ann. § 11-10-513(c)(1). According to Southwestern Bell, Barkley chose to apply for the VSP without being asked to volunteer, and the Board's finding that it asked for volunteers by making this option available to its employees is an erroneous construction of the statute.

The VSP at issue in this case has previously been addressed by this court in the context of Ark. Code Ann. § 11-10-513 in *Billings, supra.* This court held in *Billings* that employees who chose

to leave their employment with Southwestern Bell by participating in the VSP were not entitled to unemployment benefits under § 11-10-513. The 2003 amendment to § 11-10-513, however, was not in effect at the time these employees were denied benefits. In the present case, the 2003 amendment that added subsection (c) to § 11-10-513 was applicable at the time of Barkley's separation from his employment and the Board's decision. In fact, the Board awarded benefits to Barkley pursuant to Ark. Code Ann. § 11-10-513(c).

The intent of the Arkansas Legislature controls the construction of our unemployment security laws. *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983). Unemployment benefits are intended to benefit employees who lose their jobs through no fault of their own. *Bradford v. Director*, 83 Ark. App. 332, 128 S.W.3d 20 (2003) (citing *Osterhout v. Everett*, 6 Ark. App. 216, 639 S.W.2d 539 (1982)). The policy of the Arkansas Employment Security Act is "to encourage employers to provide more stable employment" and to systematically accumulate "funds during periods of employment from which benefits may be paid for periods of unemployment." Ark. Code Ann. § 11-10-102 (Repl. 2002).

Where the language of a statute is plain and unambiguous, legislative intent is determined from the ordinary meaning of the language used. *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999). While not conclusive, an administrative agency's interpretation of a statute is highly persuasive and will not be overturned unless it is clearly wrong. *Death & Perm. Total Dis. Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002). Changes to statutes by subsequent amendments can be used as a determining factor to legislative intent. *Pledger v. Mid-State Constr. & Materials, Inc.*, 325 Ark. 388, 925 S.W.2d 412 (1996).

In its brief Southwestern Bell states that, after it declares a surplus, "employees are canvassed to determine if they are interested in the VSP." Eligible employees are then allowed to apply for the VSP, under which the employee may be offered a severance payment in exchange for their voluntary retirement. Simmons testified that the Voluntary Candidate Request Forms were available on his desk to employees who request them. In this instance, after the surplus was announced in his force adjustment area, Barkley decided to apply for the VSP. He requested and completed the form, and Southwestern Bell sent him a conditional offer. The

offer stated that, if Barkley accepted, he would be added to a pool of voluntary severance candidates and that his acceptance would be irrevocable. Barkley accepted the offer, and Southwestern Bell "matched" Barkley with another employee whose job would otherwise be at risk. Barkley then left his employment with Southwestern Bell.

Southwestern Bell strongly asserts that it absolutely did not ask for volunteers. It argues that the only thing it did in this case was to "make the VSP available, as it is required to do 'pursuant to [its] union contract' whenever a surplus is declared," and that the use of the term "offer" in the VSP was incorrectly translated by the Board to mean "ask." Southwestern Bell maintains that providing an opportunity for its employees to volunteer is not the same as asking for volunteers. This argument, however, is not persuasive.

Southwestern Bell may not have addressed each employee directly to ask them if they would volunteer, but Southwestern Bell's policy of making the VSP available to employees when there is an announced surplus provided the means by which the employees could volunteer to leave their employment and reduce the surplus. This policy is essentially a way for Southwestern Bell to solicit volunteers for its VSP.

■■ This court does not engage in statutory interpretations that defy common sense and produce absurd results. *Green v. Mills*, 339 Ark. 200, 4 S.W.3d 493 (1999). The legislature amended Ark. Code Ann. § 11-10-513 to add subsection (c), which supports the fact that the legislature intended to provide benefits to employees under circumstances such as in the present case. Thus, the Board's finding that Barkley left his employment with Southwestern Bell after it asked for volunteers for a permanent work force reductions and that he is entitled to unemployment benefits under Ark. Code Ann. § 11-10-513(c) is supported by substantial evidence.

Affirmed.

BAKER, J., agrees.

CRABTREE, J., concurs.

TERRY CRABTREE, Judge, concurring. At issue in this appeal is the newly-enacted provision of Ark. Code Ann. § 11-10-513 that allows unemployment compensation benefits to an individual who quits his job when he has "voluntarily participated in

a permanent reduction in the employer's work force after the employer announced a pending reduction in its work force and asked for volunteers." Ark. Code Ann. § 9-10-513(c)(1) (Supp. 2003). I am in full agreement with Judge Roaf's application of the statute, as it is written, to the facts of this case and the holding that the Board's decision is supported by substantial evidence. I write separately only to express my concern about benefits being awarded to someone in this claimant's position.

The policy objectives of employment security law are to "lighten [the] burden which may fall with crushing force upon the unemployed worker and his or her family" and to provide benefits for "persons unemployed through no fault of their own." Ark. Code Ann. § 11-10-102(1) & (3) (Repl. 2002). The statute under consideration, as applied here, does not comport with these laudable goals. In accepting the VSP, the claimant received a severance payment of $46,700, a lump-sum pension payment of $244,000, and $4,000 for unused vacation time. Now in addition, the statute permits him to receive unemployment compensation, even though his voluntary separation from work caused no undue hardship. Not every person who participates in a qualifying voluntary layoff will be fortunate enough to receive a lucrative severance package, and thus the statute serves to protect those deserving individuals in their time of need. However, it strikes me as obscene for unemployment benefits to be awarded someone who received almost $295,000 for quitting his job. Although it is for legislators, not judges, to write the laws, this case demonstrates that perhaps the statute sweeps too broadly to benefit persons who are not financially burdened by a voluntary layoff.

Zeronical RICE *v.* STATE of Arkansas

CA CR 05-409 219 S.W.3d 672

Court of Appeals of Arkansas
Opinion delivered December 7, 2005

Dustin M. Dyer, for appellant.

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

JOHN MAUZY PITTMAN, Chief Judge. The appellant in this criminal case was convicted of possession of crack cocaine and sentenced to twenty years' imprisonment. On appeal, he argues that the trial court erred in refusing to suppress the crack cocaine found on appellant's person because, *inter alia*, the search exceeded the permissible scope of a protective search. Alternatively, appellant contends that the evidence should have been excluded for failure to establish a sufficient chain of custody. We agree with his first point, and we reverse and remand.

In reviewing the trial court's denial of a motion to suppress evidence, we conduct a *de novo* review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Baird v. State*, 83 Ark. App. 392, 128 S.W.3d 459 (2003).

Viewed in light of this standard, the record shows that appellant was a passenger on a motor scooter driven by a twelve or thirteen-year-old juvenile. Officer Phillip Bailey stopped the vehicle and warned the juvenile that he was violating the law by not wearing a helmet and by carrying a passenger. Officer Bailey knew from past experience with appellant that appellant had been known to carry weapons and had been arrested for a terroristic act. He also noticed that appellant's demeanor was radically different from what it had been in their prior encounters. Whereas appellant had in the past been characteristically aggressive, belligerent, and uncooperative in his dealings with Officer Bailey, appellant on this occasion was nervous and overly friendly. Officer Bailey asked appellant if he would consent to a pat-down for weapons. Appellant consented and, while conducting the pat-down, Officer Bailey felt something in appellant's left coat pocket. Officer Bailey testified that, based on his training and experience, it was immediately apparent that the object that he felt in appellant's pocket was crack cocaine. Officer Bailey did not, however, explain what it was about the object's shape, feel, or contour that made the incriminating nature of the object immediately apparent to him.

The Fourth Amendment to the United States Constitution guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. The Fourth Amendment requires adherence to judicial processes, and searches conducted outside the judicial

process, without prior approval by judge or magistrate, are *per se* unreasonable – subject only to a few specifically established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347 (1967). One such exception was delineated in *Terry v. Ohio*, 392 U.S. 1 (1968), which authorizes a police officer who has reason to believe that he is dealing with an armed and dangerous individual to conduct a reasonable search for weapons for the protection of the police officer. *Id.* at 27. This authority, however, is narrowly drawn, and such a warrantless protective search is strictly limited to that which is necessary for the discovery of weapons that might be used to harm the officer or others nearby; if the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

Appellant's argument for suppression is twofold: he argues that Officer Bailey had no right to search appellant after the stop had been concluded, and that the pat-down exceeded the permissible scope of a *Terry* search. We need not decide whether Officer Bailey was justified in searching appellant because, even assuming that the search was justified by circumstances or consent, the search clearly exceeded the scope of the *Terry* search to which appellant arguably consented.[1]

Deciding whether the pat-down exceeded the permissible scope of a *Terry* stop requires application of the "plain feel" doctrine enunciated in *Minnesota v. Dickerson*, *supra*, which holds that, if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context. *Id.*, 508 U.S. at 375-76. Appellant argues that Officer Bailey's testimony that it was "immediately apparent" that

[1] Here Officer Bailey asserted that he searched appellant's person for weapons as a safety precaution and testified that he asked appellant "if he minded if I pat him down for weapons and he said, 'No.' " Under these circumstances, the scope of the consent would be limited to a pat-down search for weapons. *See Howe v. State*, 72 Ark. App. 466, 39 S.W.3d 467 (2001).

the object in appellant's pocket was crack cocaine is insufficient in the absence of any testimony concerning the factual basis for his knowledge.

There is a split of authority on this issue. Some courts have accepted a police officer's testimony that he was able to immediately recognize the incriminating character of crack cocaine by feel during a pat-down where it was supported by evidence that the officer had experience detecting the substance in that manner. *See, e.g., Huffman v. State*, 651 So. 2d 78 (Ala. Crim. App. 1994). Other courts, however, have held that a police officer's generalized statement that the incriminatory nature of the contraband was readily apparent was insufficient to establish that fact for purposes of the plain-feel exception where the officer did not testify concerning specific facts establishing his ability to recognize crack cocaine by touch. *See Jones v. State*, 343 Md. 448, 455, 682 A.2d 248, 252 (1996) ("it's not just a question of being an expert and coming in and saying the magic words"). Although we have not expressly ruled on this issue, our cases have employed the latter rationale. In *Howe v. State*, 72 Ark. App. 466, 472, 39 S.W.3d 467, 471 (2001), we noted that "[c]ompletely absent from [the officer's] testimony is any statement explaining what it was about the object's feel, shape, or contour that led him to believe that the object was contraband." In the absence of any such explanation in the present case, we hold that Officer Bailey's testimony does not permit a reasonable conclusion that the incriminating nature of the object in appellant's pocket was immediately apparent, and that the trial court therefore erred in denying appellant's motion to suppress. In light of our resolution of this issue, we need not address appellant's remaining arguments.

Reversed and remanded.

BIRD, J., agrees.

NEAL, J., concurs.

OLLY NEAL, Judge, concurring. I agree that this case should be reversed and remanded; however, I write separately to point out that when the minor driving the scooter was free to leave, the purpose of the stop had ended and Officer Bailey had no specific or particularized reason for the continued detention of appellant. Officer Bailey testified that he stopped the scooter on which appellant was a passenger because the driver, a juvenile, was not

wearing a helmet and should not have had a passenger. Pursuant to Ark. Code Ann. § 27-20-104(b)(1)(2) (Repl. 2004), "All passengers and operators of motorcycles and motor-driven cycles used upon the public streets and highways of this state shall be equipped with the following equipment under standards set forth by the Office of Motor Vehicle: (1) Protective headgear unless the person is twenty-one (21) years of age or older; and (2) Protective glasses, goggles, or transparent face shields." It is also unlawful for any person in the State of Arkansas under sixteen (16) years of age to carry another person as a passenger upon a motor-driven cycle. *See* Ark. Code Ann. § 27-20-110 (Repl. 2004).

Moreover, as part of a valid traffic stop, a police officer may detain a traffic offender while the officer completes certain routine tasks; however, after those routine checks are completed, unless the officer has a reasonably articulable suspicion for believing that criminal activity is afoot, continued detention of the driver can become unreasonable. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004). Under our criminal rules, once the legitimate purpose of a valid traffic stop is completed, a police officer must have a reasonable suspicion that the person is committing, has committed, or is about to commit a felony or a misdemeanor involving danger to persons or property, in order to continue to detain that person. *See* Ark. R. Crim. P. 3.1; *Lilley v. State*, 362 Ark. 436, 208 S.W.3d 785 (2005).

A person has been seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave. *See Jefferson v. State*, 349 Ark. 236, 76 S.W.3d 850 (2002); *Lilley, supra*. Under Rule 3.1, in order to further detain him and ask him questions, the officer is required to have reasonable suspicion. Whether there is reasonable suspicion depends on whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating that the person may be involved in criminal activity. *Laime v. State*, 347 Ark. 142, 155, 60 S.W.3d 464, 473 (2001) (*quoting Smith v. State*, 343 Ark. 552, 570, 39 S.W.3d 739, 750 (2001)).

Officer Bailey testified that he told the juvenile what he did wrong and sent him on his way. He testified that:

> As soon as I told the juvenile he was free to go, I turned and talked to Mr. Rice and asked him if he would consent to a pat down for weapons. . . . His demeanor was very uncharacteristic from my

> prior dealings. He was very nervous and jittery and overly helpful, which is very uncharacteristic from dealings I've had with him in the past. . . .

Here, the purpose of the stop had ended, but the officer continued to detain appellant because of his friendly behavior. The officer articulated no specific or particularized reason for the further detention of appellant that was based on reasonable suspicion that appellant was involved in criminal activity. Therefore, once Officer Bailey told the juvenile he was free to leave, appellant should have been free to leave also, absent any specific particularized reasons of reasonable suspicion of criminal activity. Here, Bailey offered no suspicion of criminal activity afoot but only that appellant was known to have carried weapons on his person and that his demeanor was uncharacteristic.

Based on the foregoing reason, I respectfully concur in the reversal of this case.

SUPERIOR FEDERAL BANK *v.*
JONES & MACKEY CONSTRUCTION COMPANY, L.L.C.,
and George Mackey

CA 04-1389 219 S.W.3d 643

Court of Appeals of Arkansas
Opinion delivered December 7, 2005

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

David M. Hargis, for appellees.

JOSEPHINE LINKER HART, Judge. In this case, we are asked to determine whether a $3.08 million punitive-damage award imposed by the trial court meets the due-process requirements of the United States Constitution. We are also asked, on cross-appeal, to reinstate the jury's original $5 million punitive-damage verdict. Based on our de novo review, we believe that the trial court properly applied the due-process considerations in awarding $3.08 million, and we therefore affirm on direct and cross-appeal.

Direct Appeal

This is the second time that this case has come before us. The first appeal was brought following a jury trial in which damages were awarded against appellant Superior Federal Bank and in favor of appellee Jones and Mackey Construction Company, LLC (hereafter, the LLC), as follows: $411,000 for breach of contract; $210,000 for promissory estoppel (which the trial judge set aside); $175,000 for defamation; and $5,000,000 in punitive damages. In *Superior Federal*

Bank v. Mackey, 84 Ark. App. 1, 129 S.W.3d 324 (2003) (*Mackey I*), this court reversed the breach-of-contract award, reinstated the promissory-estoppel award, and affirmed the defamation award, with the net result being that the LLC's compensatory verdict was reduced from $796,000 to $385,000. As for the punitive damages, we remanded that award to allow the trial judge to review it in light of the considerations expressed by the United States Supreme Court in *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408 (2003), which was decided while the appeal was pending. Upon remand, the trial judge reduced the punitive award to $3.08 million. Appellant Superior Federal now appeals and argues that the punitive damages, even as reduced, remain excessive. Our review of this argument will be undertaken de novo. *See Union Pac. R.R. v. Barber*, 356 Ark. 268, 149 S.W.3d 325 (2004).

The pertinent facts are contained in *Mackey I*, but we believe it is helpful to reiterate at least some of those facts here and add others for the purpose of explaining our affirmance of the punitive award. The LLC is a construction company owned by Mr. George Mackey. Although Mackey has a background in accounting and banking and is the former vice-president of the Arkansas Development Finance Authority, he decided in 1998, while he was still with the ADFA, to join forces with an experienced builder, Mr. Robert Jones, and pursue a career in the construction business. They formed the LLC and successfully completed several projects. By virtually all accounts, the company enjoyed a stellar reputation, as did Mr. Mackey himself.

In late 1998, after the LLC began to do business in Faulkner County, Mackey received a phone call from Rick Baney, one of appellant's loan officers, who expressed an interest in financing the company's next project. As a result, in early 1999, appellant financed the purchase of two residential lots and the construction of a home. At about this same time, Mackey became sole owner of the LLC.

The controversy that led to the present lawsuit began when the LLC purchased a piece of property near a hospital in Faulkner County for the purpose of constructing a medical-office building. In April 1999, the LLC obtained a $270,000 loan from appellant to purchase the land. However, on May 10, 1999, the University of Central Arkansas (UCA), which owned land adjacent to the LLC parcel, filed suit to enjoin all work on the LLC parcel in an attempt to acquire it through eminent domain. Ultimately, UCA's petition was denied, and on May 18, 1999, appellant sent the LLC a conditional commitment letter for $1.8 million in construction

financing. Upon receiving this letter, Mackey tendered his resignation to the ADFA and began work on the project.

Several weeks later, the LLC received a fax from appellant implying that the construction financing had not yet been approved, including, specifically, several conditions that had not been set out in the previous commitment letter. In an attempt to resolve the situation, Mackey met with appellant's regional manager of commercial loans, Tom Wetzel. As we noted in our prior opinion, Mackey and Wetzel "clashed immediately, and their relationship deteriorated to the point of outright hostility." *Mackey I*, 84 Ark. App. at 10, 129 S.W. 3d at 330. Following a few combative meetings and telephone calls, and an attempt by a third person, Bernard Veasley, to intervene on the LLC's behalf, Wetzel sent the LLC a letter on August 24, 1999, declining the LLC's construction loan on the medical-office building. Once the financing on that major project, which was already under way, fell through, the LLC began to lose money rapidly and was unable to pay its bills or continue other construction. Ultimately, numerous lawsuits were filed against the LLC, asserting claims of approximately $1.3 million.

On May 1, 2000, Mackey and the LLC sued appellant, alleging that, in reliance on appellant's commitment to provide financing, they had expended substantial resources on the medical-building project and suffered considerable financial losses when appellant's commitment was withdrawn. It was this allegation that eventually led to the LLC's recovery of breach-of-contract and promissory-estoppel damages following a jury trial. As previously mentioned, this court reversed the breach-of-contract verdict and affirmed the jury's $210,000 promissory-estoppel award.

Mackey and the LLC also contended in their complaint and at trial that, around the same time period that appellant withdrew its financing commitment, appellant defamed Mackey and the LLC by virtue of five incidents that destroyed their once excellent reputations. These incidents are fully recounted in our prior opinion, but, again, we will repeat them here for the sake of explanation.

The first incident that we discussed in *Mackey I* involved statements made by two of appellant's officers to the Gospel Temple Baptist Church. The church had obtained a $300,000 building loan from appellant and had entered into a contract with the LLC to construct the building. However, when appellant's

officers learned that the LLC would be the church's contractor, they told the church that the LLC was not on its "approved builders list," even though there was considerable evidence that no such list existed. Eventually, the church canceled its contract with the LLC and requested a refund of $133,000 it had paid on the contract. We held that this incident alone supported the jury's $175,000 defamation award, given that the LLC had to refund the money that the church had already paid and sustained reputational damage as well. *Id.* at 14-15, 129 S.W.3d at 332-33. However, we went on to discuss the other four incidents "in the interest of providing a complete account of the events that occurred in this case and because it may prove useful to the trial court's reconsideration of the punitive-damage issue . . . ." *Id.* at 16, 129 S.W.3d at 333.

Of those four incidents, the first involved appellant's returning some of the LLC's checks marked "NSF" (insufficient funds). This situation arose after Mackey had deposited a $65,000 check into the LLC account and immediately wrote $40,000 in checks thereon. When the $65,000 check turned out to be bad, Mackey was notified of that fact, and he promptly deposited $40,000 to $50,000 to cover the checks that the LLC had written. However, despite Mackey's quick action, appellant returned the LLC's checks marked "NSF" and accused Mackey of check-kiting, notwithstanding the fact that appellant and the LLC had established a course of dealing covering overdrafts up to a certain amount. In *Mackey I*, we stated that this incident would not support the jury's defamation award because the LLC presented insufficient proof that its reputation was damaged by the NSF notations.[1] However, we expressed "our conviction that [appellant's] conduct in this instance was particularly egregious and seemingly calculated to do harm to the LLC by unexplainedly abandoning an established practice." *Id.* at 17, 129 S.W.3d at 334.

The next incident occurred when appellant's loan officer, Tom Wetzel, told an officer at Regions Bank that appellant "wasn't lending Mr. Mackey any more money" and was "no longer doing business with Mr. Mackey." We declared these statements to be defamatory by implication because they were incomplete and tended to suggest, incorrectly, that Mackey and the LLC were unworthy of a loan. However, we said that the

[1] There was no testimony from the payees of the checks or anyone who had seen the NSF notation.

statements would not support the defamation verdict because Mackey and the LLC did not prove reputational damage by virtue of the statement.[2]

The final two incidents concern statements that Tom Wetzel made about George Mackey. Wetzel told Bernard Veasley, who was attempting to intercede in the construction-financing conflict to help the LLC, that Mackey was a "big, fat, damn slob" who was "f***ing up." Wetzel also called Mackey, who is an African-American man, a "big, black gorilla." In the prior appeal, appellant argued that these statements about Mackey personally did not support the jury's defamation award in favor of the LLC. We declined to reach that argument, having already decided that the defamation verdict was supported by one of the other incidents. However, we said that there was "no doubt that these statements are defamatory" and that "actual reputational damage was caused." *Id.* at 18-19, 129 S.W.3d at 335. We further took the opportunity to "express our revulsion toward such malicious and hateful language uttered by a bank about its customer." *Id.* at 19, 129 S.W.3d at 336.

Having affirmed the defamation verdict, we turned to appellant's challenge to the $5 million punitive-damage award. After ruling that appellant had waived any argument regarding a lack of substantial evidence to support a punitive-damage verdict, we examined the argument that the award was unconstitutionally excessive. We decided to remand that issue to the trial court because, while the appeal was pending, the United States Supreme Court decided *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408 (2003), in which the Court offered new thoughts and considerations on the constitutionality of punitive-damage awards. That remand gave rise to the present legal proceeding.

Upon remand, no new evidence was taken by the trial judge; rather, he ordered the parties to file briefs to assist him in re-evaluating the punitive-damage award. On September 23, 2004, the judge entered an order reducing the punitive award to $3.08 million. His decision was based, in part, on the fact that the award created what he considered to be a constitutionally acceptable 8-to-1 ratio of punitive damages to compensatory damages when both the defamation and promissory-estoppel verdicts were

[2] The Regions officer testified that he would have no problem with the LLC's being a contractor on a project.

combined. The judge also determined that the award was supportable in light of the reprehensible nature of appellant's conduct and in comparison to sanctions imposed for similar conduct in this state. Appellant appeals from that ruling and argues generally (along with some specific arguments that will be addressed later in the proper context) that the $3.08 million punitive-damage award does not comport with the due-process considerations established by the United States Supreme Court in cases such as *Campbell, supra*, and *BMW of North America v. Gore*, 517 U.S. 559 (1996).

As appellant correctly states, the Due Process Clause of the Fourteenth Amendment imposes limits on punitive-damage awards. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). The reason behind such limits is that elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that may be imposed. *See Campbell, supra.* In 1996, the Supreme Court in *Gore, supra*, developed three guideposts for evaluating the constitutionality of a punitive-damage award: 1) the degree of the defendant's reprehensibility or culpability; 2) the disparity between the penalty and the harm or potential harm suffered (usually defined by reference to the punitive-to-compensatory ratio); 3) the civil penalties authorized or imposed in comparable cases. We will now review the trial court's $3.08 million award in light of these considerations.

Reprehensibility of the Defendant's Conduct

We begin by addressing a specific argument raised by appellant concerning the particular conduct that may be viewed in determining the degree of reprehensibility. Appellant contends that, because *Mackey I* held that only one defamatory statement — made by appellant's officers to the Gospel Temple Church — was proven to support the defamation award, only that conduct should be considered in determining reprehensibility, and this court should not consider the other four defamatory statements. We disagree.

Appellant bases its argument on language in *Campbell, supra*, that "a defendant should be punished for the *conduct that harmed the plaintiff*, not for being an unsavory individual or business." *Campbell*, 538 U.S. at 423 (emphasis added). According to appellant, this language means that, in assessing a punitive-damage award, a court

should not consider conduct by a defendant that did not result in compensated harm to the plaintiff. However, when *Campbell's* language is viewed in the light of its full holding, it is not as limiting as appellant suggests. In *Campbell*, State Farm was sued for bad faith, fraud, and outrage in connection with its failure to settle a liability claim against its insureds, the Campbells. At trial, evidence of State Farm's claims practices in other states was admitted and relied upon by the Utah appellate court in upholding the jury's $145 million punitive-damage award. The United States Supreme Court, in reviewing the award, noted that much of the evidence concerning State Farm's practices occurred in other states and bore no relation to claims like the Campbells'. As a result, the Court determined, the Campbells' case was "used as a platform" to expose and punish perceived deficiencies in State Farm's operations throughout the country. *Campbell*, 538 U.S. at 420. It was this concern that gave rise to the Court's pronouncement that a defendant should be punished for the conduct that "harmed the plaintiff." The Court was cautioning against evaluating a punitive award by considering conduct that may have harmed other, unrelated persons. We do not understand the Court to say that conduct bearing some nexus to the plaintiff's harm should be ignored. In fact, other language in *Campbell* makes it clear that such conduct may be considered. The Court noted that State Farm was improperly being condemned for its nationwide policies "rather than for the conduct directed toward the Campbells" and that punitive damages were improperly awarded to punish conduct "that bore no relation to the Campbells' harm." *Id.* at 420, 422. Further, the Court stated that a defendant's "*dissimilar acts, independent from the acts upon which liability was premised*, may not serve as a basis for punitive damages." *Id.* at 422-23 (emphasis added).

By contrast, in the case at bar, the other defamatory statements that appellant asks us to disregard were not directed to other persons and did not involve separate, unrelated claims; nor were they dissimilar acts, independent from the acts upon which liability was premised. Instead, they were part of a pattern of behavior directed toward the LLC, and they paint a telling picture of appellant's overall conduct and intent to cause harm.[3]

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[3] *See Gore, supra*, 517 U.S. at 574, n. 21, and *TXO, supra*, 509 U.S. at 462, n. 28 (1993), recognizing that evidence of other transactions may be relevant in determining a defendant's degree of reprehensibility. *TXO* also considered evidence of a "pattern of fraud, trickery, and deceit." 509 U.S. at 462.

Appellant's argument is also contrary to our specific language in *Mackey I*, wherein we made a point of discussing the four remaining statements "in the interest of providing a complete account of the events that occurred in this case, *and because it may prove useful to the trial court's reconsideration of the punitive-damage issue.*" *Mackey*, 84 Ark. App. at 16, 129 S.W.3d at 333 (emphasis added). We went on to note at various points that appellant's conduct was "egregious" or "seemingly calculated to do harm," and we expressed our "revulsion" at the "malicious and hateful" statements made against Mackey personally. *Id.* at 17-19, 129 S.W.3d at 334-36. Thus, we contemplated that, upon remand, the trial judge would consider the full scope of appellant's behavior as it relates to this case. *See also Barber, supra*, a case involving a dangerous railroad crossing, where our supreme court, in determining the degree of the railroad's reprehensibility, considered a factor separate and apart from the personal injuries that occurred — the railroad's destruction of evidence after the accident. *Barber*, 356 Ark. at 303, 149 S.W.3d at 348.[4]

In light of the above, we conclude that we may consider all of appellant's egregious conduct in connection with the harm that befell the LLC. With that in mind, we now turn to the factors that weigh on a defendant's degree of reprehensibility.

In *Campbell, supra*, the Supreme Court elaborated on the matters to be considered when assessing the degree of a defendant's reprehensibility: 1) whether the harm caused was physical as opposed to economic; 2) whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; 3) whether the target of the conduct had financial vulnerability; 4) whether the conduct involved repeated actions or was an isolated incident; 5) whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Campbell*, 538 U.S. at 419. Appellant claims that only two of the five factors exist here — financial vulnerability and malice. However, in light of our holding that it was proper to consider conduct by appellant in addition to the one defamatory statement, a third factor also exists — conduct involving repeated actions — given that several statements were made by appellant in what seemed to be a continuing effort to inflict harm. With three of the five factors in existence,

[4] Although it is not clear, it also appears that, in *Hudson v. Cook*, 82 Ark. App. 246, 105 S.W.3d 821 (2003), this court, in evaluating a punitive-damage award, considered conduct other than that for which the plaintiff received compensatory damages.

particularly the existence of malice, there is ample evidence from which the trial court could have assessed appellant's conduct as having a significant degree of reprehensibility. The circumstances in this case, when viewed as a whole, would warrant a finding that appellant, at a time when the LLC was financially vulnerable and operating in good faith to conduct business that appellant had solicited, acted in a malicious manner calculated to do harm to a once-reputable business. There is also evidence that at least part of appellant's motivation may have been racial animosity, given Tom Wetzel's comments. Although appellant downplays the racial element because Mackey and the LLC did not file a discrimination action, we see no reason why the trial court or this court should be prohibited from considering a possible racial motivation simply because no claim was brought under the state Civil Rights Act or the federal Equal Credit Opportunity Act. Whatever legal strategy was involved in deciding not to pursue such claims, it has no bearing on the fact that appellant is to be judged by its conduct in this case and not on the plaintiffs' choice of remedies.

When all is considered, we conclude that there is a substantial degree of reprehensibility on appellant's part. Through malicious, calculating, and egregious acts and statements, appellant inflicted harm on the LLC to the point that it suffered considerable economic and reputational injuries. As our supreme court recognized in *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (2003), the presence of bad faith, deliberate false statements, and acts of affirmative misconduct — all of which are present here — bear on whether a defendant's conduct has been reprehensible. While that same opinion notes that the infliction of purely economic harm, as arguably occurred in this case, is a factor weighing against reprehensibility, the U.S. Supreme Court noted in *Gore*, *supra*, at 576, that infliction of economic injury, especially when done intentionally through affirmative acts of misconduct or when the target is financially vulnerable, can warrant a substantial penalty.

Ratio of Punitive Damages to Compensatory Damages

Our research indicates that this factor seems to engender great confusion and controversy in comparison with the other factors. We believe that this is due in no small part to the U.S. Supreme Court's rather conflicting statements on the matter. In one of the first cases to address the constitutionality of punitive damages, *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1,

23-24 (1991), the Court stated that a punitive-damage award of more than four times the amount of compensatory damages might be "close to the line." However, two years later, in *TXO*, *supra*, a case involving an oil company's scheme to reduce or eliminate its royalty obligations, the Court approved a $10 million punitive-damage award that accompanied a $19,000 compensatory verdict, a 526-to-1 ratio. The Court noted that it would not draw a mathematical bright line between acceptable and unacceptable punitive awards but stated that "a general concern of reasonableness properly enters into the constitutional calculus." 509 U.S. at 458. Three years after *TXO*, the Court decided *Gore*, *supra*, which involved an auto company painting over a damaged vehicle without revealing the damage to the buyer. The Court reversed a $2 million punitive award that accompanied a $4000 compensatory verdict, a 500-to-1 ratio.

Finally, in *Campbell*, *supra*, the Court dealt with a situation in which the plaintiffs received $1 million in compensatory damages and $145 million in punitive damages, a 145-to-1 ratio. The *Campbell* Court stated that it would not impose a bright-line ratio but observed that, in practice, few awards exceeding a single-digit ratio, to a significant degree, will satisfy due process. *Campbell* is the most recent statement on this subject by the U.S. Supreme Court.

With these cases in mind, we review the particular arguments made by appellant. Appellant contends first that the trial judge erred in calculating the ratio in this case. The judge combined the defamation and promissory-estoppel verdicts to arrive at $385,000 as the "denominator" figure in the ratio and used that figure to support a punitive award of $3.08 million, an 8-to-1 ratio. Appellant claims that only the $175,000 tort award should have been used and, had that occurred, the punitive award would have borne a more constitutionally suspect 17.6-to-1 ratio.

On this point, we first consider appellant's claim that, in *Mackey I*, this court recognized that only the defamation damages should be considered in arriving at the ratio. Appellant is referring to the statement that we made in *Mackey I* that the punitive award bore a 28.5-to-1 ratio to the compensatory award — a figure we could only have reached by considering the $175,000 awarded for defamation as the compensatory denominator. According to appellant, our statement is now law of the case on this issue. We disagree.

It is well settled that the decision on the first appeal becomes law of the case and is conclusive of every question of law or fact decided in the former appeal. *Ghegan & Ghegan, Inc. v. Barclay*, 345 Ark. 514, 49 S.W.3d 652 (2001). However, the context of the appellate court's ruling in the first appeal must be considered, and the court's pronouncements are generally effective only on issues that it actually decides. *See id.* In referring to the 28.5-to-1 ratio in *Mackey I*, we were simply echoing what the trial court and appellant had declared the ratio to be at the trial level; we made no independent calculation of our own. Moreover, the issue of the makeup of the compensatory denominator was not before us, and we made no studied assessment of what compensatory damages should be included in the ratio; we merely remanded the damage award for reconsideration. Our case law is clear that we are not bound by a conclusion stated as obiter dictum, even if couched in terms that infer that the court reached a conclusion on the matter. *See, e.g., Clemmons v. Office of Child Support Enfcm't*, 345 Ark. 330, 47 S.W.3d 227 (2001); *Green v. State*, 343 Ark. 244, 33 S.W.3d 485 (2000); *see also Ward v. Williams*, 354 Ark. 168, 118 S.W.3d 513 (2003). We therefore reject appellant's law-of-the-case argument.

Appellant continues by arguing that a punitive recovery should only be "predicated" on tortious acts, given that Arkansas law does not permit recovery of punitive damages on contract or equitable theories. *See L.L. Cole & Son, Inc. v. Hickman*, 282 Ark. 6, 665 S.W.2d 278 (1984) (holding that, ordinarily, punitive damages for breach of contract are not allowed); *Toney v. Haskins*, 7 Ark. App. 98, 644 S.W.2d 622 (1983) (holding that equity will not ordinarily enforce penalties). While it is generally true that contract damages do not support a punitive award, they may be awarded where the defendant commits a willful and malicious act in connection with the contract. *See, e.g., Dews v. Halliburton Indus.*, 288 Ark. 532, 708 S.W.2d 67 (1986). However, we need not reach the substance of this issue. Even if appellant is correct that the trial court should have considered only the $175,000 defamation verdict in evaluating the reasonableness of the punitive award, we do not believe that the ensuing 17.6-to-1 ratio would be unconstitutionally excessive under the circumstances of this case. In *Barber, supra*, our supreme court stated that the standard to be employed in reviewing a punitive-to-compensatory ratio is whether the ratio is "breathtaking." *Barber*,

356 Ark. at 303, 149 S.W.3d at 348. The conduct by appellant, as recited earlier in this opinion, is such that a 17.6-to-1 ratio is not breathtaking. Moreover, even though this ratio is greater than the single-digit ratio mentioned in *Campbell, supra*, the Supreme Court has made it clear that it will not draw a bright line on this matter. Even *Campbell* recognizes that "the precise award in any case . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." 538 U.S. at 425.

Punishment for Comparable Conduct

Under this guidepost, courts ordinarily consider both the comparable criminal penalties for the type of conduct involved and the awards that have been made in similar court cases. Arkansas Code Annotated section 5-15-105 (Repl. 1997) makes it a crime to utter certain types of slander, including that which injures credit or business standing. Arkansas Code Annotated section 5-15-101 provides that slander shall be a felony, with punishments of six months to three years in prison and fines of $50 to $3000, or both.[5] Thus, the punitive award in this case far exceeds the monetary penalty provided by the criminal statute; but, we note that the statute also permits the imposition of a significant period of incarceration.

As for comparable cases, appellant cites two defamation cases decided by our supreme court in recent years, *Ellis v. Price*, 337 Ark. 542, 990 S.W.2d 543 (1999), and *United Insurance Co. of America v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998), where punitive damages in ratios of 1-to-1 and 3.3-to-1 were imposed, respectively. However, we observe that neither of those cases engaged in the federal due-process analysis set forth in *Gore*. Further, the ratios do not tell the whole story. The *Murphy* case, in which the monetary value of the punitive verdict was $2 million, should certainly give notice that a substantial exemplary award in the millions of dollars may be imposed in a defamation case. *See also Routh Wrecker Service v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998), a case involving a non-physical-injury tort, abuse of process, where a 75-to-1 ratio was allowed to stand after undergoing the *Gore* analysis.

[5] These statutes were repealed by our legislature by Act 1994 of 2005. However, they were in effect at the time of appellant's conduct in this case.

In light of the foregoing, and given the unique facts and circumstances of this case, we believe that the $3.08 million punitive award is in line with federal due-process considerations. We therefore affirm the award.

Cross-Appeal

The LLC contends on cross-appeal that the jury's original $5 million verdict should be reinstated. It argues that the egregious nature of appellant's conduct, the State's interest in protecting its citizens from defamation and racial animus, and the respect to be accorded a jury's verdict, justify reinstatement of the full award. The LLC also points to "the defendant's wealth," which is a factor we address when evaluating a punitive-damage award under Arkansas common law. *See Hudson, supra.*[6]

The points made by the LLC are well taken. However, appellate consideration of a punitive-damage award under the United States Constitution is not a review of a jury's finding of fact. *See Cooper Indus., Inc. v. Leatherman Tool Group*, 532 U.S. 424 (2001). Rather, our task is to engage in a de novo, independent review and determine whether the award is excessive under constitutional guidelines. *See id.* To say the least, such a review is not an exact science but is a fluid analysis, based on the particular facts and circumstances of each case. We therefore conclude, without the need for further discussion, that, in light of all of the factors previously discussed in this opinion, the $3.08 million punitive award serves the requirements of due process better than the $5 million award. We therefore affirm on cross-appeal.[7]

Affirmed on direct appeal and cross-appeal.

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

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[6] The trial court found that the $3.08 million award was less than three percent of appellant's net worth.

[7] The LLC also argues that, in the prior appeal, appellant waived any argument regarding the excessiveness of the punitive damages. We obviously believed in *Mackey I* that the issue was not waived because we remanded it to the trial court for reconsideration.

Michael Shane DIGGS *v.* STATE of Arkansas

CA CR 05-392 219 S.W.3d 654

Court of Appeals of Arkansas
Opinion delivered December 7, 2005

[redacted]

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

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

ROBERT J. GLADWIN, Judge. Appellant Michael Shane Diggs was convicted by a Garland County jury of residential burglary and sentenced to eighteen years in the Arkansas Department of Correction. On appeal, he challenges the sufficiency of the evidence related to the conviction and argues that the trial court erred in denying his motion to enforce a plea offer made by the State, which was subsequently withdrawn. We affirm.

On or about October 27, 2003, Phyllis Johnson was alone in her home in rural Garland County, Arkansas. She retired to her bedroom at her usual time of approximately 11:15 p.m. As she

typically did, Ms. Johnson turned on the lamp and television in her bedroom, but soon thereafter, she experienced a power outage. This was a frequent occurrence in the area, so Ms. Johnson initially attempted to go to sleep without investigating the power outage.

After approximately fifteen or twenty minutes, Ms. Johnson heard knocking sounds at the door leading to her carport. She ignored it, but the knock repeated a short time later. Ms. Johnson got out of bed and walked to the living room to look outside for the source of the noise. She did not see anyone at the door when she looked through the window; however, she did notice that she was the only one on her block experiencing a power outage and that all of the street lights were operating normally.

It was at this time that Ms. Johnson became extremely frightened. As she walked back to her bedroom to retrieve her gun, she heard a voice outside the house in the front part of the garage. Next, when she reached her bedroom, she heard a heavy scratching sound above her, specifically a "long, drawn-out, shuffle, slide, dragging-type noise" in the attic that sounded too heavy to be an animal. In her frightened state, Ms. Johnson broke off the key of her gun's trigger lock in the lock, effectively rendering the gun useless to protect her. Her land-line phone would not operate without electricity, but Ms. Johnson remembered her mobile phone and used it to call 911. She remained on the line with the 911 dispatcher until Garland County Sheriff's Department officers arrived.

Corporal Scott West, one of the first officers to arrive, accompanied a shaken Ms. Johnson outside to survey the area. They noticed muddy footprints and small dents on the hood of her car and realized that the attic-access door, which was located just above the car, was open. Once other officers arrived, Officer West made his way up into the attic where he noticed what appeared to be a "trail" where someone had crawled through the insulation. At the end of the path, appellant was discovered lying between two floor joists under the insulation. He was wearing a black jacket, and when he initially put his hands up in the air at the direction of the officers, the officers noticed he was wearing latex or surgical-type gloves. Appellant quickly put his hands back under the insulation, prompting officers to order him to raise them again. When he did, the gloves were no longer on his hands. Subsequent to appellant being removed from the attic, Officer West returned to appellant's hiding place where he discovered the latex gloves

and a large, serrated kitchen knife. Ms. Johnson testified that she did not store knives in the attic and that the knife was not hers.

Deputy Ron Stone arrived at the scene later and stayed with Ms. Johnson while the other officers took appellant into custody. While Officer Stone and Ms. Johnson looked around the house to make sure the area was secure, they noticed that the breaker box had been opened and the power shut off. They flipped the switch, and the power was restored. Nevertheless, Ms. Johnson spent the remainder of the night with her son. The following day, she returned to the house with her daughter and discovered that the telephone lines had been pulled out of the box through which the line passes into her home.

Appellant explained to the officers that he had escaped from Robert Blackstead, who had kidnapped him, and that he had taken the knife from Blackstead's residence during his escape. He claimed that he was merely hiding from Blackstead in Ms. Johnson's attic and then asked to speak to a "Hot Springs drug agent."

Appellant was charged with residential burglary, specifically with entering or remaining unlawfully in a private residence with the purpose of committing assault in the third degree, an offense punishable by imprisonment. At the close of the State's case, the trial judge ordered a short recess. The parties and counsel met in chambers during the recess, at which time appellant moved for a directed verdict. The motion was denied, and appellant's counsel rested the defense's case without putting on any evidence. While appellant did not renew his motion for a directed verdict, as generally required by Rule 33.1(a) of the Arkansas Rules of Criminal Procedure, he was not required to do so, where, as here, he rested without presenting a case. *See Robinson v. State*, 317 Ark. 17, 875 S.W.2d 837 (1994); *Chrobak v. State*, 75 Ark. App. 281, 58 S.W.3d 387 (2001). The jury was instructed that, in order to find appellant guilty of residential burglary, they had to find that he intended to commit third-degree assault, which was defined as purposely creating apprehension of imminent physical injury in the victim. From his conviction on that charge, comes this appeal.

I. Denial of Motion for Directed Verdict

We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Williams v. State*, 363 Ark. 395, 214 S.W.3d 829 (2005). 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 that is of sufficient certainty and precision to compel a conclusion one way or the other and pass beyond mere suspicion or conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Id.* Additionally, when reviewing a challenge to the sufficiency of the evidence, we consider all the evidence, including that which may have been inadmissible, in the light most favorable to the State. *Id.*

A person commits the offense of residential burglary if he "enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment." Ark. Code Ann. § 5-39-201(a)(1) (Repl. 1997). A person commits third-degree assault, which is punishable by up to thirty days' imprisonment, if he "purposely creates apprehension of imminent physical injury of another person." Ark. Code Ann. § 5-13-207(a) (Repl. 1997). Appellant maintains that the State failed to prove that he had the *intent* to commit third-degree assault. With regard to a person's intent, the Arkansas Supreme Court has stated:

> A person's state of mind at the time of a crime is seldom apparent. One's intent or purpose, being a state of mind, can seldom be positively known to others, so it ordinarily cannot be shown by direct evidence, but may be inferred from the facts and circumstances shown in evidence. Since intent cannot be proven by direct evidence, members of the jury are allowed to draw upon their common knowledge and experience to infer it from the circumstances.

Cummings v. State, 353 Ark. 618, 110 S.W.3d 272 (2003). While appellant admits that he entered or remained unlawfully in Ms. Johnson's attic, he asserts that there is nothing else that can be said about his actions that indicates a certain intent. He concedes that Ms. Johnson was terrified, but maintains that no inference can be fairly drawn from her "state" that his purpose of going into the attic was to instill such an apprehension. He argued at trial, and continues to argue, that inferring the intent from the act of illegally entering or remaining, itself, is something that is strictly forbidden by the United States Constitution. *See Norton v. State*, 271 Ark. 451, 609 S.W.2d 1

(1980). He maintains that the following evidence against him is insufficient to infer the requisite intent: (1) entering and remaining in the attic; (2) the facts surrounding his arrest, including the possession of latex gloves and a serrated kitchen knife, and his statement that he escaped from his kidnapper, Robert Blackstead; (3) the breaker switch having been turned off, presumably by appellant; (4) the telephone wires having been pulled out of the outside box. He states that at the time the events that prompted Ms. Johnson to call the police occurred, she did not know that he had a knife in the attic, nor did she know that he had turned off her electricity by switching off the power or that he had pulled her telephone wires out of the box. All she knew is that someone was in the attic, and appellant maintains that that is not sufficient to sustain the conviction.

There was far more evidence presented to the trial court than that appellant merely entered the residence. There is evidence from which the fact finder could conclude that he took steps to hinder Ms. Johnson's ability to summon help by turning off the power and pulling out the phone lines. At a minimum, she knew that power was off only to her residence after noticing the rest of the houses on the block had power and the street lights were functioning properly. Secondly, appellant banged on her carport door and noisily crawled through her attic, which she could easily hear, and which could, and did, frighten her. She might not have known that appellant had a knife with him, but the fact that he had a potentially deadly weapon on his person could at least raise an inference that he intended to, at the very least, place her in fear for her physical well-being.

Appellant's argument that the State is required to prove that he was planning to do harm to Ms. Johnson if there had not been police intervention is misguided. Appellant was engaged in a deliberate course of conduct, which led to the natural consequence that Ms. Johnson was placed in imminent fear of bodily harm. The law presumes that it was his intent to do so. *See Dye v. State*, 70 Ark. App. 329, 333, 17 S.W.3d 505, 508 (2000). The State contends that the best evidence that appellant entered Ms. Johnson's home with the purpose of committing third-degree assault is the fact that he did in fact commit the offense when he entered and remained there. Substantial evidence exists to support the verdict; therefore, we affirm on this point.

II. Denial of Motion to Enforce Plea Offer

At a pretrial hearing, appellant asked that a plea agreement agreed upon by the parties be enforced. The essence of the proposed agreement was that the State would reduce the charge to criminal attempt to commit burglary and recommend a sentence of three years',[1] which would also have resolved another pending charge of aggravated assault. Subsequent to appellant agreeing to the terms of the plea agreement and signing all the related documents, his counsel received a telephone call from the prosecuting attorney's office withdrawing the plea offer. The deputy prosecutor explained that he had assumed the victim, Ms. Johnson, had agreed to the plea agreement, but that his assumption had been incorrect. Also, his supervising attorney had declined to authorize the plea agreement. The deputy prosecutor explained that the plea offer could be withdrawn so long as appellant had not suffered any detriment and pointed out that the only detriment suffered so far was the lack of time to prepare for trial, because appellant had been planning on pleading guilty. In order to compensate for this issue, the State moved for a continuance, at its expense, in order to allow appellant adequate time to prepare for trial.

Appellant verbally moved the court to enforce the plea agreement, and the trial court denied it, holding that the guilty plea would not have been accepted by the trial court, anyway, if the victim did not go along with the agreement. Subsequently, appellant was allowed to file a formal written motion to enforce the plea agreement, setting out the following ways in which he was prejudiced by the rescission of the offer:

> (1) The plea offer was to reduce the charge from a Class B to a Class C felony, and if he were to be tried for the original burglary charge, it would have a maximum sentence in excess of the three years he had bargained for;
>
> (2) If convicted of the original residential burglary charge, appellant would be classified as a habitual offender when he faced the other pending aggravated assault charge;
>
> (3) A conviction of residential burglary would be a second conviction for appellant, which would automatically enhance the amount of time he would serve before being eligible for parole;

[1] There is some discrepancy as to whether it was for probation or prison time.

> (4) He would still be required to face the other pending aggravated assault charge, and if convicted, he would in all probability receive a sentence consecutive to the sentence assessed in this matter.

All parties agreed that the motion did not become ripe unless and until appellant had been convicted and suffered a sentence more severe than he had bargained for under the proposed plea agreement, and further agreed that the motion should be reviewed after the completion of the trial in this matter. It was so heard, and the trial court once again denied appellant's motion.

Appellant acknowledges that the Arkansas Supreme Court stated in *Caldwell v. State*, 295 Ark. 149, 747 S.W.2d 99 (1988), that parties have no power to bind the trial court and that it is "illusory to say that the state is bound by such an agreement before it is consummated by the acceptance of a guilty plea by the [trial] court." *Caldwell*, 295 Ark. at 152, 747 S.W.2d at 101. He relies, however, on *Santobello v. New York*, 404 U.S. 257 (1971), which states that when a criminal defendant's inducement to enter a plea of guilty is a promise or agreement of the prosecutor, that promise must be fulfilled. He maintains that in *Caldwell, supra*, the Arkansas Supreme Court left open an avenue of relief related to the *Santobello* holding that has not been previously dealt with, as the cases that have addressed this issue have focused on the incorrect issue. Appellant asserts that the issue should not be whether the trial court accepts the guilty plea, but rather whether the prosecution bargains in good faith with the defense when it proposes the guilty plea agreement. He argues that, in his case, members of the prosecuting attorney's office were acting "without knowledge of the ultimate decision makers." That was not his fault, and he contends that it was a denial of due process to deprive him of the benefits of that plea agreement because of the errors of attorneys for the State who did not represent him.

Santobello, supra, is distinguishable in that there, the defendant had entered a plea to a reduced charge, and the trial court set the matter for sentencing at a later date. Here, the guilty plea had not been accepted or entered, accordingly, appellant had not suffered judgment for an offense. Likewise, in *Caldwell*, the prosecutor made the defendant a plea offer whereby the prosecutor would recommend a probationary sentence in exchange for his guilty plea. Prior to the parties appearing in court, a new prosecutor took over and rescinded the plea offer. The motion to enforce

the plea offer was denied, and the Arkansas Supreme Court affirmed, distinguishing situations of where plea offers have been entered from those where they have not. Because the defendant could not show other detrimental reliance, beyond merely accepting the plea offer, he was not entitled to enforce it.

Appellant's four alleged points of "detrimental reliance" are illusory. All of the facts he asserts would have occurred if, and only if, the trial court had accepted the plea agreement, which it stated it would not have done because of the victim's objection to the agreement. Additionally, the supreme court in *Caldwell* suggested that, in a case in which an accused detrimentally relies on a withdrawn plea offer, the withdrawal may affect only the evidence available to the prosecution. *Caldwell*, 295 Ark. at 152, 747 S.W.2d at 101. Pursuant to *Caldwell*, a defendant is required to show more than the mere fact that he desired the concessions contemplated by the withdrawn plea offer, and even if he does show it, the appropriate remedy would seem to be to withdraw the guilty plea and limit to some extent the prosecution's evidence in the matter. Here, appellant failed to prove detrimental reliance, and accordingly, we affirm on this point as well.

Affirmed.

PITTMAN, C.J., and HART, J., agree.

Craig CAMPBELL, Ben Eoff, and Campbell & Eoff Properties *v.* James CARTER, Jerre Carter and The Village, Inc.

CA 05-537 219 S.W.3d 665

Court of Appeals of Arkansas
Opinion delivered December 7, 2005

[Rehearing denied January 11, 2006.]

Donald E. Wilson, P.A., for appellants.

Kincaid, Horne & Daniels, by: *David B. Horne*, for appellees.

ROBERT J. GLADWIN, Judge. Appellants Craig Campbell, Ben Eoff, and Campbell & Eoff Properties were held liable by the trial court, sitting as the finder of fact, for unreasonably interfering with an easement owned by appellees James and Jerre Carter and The Village, Inc. The court awarded appellees a total of $19,722.02, and appellants appealed. We find no error and affirm.

Appellees acquired lots in the Village Estates subdivision in Washington County in the late 1980s and early 1990s. Although it was originally contemplated that the lots would be served by a sewage-disposal plant, the plant was never approved. As a result, the lots were served by septic systems. Appellees' deeds conveyed a septic-system easement over another lot in the subdivision, Lot 45, which was located north across Broadview Drive. The deed of appellees James and Jerre Carter states that they were granted

> an easement for the purpose of operating and maintaining an existing septic tank and sewage and disposal system over and across Lot 45, Block 7, Village Estates Subdivision, Washington County, Arkansas. Said easement shall terminate at such time as a sewage disposal plant for Village Estates Subdivision becomes operational and is approved by the applicable regulatory and licensing agencies.

The deed of The Village contains similar language.

At a certain point, the lots in the subdivision were re-platted, and Lot 45 became Lot 32. There is no dispute that the septic-system easement survived the re-platting, and we will hereafter refer to the servient lot as Lot 32.

Lot 32 remained vacant during the time of appellees' ownership until the summer of 2003, when it was purchased by appellants. In August 2003, appellants began constructing a house and driveway on Lot 32. At one point, appellant Eoff was using a bulldozer to scrape the lot when he was confronted by Mr. Carter, bearing his deed. Mr. Carter explained to Eoff that he had a septic-system easement over the lot, although he could not identify the exact location of the system. According to Eoff, he ceased work immediately and conferred with his business partner, Campbell, about the situation. A week or two later, at Campbell's direction, Eoff dug some trenches in the lot at a depth of twenty-four inches to see if he could discover a septic system. When no system was located, appellants proceeded with the construction of the house.

Eoff said that Mr. Carter contacted him next when the house was about fifty-percent complete. Carter apparently mentioned

getting an injunction to enjoin appellants' construction but never did so. Eoff said that, at that time, Carter still could not identify the location of the septic system. Appellant Campbell also said that he met with Carter at some point when construction was fairly far along. Campbell told Mr. Carter that he did not believe that a septic system existed on the lot but, if it did and appellants damaged it, they would "correct the situation." During this period, construction on Lot 32 did not abate.

Mr. Carter's version of events is somewhat different. He said that, after first confronting Eoff in August 2003, he saw workers back out on the lot a week later. He went over to the lot and learned that appellants had not found a septic system and were going to proceed with laying the foundation of the house. He also said that he saw Eoff later in August and that Eoff told him that they had "looked and couldn't find anything."

In November 2003, after unsuccessfully trying to persuade Campbell and Eoff to cease construction, Carter decided to try and pinpoint the exact location of his septic system. He called Roto-Rooter, who tracked the system from his house northward across Broadview Drive and into a six-inch sewer line that ran adjacent to Broadview. It was discovered that, if the water in the Carters' house was turned on, within a few minutes, water could be seen flowing underneath a manhole cover (above the six-inch line) located in the corner of Lot 32. Carter further learned that the same thing occurred when water was turned on at the house owned by appellee, The Village. However, he could not determine at that time where the water went from the manhole area.

Carter reported his findings to Eoff, but it was Eoff's opinion that the Carters' sewage was flowing along the six-inch line adjacent to Broadview; thus, appellants continued constructing the house. In January 2004, Carter and The Village filed suit against appellants for interfering with their easement. Their complaint sought damages, along with an order requiring appellants to cease construction and remove any existing structures. At that time, the house was seventy to eighty percent complete, but the driveway was not yet poured; appellants continued construction after the suit was filed.

In February 2004, the parties met and decided to dig up parts of Lot 32 for the purpose of trying to locate the septic system. Appellants hired Bud Moore, and he located a "T" coming off of the six-inch line that ran alongside Broadview. The "T" led onto

Lot 32 through a four-inch pipe and then into a septic tank, located in what is now the front yard of appellants' home. Despite this discovery, appellants continued to build. Later, a forty-three-foot lateral line was discovered connected to the septic tank. The line apparently ran out of the tank and underneath the area where appellants planned to construct a driveway. According to Mr. Carter, the next day after the septic system was discovered, appellants started pouring concrete for the driveway. It is undisputed that the driveway now covers part of that lateral line (although the septic tank is not covered).[1]

The case went to trial in October 2004, and the following additional evidence was adduced. David Jorgenson, appellants' predecessor in title on Lot 32, said that, at the time he acquired the lot in the early or mid-1990s, he knew of no easement on it. However, at some point during his ownership, he was informed by the Carters that they had a sewage easement across the lot. Jorgenson went to the Health Department to see if he could find evidence of a septic system on the lot but found nothing. He also dug several test holes on the lot but found no evidence of a septic system. Nevertheless, according to him, when he sold Lot 32 to appellants in the summer of 2003, he informed them of the possibility that a septic system existed on the lot.

Linda Apple was the former owner of the Carters' home. Her deed contained the same grant of an easement over Lot 32. She recalled that, on one occasion in 1986, she had a problem with her septic system, and it "made everything back up." The repairman told her that the problem was with her septic tank, which he determined was on Lot 32. Apple testified that the repairman worked on the tank "deep in the lot," where the back part of appellants' newly constructed house now stands. Her testimony thus indicated that there was a second septic tank on Lot 32 other than the one near appellants' driveway.

Testimony was also given by Rick Johnson of the Arkansas Department of Health. Johnson said that Lot 32 was not big

[1] During this same time period, appellants sold the house to Roger and Patricia Penny. The Pennys were informed about the lawsuit, about the sewage easement on the lot, and about the possibility that another resident's septic system could exist on the property. However, appellants agreed to indemnify the Pennys from litigation expenses and any adverse judgment. On June 4, 2004, appellees added the Pennys as defendants in the lawsuit. However, because the Pennys are not participating directly in this appeal, we will, for the sake of simplicity, refer to Lot 32 and the home thereon as belonging to appellants.

enough to support systems for three houses. He stated that, had the Department been aware of the existing septic system on Lot 32 at the time appellants applied for their own septic system, which was now installed on Lot 32, appellants' application would not have been approved. Johnson also noted that appellees' system was in a state of disrepair. Although he observed that the system was currently flowing and that sewage had been pumped out of the 1000-to-1200-gallon septic tank, he anticipated that upgrading and repairs would be needed. He also said that the existing system did not meet Health Department requirements, although it was not malfunctioning to the point that a citation had been issued. Johnson further testified that the lateral line leading away from the septic tank near the driveway was crushed "about halfway through it" and was dry as though no liquid had entered it in a long time. However, despite the need for repairs, Johnson expressed reservations that repairs could be accomplished under the existing circumstances. When asked if, given that appellants' house, driveway, and septic tanks were all on the lot, appellees' tank could be "revitalized or repaired," he said that they could not. Johnson also expressed skepticism that a second tank was located on the lot, although he admitted that one could have been added when another house was added to the system. Finally, he stated that, while he could not say with certainty where appellees' sewage was going, it was possible that "the sewage is either going to another connection off the [six-inch] collector line to another tank, another system, or it's using the collector line as the disposal and going toward Beaver Lake."

Bud Moore, who did the digging on the lot in 2004, explained that he had discovered the "T" where a four-inch pipe on Lot 32 tapped into the six-inch line along Broadview. He testified that, despite the existence of the four-inch pipe leading to the septic tank on Lot 32, he believed that appellees' sewage had been running in the six-inch line and had simply backed up into the septic tank. He further offered his opinion that appellees' system was a "failed" system because the four-inch pipe leading off of the six-inch line was actually intended to flow away from Lot 32, not toward it.

Appellee James Carter testified to his belief that the sewage was going back to another tank, as testified to by Linda Apple. He further said that, if he were to try and repair his system, he "couldn't go anywhere" because appellants' house and driveway were in the way. Finally, he testified regarding damages. He said

that, before the current problems, his house was worth $185,000 but now was worth nothing. He also said that it would cost about $9000 to put a septic system on his own lot. Finally, he offered an exhibit showing that he had paid Roto-Rooter and AAA Septic Tank Service $4062.02 as "expenses incurred re: septic tank dispute," of which The Village reimbursed him for $1650, leaving his net expenses as $2412.02. Likewise, Amy Fugman, Executive Director of The Village, testified that, in addition to the $1650 paid to Mr. Carter, the Village had paid Roto-Rooter $1160. Fugman also said that it would cost The Village $5000 to $6000 to install a new septic system on a different lot.

After the bench trial, the judge determined that appellants' construction unreasonably interfered with appellees' easement and, although he did not order the removal of any structures, he awarded $11,412.02 in damages to the Carters and $8310 to The Village. Appellants now appeal from that order.

Cases involving easements are traditionally equity cases, and such cases are reviewed de novo on appeal. *See Wilson v. Johnston*, 66 Ark. App. 193, 990 S.W.2d 554 (1999). However, we will not reverse unless we determine that the trial court's findings of fact were clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the appellate court is left with the firm conviction that a mistake has been committed. *White River Levee Dist. v. Reidhar*, 76 Ark. App. 225, 61 S.W.3d 235 (2001).

Appellants argue first that the trial court erred in finding that they unreasonably interfered with appellees' easement. The owner of an easement may recover damages resulting from interference by the servient owner. *See* 28A C.J.S. *Easements* § 209 (1996); 25 AM. JUR. 2D *Easements and Licenses* § 129 (2d ed. 1996). While the owner of a servient tenement may make any use thereof that is consistent with, or not calculated to interfere with, the exercise of the easement granted, *see Howard v. Cramlet*, 56 Ark. App. 171, 939 S.W.2d 858 (1997), he can do nothing tending to diminish the easement's use or make it more inconvenient or create hazardous conditions. *See Hatfield v. Ark. W. Gas Co.*, 5 Ark. App. 26, 632 S.W.2d 238 (1982). The question of the right of a servient owner to obstruct an easement is one of fact to be determined from consideration of the terms of the grant, the parties' intentions as reflected by the circumstances, the nature and situation of the property, the manner in which it has been used and

occupied before and after the grant, and the location of the obstruction. *See Jordan v. Guinn*, 253 Ark. 315, 485 S.W.2d 715 (1972).

■ ■ It is undisputed in this case that appellants constructed a house and driveway that cover at least a portion of appellees' septic system. Moreover, there is testimony by Rick Johnson and James Carter to the effect that appellants' presence on the lot will inhibit appellees' ability to repair and maintain the system. In *Hatfield, supra*, our court addressed a situation in which a building was constructed over a gas-pipeline easement. We noted that, in the case of underground pipelines, "it would appear that one of the primary incidents of the easement is that the line be accessible for maintenance and repair" and that "without such rights the easement could become useless." *Hatfield*, 5 Ark. App. at 30, 632 S.W.2d at 241; *see also Craft v. Ark. La. Gas Co.*, 8 Ark. App. 169, 649 S.W.2d 409 (1983) (holding that construction of a building over a gas line interfered with the use of an easement). The evidence in this case shows that appellants have built over appellees' easement and interfered with appellees' ability to repair and maintain their septic system. Further, appellants did so knowingly, having been warned in advance of their construction that the septic-system easement existed. We therefore agree with the trial court that appellants unreasonably interfered with appellees' easement.

■ Appellants argue, however, that their interference was inconsequential because 1) the lateral line located under the driveway is near a gas line and does not meet with Health Department regulations; 2) the line has been dry and crushed for many years; 3) the system would require a large expansion to meet the needs of the two houses it purportedly serves; 4) the system is currently usable. The gist of appellants' contention seems to be that appellees have not been damaged because their system is functioning and, in any event, should appellees try and make repairs, those repairs would be impossible through no fault of appellants. However, while Rick Johnson testified that the system is currently functioning, he also said that the need for repairs is anticipated and in fact imminent. Further, although Johnson stated that the system did not currently meet Health Department regulations and that there might be some difficulties in making repairs, such as the location of the gas line, he also stated that appellees'

system could not be repaired or revitalized at least in part because of the location of appellants' house, driveway, and septic system. James Carter also testified in this regard. Additionally, appellants' arguments discount the possibility that another septic tank exists on the lot and that the tank is currently located underneath the house itself, as testified to by Linda Apple. In light of these considerations, along with appellants' undisputed prior knowledge that the easement existed, we cannot say that the trial judge erred in ruling as he did.

Appellants argue next that the trial judge erred in awarding appellees temporary damages. Where harm is done to real property, damages may be either permanent or temporary. If damages are permanent or incapable of repair, the proper measure is the difference in market value before and after the injury. *State v. Diamond Lakes Oil Co.*, 347 Ark. 618, 66 S.W.3d 613 (2002). On the other hand, temporary or repairable damages are measured by the reasonable expense of necessary repairs to the property. *Id.*; *see also Fox v. Nally*, 34 Ark. App. 94, 805 S.W.2d 661 (1991) (holding that, for temporary injury to real property, the measure of damages is the cost of restoring the property to the same condition that it was in prior to the injury). The easement owner is also entitled to compensation for loss of use of the property. Howard Brill, *Law of Damages* § 30:1 at 529 (5th ed. 2002); *see generally* Arkansas Model Jury Instructions-Civil 2224 (2005). The specific losses are determined on a case-by-case basis. Howard Brill, *Law of Damages*, *supra.*

In the case at bar, there is evidence that appellees will be unable to repair or upgrade their system and that the existence of their system is incompatible with appellants' system. Under these circumstances, we believe that the trial judge devised an equitable solution by compensating appellees for moving their system elsewhere plus awarding them the expenses they incurred as the result of appellants' placing a house on Lot 32. Further, the damages of $11,412.02 and $8310 awarded by the judge correspond with the evidence. Carter testified that it would cost him approximately $9000 to put a new system on his own lot and that he had incurred $2412.02 in expenses, for a total of $11,412.02. Amy Fugman testified that a new system would cost $5000 to $6000 and that The Village had incurred expenses of $2801 ($5500 plus $2810 equals $8310). We therefore find no error in these awards.

Finally, appellants argue that appellees' claim should be barred by laches. The doctrine of laches is based on a number of equitable principles that are premised on some detrimental change in position made in reliance upon the action or inaction of the other party. *Self v. Self*, 319 Ark. 632, 893 S.W.2d 775 (1995). It is based on the assumption that the party to whom laches is imputed has knowledge of his rights and the opportunity to assert them, that by reason of his delay some adverse party has good reason to believe those rights are worthless or have been abandoned, and that, because of a change of conditions during this delay, it would be unjust to the latter to permit him to assert them. *Id.* Whether a claim is barred by laches depends on the particular circumstances of each case. *See id.* The issue is one of fact, and we will not reverse the trial court's decision on a question of fact unless it is clearly erroneous. *Id.*

Appellants claim that appellees should have told them the location of the septic system sooner, before the house construction was so far along. This argument is without merit, given that Mr. Carter told appellants of the existence of the easement before any construction had been done on the lot and continued to object to the construction. Appellants took the risk that they were building over a septic system, and, despite clear evidence that an easement existed, they refused to believe that a septic system was present. When they were proven wrong, it was not the fault of appellees but of themselves.

Affirmed.

PITTMAN, C.J., and HART, J., agree.

Robert WILLIAMS III *v.* STATE of Arkansas

CA CR 05-440 219 S.W.3d 676

Court of Appeals of Arkansas
Opinion delivered December 7, 2005

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

Mike Beebe, Arkansas Attorney General, by: *Brent P. Gasper*, Assistant Attorney General, for appellee.

SAM BIRD, Judge. Appellant Robert Williams III was convicted by a jury of multiple drug-related crimes and of theft by receiving property valued at less than $2500. In addition to being sentenced to terms of imprisonment for the drug-related crimes, he was also sentenced to five years' imprisonment for the theft-by-receiving conviction. As his sole point on appeal, Williams contends that the trial court erred in denying his motion for a directed verdict on the theft-by-receiving charge because the State failed to produce

substantial evidence that he knew the property was stolen or that he had good reason to believe that the property had been stolen. We affirm.

At trial, Sherrell Turner testified for the State that he was the owner of a Taurus revolver that he had reported stolen in December 2003. Turner said that he first noticed that the gun was missing in October 2003. Turner said that he was not aware of a break-in at his residence and that he did not know Williams. He also said that he never had any reason to give the gun to Williams. He claimed that his daughter had "several part-time jobs" and that she would occasionally bring some of her co-workers inside the house, unsupervised, while he was at work. He opined that these individuals "weren't upstanding citizens."

Gene Whitley of the North Little Rock Police Department also testified at trial. He said that he was working on the evening of February 25, 2004, and that he came into contact with Williams that night at a Citgo service station. He said that he had gone into the service station, had come back outside, and had gotten into his patrol car when he noticed that a girl "jumped out" of a small white vehicle and "took off pretty fast." According to Whitley, two other individuals got out of the car and started walking toward the girl. He said that he approached these individuals and asked whether the girl was okay, but they "just stared" at him. He said that he followed the girl and, once he found her, "she appeared to be okay." He then returned to the white vehicle and made contact with Williams.

Whitley testified that he initially asked Williams what was going on and said that Williams "just stared" and "didn't respond." He said that Williams was sitting in the driver's seat with one hand under his right leg and that Williams refused to show his hands. According to Whitley, Williams then turned around and told officers to "get away from him" and to "leave him alone." Whitley said that Williams then placed his left hand on the steering wheel but still refused to show his right hand. Whitley walked around to the passenger side of the vehicle and saw a black revolver in Williams's right hand. Whitley said that he "reached in" through the passenger door, which had been left open by the individuals who had previously exited the vehicle, and he took the gun from Williams. He said that the serial number on the gun matched the number on the one that Turner reported missing. He also said that he found drugs in Williams's possession.

At the close of the State's case-in-chief, defense counsel made the following motion for a directed verdict:

> At this time, Your Honor, I would make a motion for a directed verdict in that . . . I think there is reasonable doubt that . . . Mr. Williams produced or had the handgun in connection with the drugs; also, that he had reason to know or believe that the gun was stolen. And so for those reasons, I move for a directed verdict.

The trial court denied the motion. The defense rested, without presenting any evidence, and renewed its motion. The jury was instructed that, if it found Williams to be in unexplained possession or control of recently stolen property, it could consider that fact in deciding whether Williams knew or reasonably believed that the property was stolen.

A directed-verdict motion is a challenge to the sufficiency of the evidence. *Doubleday v. State*, 84 Ark. App. 194, 138 S.W.3d 112 (2003). 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. *Lowry v. State*, 364 Ark. 6, 216 S.W.3d 101 (2005). We will 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.*

In order for circumstantial evidence to be sufficient, it must exclude every other reasonable hypothesis consistent with innocence. *Carter v. State*, 324 Ark. 395, 921 S.W.2d 924 (1996). That determination is a question of fact for the fact finder to determine. *Id.* However, the fact finder must not be left to speculation and conjecture in arriving at its conclusions on the matter. *Id.*

Arkansas Code Annotated section 5-36-106(a) (Supp. 2003) states that "[a] person commits the offense of theft by receiving if he or she receives, retains, or disposes of stolen property of another person, knowing that it was stolen or having good reason to believe that it was stolen." Under this statute, "receiving" means acquiring possession, control, or title or lending on the security of the property. Ark. Code Ann. § 5-36-106(b) (Supp. 2003). Furthermore, the unexplained possession or control by a person of recently stolen property shall give rise to a presumption that he or she knows or believes that the property was stolen. Ark. Code Ann. § 5-36-106(c) (Supp. 2003).

In support of his contention that the evidence is insufficient to support his conviction for theft by receiving, Williams argues that the only fact that would have allowed the jury to infer that he knew or had good reason to know that the revolver was stolen was that he possessed it approximately four months after it was discovered missing from Sherrell Turner's home. Citing cases from other jurisdictions, he apparently argues that a gap of four months between the time that the gun was discovered missing and the time that it was found in his possession was not "recent" for purposes of the presumption in Ark. Code Ann. § 5-36-106(c).

Williams also claims that the State never proved "any connection" between Turner and Williams or that Williams had ever been in Turner's house at any time. Furthermore, Williams asserts that the State never proved how he acquired the gun. Williams therefore urges this court to reverse his theft-by-receiving conviction on the basis that the evidence is insufficient to show that he knew or had good reason to know that the gun was stolen.

Viewing the evidence in the light most favorable to the State, as we are required to do, we find that substantial evidence supports Williams's conviction. Officer Whitley testified that he approached Williams while Williams was sitting in a parked vehicle in front of a service station and that, when Whitley asked Williams what he was doing, Williams did not respond. According to Whitley, Williams then told officers to "get away from him" and to "leave him alone." Whitley said that he subsequently discovered that Williams was concealing a black revolver in his right hand and that Whitley retrieved the gun from Williams. The gun matched the serial number of a black revolver that belonged to Sherrell Turner, who testified that he first noticed that the gun was missing in October 2003 — approximately four months before Williams was found with the gun. Williams was also found to be in possession of drugs.

Based on the foregoing, we hold that the evidence was sufficient to allow the jury to find — without resorting to speculation or conjecture — that Williams knew or had reason to believe that the gun was stolen because he was in unexplained possession of a gun that had been discovered missing four months earlier. In *Wiley v. State*, 92 Ark. 586, 124 S.W. 249 (1909), our supreme court recognized that the question of whether the theft of property was recent does not depend entirely upon the lapse of

time, but also on the nature of the property alleged to have been stolen; the actions of the defendant and the nature of his claim thereto, if he subsequently makes an assertion of title; and all the circumstances surrounding the particular case. The court in *Wiley* found that the possession of property by the defendant, following a time period of approximately three months from the date that the property was alleged to have been stolen, was "not too remote . . . to deprive it of its probative effect as a fact from which an inference of the guilt of the defendant could be drawn by the jury." *Id.* at 591, 124 S.W. at 251. On the other hand, this court has held that the lapse of fourteen months between the time that a trailer was stolen and the time that it was found in the defendant's possession was too remote to allow the statutory presumption of knowledge that it was stolen. *See Doubleday v. State*, 84 Ark. App. 194, 138 S.W.3d 112 (2003). Here, we conclude that a lapse of four months is not so great that we should hold, as a matter of law, that it could not be considered recent.[1]

The jury was entitled to find, as a matter of fact, that the gun had been "recently stolen" in this case, thus giving rise to the statutory presumption under Ark. Code Ann. § 5-36-106(c) that Williams had knowledge of the gun's status as stolen property. As the State points out, this presumption was never rebutted by Williams. We therefore hold that substantial evidence supports Williams's conviction for theft by receiving, and we affirm.

Affirmed.

ROBBINS and GRIFFEN, JJ., agree.

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[1] For a survey of case law from other jurisdictions discussing what constitutes "recently" stolen property in similar cases, see *What Constitutes "Recently" Stolen Property Within Rule Inferring Guilt from Unexplained Possession of Such Property*, 89 A.L.R.3d 1202 (1979).

J. Paul BRIDGES *v.* Alison Gaddis BRIDGES

CA 04-1105 219 S.W.3d 699

Court of Appeals of Arkansas
Opinion delivered December 7, 2005

Keith, Miller, Butler & Webb, P.L.L.C., by: *Mary M. White Schneider*, for appellant.

George Ray Spence, for appellee.

SAM BIRD, Judge. Appellant J. Paul Bridges and appellee Alison Gaddis Bridges were divorced in 2002 by the Tenth

Judicial District Court in Natchitoches Parish, Louisiana. By order of the Circuit Court of Benton County, Arkansas, on March 17, 2004, Ms. Bridges was granted permanent primary care and custody of the parties' minor children, and the visitation rights of Mr. Bridges were modified. Mr. Bridges appeals the order of the Arkansas trial court, contending that the court 1) improperly exercised jurisdiction and 2) failed to consider the best interest of the children in these matters. We disagree and affirm the decision of the Arkansas court.

On April 9, 2003, Ms. Bridges filed in Arkansas a petition to register a foreign decree and orders. Attached to her petition were the Louisiana judgment of divorce and subsequent judgments from that court, reflecting that Ms. Bridges was the primary custodial parent and Mr. Bridges was to have custodial visitation privileges as set forth in the court's visitation schedule. The judgments also indicate that in February 2002 Mr. Bridges had moved to Mississippi but by April 2002 was employed in Georgia.

On April 14, 2003, Ms. Bridges filed in the Arkansas court a petition for modification of the visitation schedule established in Louisiana. Her petition asserted that the Louisiana court awarded the parties joint custody in July 2002, with Ms. Bridges being the primary residential custodial parent and Mr. Bridges having reasonable and liberal custodial visitation; that subsequent orders and judgments had modified the visitation privileges of Mr. Bridges based upon the parties' changed residences; that Arkansas had become the home state of the children because Ms. Bridges had relocated to Benton County and her period of residence in Arkansas exceeded six months at the time her petition was filed; and that Mr. Bridges was believed to be residing in Mississippi after a period of relocation to Benton County. On May 20, 2003, Mr. Bridges filed in Arkansas a motion to dismiss the petitions of Ms. Bridges for lack of jurisdiction.

Upon Ms. Bridges's filing the petitions for registration and modification, the Arkansas judge communicated with the Louisiana judge. In a letter of May 7, 2003, the Louisiana judge responded:

> Thank you for visiting with me by telephone concerning the referenced matter. Proceedings have been filed in this court and yours, and the Uniform Child Custody Jurisdiction Act, as well as the Parental Prevention Kidnapping Act have been raised.

The letter listed approximate dates that recounted the relevant history of the parties, including recent events of 2003. On April 16, Mr.

Bridges had filed with the Louisiana court a petition praying for an assortment of relief relating to custody matters, and a hearing was set there for April 29. On April 18, the Arkansas court had recognized jurisdiction and modified the visitation schedule. On April 24, Ms. Bridges had filed with the Louisiana court "an exception of lack of subject matter jurisdiction."

At a hearing in Louisiana on April 29, 2003, the only issue was the question of jurisdiction. Arguments were received from counsel in Louisiana and Arkansas during a telephone conference between the Louisiana court and the Arkansas court, and the testimony of both Mr. and Ms. Bridges was received.

On June 25, 2003, the Louisiana court issued a *Reasons for Judgment*, addressing Mr. Bridges's arguments that Arkansas had improperly asserted jurisdiction and that matters of custody and visitation were still pending before the Louisiana court. The court stated that, under the Parental Kidnapping Prevention Act (PKPA), it would be inappropriate for any other court to exercise jurisdiction over the children without a determination by the Louisiana court that it should no longer hear the case. The court wrote:

> The Parental Kidnapping Prevention Act, cited as 28 U.S.C. 1738A, is titled "full faith and credit to be given to child custody determinations." It reads in part as follows:
>
> > "(a) the appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any custody determination made consistently with the provisions of this section by a court of another State."

The court found that the children had resided continuously in Arkansas for a period of more than six months, that neither party asserted that any evidence remained in Louisiana concerning the welfare of the children, that Ms. Bridges and the children currently lived in Arkansas, and that Mr. Bridges currently lived in Mississippi. The court found that Louisiana was an inconvenient forum and that Arkansas was the more appropriate forum, setting forth its analysis under Louisiana law:

Louisiana Revised Statutes 13:1706 provides in part as follows:

A. A court which has jurisdiction under this Part to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

. . . .

C. In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(1) If another state is or recently was the child's home state.

(2) If another state has a closer connection with the child and his family or with the child and one or more of the contestants.

(3) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state.

In determining that Louisiana was an inconvenient forum, the court found (1) that Arkansas was the home state of the parties' minor children; (2) that Arkansas had closer connections with the children and Ms. Bridges, and (3) that there was almost no evidence in Louisiana concerning the children's present or future care, protection, training, and personal relationships, evidence which was more readily available in Arkansas. The court concluded, "These proceedings are to be dismissed."

In an order of July 28, 2003, the Arkansas court acted upon the motion to dismiss that Mr. Bridges had filed on May 20, 2003. The court found that it had jurisdiction of the parties and subject matter, and it determined that Arkansas was the home state of Ms. Bridges and the children and had been so in excess of six months; thereupon, the motion to dismiss was denied. On January 15, 2004, the Arkansas court conducted a hearing on the petitions before it and took testimonies of the parties. In the resultant order of March 17, 2004, the court found that it had jurisdiction of the parties and subject-matter jurisdiction, and that it was in the best interests of the minor children that their permanent custody be

placed with Ms. Bridges, subject to the specific visitation set forth in the order. Mr. Bridges appeals, raising the following points:

1. *Whether the Circuit Court of Benton County, Arkansas, improperly exercised jurisdiction*

Mr. Bridges argues on appeal, as he did below, that the Arkansas court improperly exercised jurisdiction. Citing the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the PKPA, he asserts that jurisdiction continued in Louisiana because matters were pending there. In part, he complains that in April 2002 the Louisiana court decreed that either party could move "to refix for rehearing" various pending issues, including a motion by Ms. Bridges to permanently fix the visitation schedule. Ms. Bridges points out, however, that a Louisiana judgment of July 2, 2002, modified the previous order for visitation.

The UCCJEA, codified at Ark. Code Ann. § 9-19-101 *et. seq.* (Repl. 2002), governs the modification of child custody determinations made in foreign jurisdictions and registered in Arkansas, as well as the determination by a court of whether or not it should assume jurisdiction over a petition to modify an existing child-custody determination made by a foreign jurisdiction. *Seamans v. Seamans*, 73 Ark. App. 27, 37 S.W.3d 693 (2001). One purpose of the UCCJEA is to avoid relitigation of child-custody determinations in other states. *West v. West*, 364 Ark. 73, 216 S.W.3d 557 (2005).

Jurisdiction to modify a child-custody determination is addressed by Ark. Code Ann. § 9-19-203 (Repl. 2002):

> Except as otherwise provided in § 9-19-204, a court of this State may not modify a child-custody determination made by a court of another State unless a court of this State has jurisdiction to make an initial determination under § 9-19-201(a)(1) or (2) and:
>
> (1) the court of the other State determines it no longer has exclusive, continuing jurisdiction under § 9-19-202 or that a court of this State would be a more convenient forum under § 9-19-207; or
>
> (2) a court of this State or a court of the other State determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other State.

Section 9-19-201, entitled *Initial child-custody jurisdiction*, states:

(a) Except as otherwise provided in § 9-19-204, a court of this State has jurisdiction to make an initial child-custody determination only if:

(1) this State is the home State of the child on the date of the commencement of the proceeding, or was the home State of the child within six (6) months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

(2) a court of another State does not have jurisdiction under subdivision (a)(1) of this section, or a court of the home State of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under § 9-19-207 or § 9-19-208, and:

(A) the child and the child's parents, or the child and at least one (1) parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

(B) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

Under section 9-19-102(7), "home state" is defined as the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding.

The exercise of jurisdiction by a court of this state is specifically addressed by Ark. Code Ann. § 9-19-206, which sets forth the following requirements:

(a) Except as otherwise provided in § 9-19-204, a court of this State may not exercise its jurisdiction under this subchapter if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another State having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other State because a court of this State is a more convenient forum under § 9-19-207.

(b) Except as otherwise provided in § 9-19-204, a court of this State, before hearing a child-custody proceeding, shall examine the

court documents and other information supplied by the parties pursuant to § 9-19-209. If the court determines that a child-custody proceeding has been commenced in a court in another State having jurisdiction substantially in accordance with this chapter, the court of this State shall stay its proceeding and communicate with the court of the other State. If the court of the State having jurisdiction substantially in accordance with this chapter does not determine that the court of this State is a more appropriate forum, the court of this State shall dismiss the proceeding.

(c) In a proceeding to modify a child-custody determination, a court of this State shall determine whether a proceeding to enforce the determination has been commenced in another State. If a proceeding to enforce a child-custody determination has been commenced in another State, the court may:

(1) stay the proceeding for modification pending the entry of an order of a court of the other State enforcing, staying, denying, or dismissing the proceeding for enforcement;

(2) enjoin the parties from continuing with the proceeding for enforcement; or

(3) proceed with the modification under conditions it considers appropriate.

We agree with Ms. Bridges that the Benton County Circuit Court proceeded exactly as it should have done in these matters. Upon receiving petitions from Ms. Bridges for registration of Louisiana judgments and for modification of Louisiana visitation orders, the circuit court stayed its proceeding and initiated communication with the Louisiana court. The Louisiana court dismissed the case after conducting a hearing, and the evidence before both trial courts (as summarized in the second point of this opinion) clearly demonstrated that Arkansas was the home state of the children for over six months before Ms. Bridges filed her petitions in Arkansas. We hold that the jurisdiction was properly exercised by the Arkansas trial court.

2. *Whether the trial court failed to consider the best interest of the children*

Mr. Bridges contends that the majority of the evidence presented at trial lent credence to a finding that the trial court's award of permanent primary care and custody, and its modification of Mr. Bridges' visitation rights, were not in the best interest of the

children. Even though we review custody issues *de novo*, we will reverse the trial court's finding of fact only if they are clearly contrary to the preponderance of the evidence. *Thigpen v. Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987). Because the question of the preponderance of the evidence turns largely on the credibility of the witnesses, the appellate court defers to the superior position of the trial judge in matters of child custody. *Id.*

On January 15 and 16, 2004, the Arkansas court conducted a hearing on the motions in this matter. In his arguments regarding the best interest of the children, Mr. Bridges points to his testimony about his involvement with the children, his son's expressed preference to live with his father, and his provision of trusted child-care providers. He also notes the guardian *ad litem*'s commendation about his involvement in the children's lives.

There was also other evidence before the trial court. Ms. Bridges testified that she moved from Shreveport to Bella Vista in Benton County, Arkansas, on August 17, 2002, because she took a job with Wal-Mart and because she owned a house from a previous time when the parties had lived there. She testified that she enrolled the children in R. E. Baker Elementary School, which the children continued to attend at the time of the hearing and where she was a room mother. She testified that Mr. Bridges, too, subsequently moved to Bella Vista but had later moved out of state.

Ms. Bridges testified that she had stayed home with the children until her move to Bella Vista and had been their primary care parent from the first. She had often stayed home with the children in Bella Vista when they were sick, the son had undergone surgery for removal of enlarged adenoids, and the daughter had been in counseling because of anxiety. She testified regarding arrearages by Mr. Bridges on his child support, the money she had paid for medical expenses, and the times he had not availed himself of the opportunity for visitation with the children. Ms. Bridges asked that the Louisiana order of visitation be modified because of the 585-mile-drive to Mr. Bridges's current residence in Mississippi.

Dr. Terry Effird, a clinical psychologist, testified that she had seen the ten-year-old daughter from April until December because of anxiety. Taylor was having stomach aches and did not want to go to school. Dr. Effird stated that Taylor reported that her father asked her who she wanted to live with, and that Taylor felt "torn." Dr. Effird opined that Taylor's anxiety was caused by Mr. Bridges and that nothing that Ms. Bridges was doing caused the anxiety.

The guardian *ad litem*, appointed to represent the interest of the two minor children, stated that both parents could provide an appropriate home for the children and made no recommendation as to who should have custody. In addition to commending Mr. Bridges for his involvement with the children, she reported that the children felt strong ties to their remaining family in Mississippi and that they wished for both parents to live there under the same roof. She noted, however, that the children had made exceptional progress in the Arkansas school system over the previous eighteen months and that Ms. Bridges had provided the stability that the children had needed during that time.

The arguments that Mr. Bridges raises regarding the award of child custody essentially go to the weight and credibility of the evidence. As previously noted, these are matters in which we give great deference to the trial court. We hold that the trial court did not clearly err in finding that the best interest of the children was served by an award of custody to Ms. Bridges and by modification of visitation for Mr. Bridges.

Affirmed.

PITTMAN, C.J., and NEAL, J., agree.

Traci MITCHELL *v.* Dr. Lance LINCOLN

CA 05-360 219 S.W.3d 686

Court of Appeals of Arkansas
Opinion delivered December 7, 2005

[Rehearing denied January 18, 2006.*]

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

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

Cox Law Firm, P.L.L.C., by: *Walter B. Cox* and *James R. Estes*, for appellee.

SAM BIRD, Judge. Appellant Traci Mitchell, administratrix of her late husband's estate, brought this medical malpractice case against appellee Dr. Lance Lincoln for the wrongful death of her husband.[1] The trial court granted appellee's motion for summary judgment on October 6, 2003, and it denied appellant's motion for reconsideration on November 3, 2003. Appellant contends on appeal that the trial court erred in granting summary judgment and in denying her motion for reconsideration; the issue before us is whether

[1] The defendants named in the original complaint are Dr. Lance Lincoln; St. Paul Fire & Marine Insurance Co., as liability insurance carrier for Baxter County Regional Hospital; and John Doe Nos. 1–3. Orders of dismissal have been entered as to all parties except Dr. Lincoln.

she was required to present expert testimony in order to establish the cause of action. We reverse the order of summary judgment and remand for trial.

The circumstances surrounding Guy Mitchell's death are these. In 1994 Mr. Mitchell was diagnosed with myelogenous leukemia. He underwent a bone-marrow transplant at M.D. Anderson Cancer Center in Houston, Texas, where one of his doctors was Dr. James L. Gajewski. In a letter to appellee dated January 6, 1995, Dr. Gajewski recommended the blood cells and platelet products to be used if Mr. Mitchell should need a blood transfusion. On eleven occasions between January 18 and March 22, 1995, Mr. Mitchell was transfused with blood products at Baxter County Regional Hospital under the direction of appellee, an internist practicing in Mountain Home, Arkansas; however, the blood products that were used included a type different from the type that Dr. Gajewski had recommended to appellee. On March 24, 1995, Mr. Mitchell was re-admitted to M.D. Anderson. In June and into July of 1995, after being discharged from M.D. Anderson, Mr. Mitchell was hospitalized at the University of Arkansas Medical Center. Mr. Mitchell died at home in Flippin, Arkansas, on July 23, 1995.

Appellee moved for summary judgment in August 1999 on the basis that appellant had not named an expert witness who would testify that appellee was "guilty of medical negligence" and that such negligence proximately caused Mr. Mitchell's death. Appellant took a voluntary non-suit on her cause of action, and the court entered an order of non-suit on August 20, 1999. Appellant re-filed her cause of action on August 17, 2000, again alleging that appellant was "guilty of medical negligence" and that such negligence was a proximate cause of the death of Mr. Mitchell.

Appellee filed his second motion for summary judgment on February 21, 2002, on the basis that appellant had not named an expert witness who would testify that appellee was guilty of medical negligence, that such negligence proximately caused the death of Mr. Mitchell, that appellee was negligent by deviating from the applicable standard of care, and that such negligence was the proximate cause of death. Appellee alleged that cases like the present one, involving complex medical issues such as treatment of leukemia, post bone-marrow transplant blood transfusions, and the appropriateness of blood and blood products that were transfused, require expert testimony because they involve medical issues not within the common knowledge of a lay juror.

Attached to appellee's motion for summary judgment was an affidavit of Dr. Gary Markland, a pathologist practicing in Little Rock, Arkansas. His affidavit included the following statements:

> (1) I am a physician who is licensed by the State of Arkansas and I am a pathologist familiar with leukemia and transfusions of blood and blood products following leukemia and bone marrow transplants.
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> (2) I am familiar with the standard of care in Arkansas as it relates to the transfusion of blood and blood products to patients suffering with chronic myelogenous leukemia, which was the form of cancer that the decedent, Guy Mitchell, had and which ultimately caused his death on or about July 23, 1995.
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> (3) I have reviewed available medical records in this case, including records from the University of Arkansas for Medical Sciences, Baxter County Regional Hospital, the office of Dr. Lance Lincoln, and limited records from the M.D. Anderson Hospital in Houston, Texas. Based upon my review of those records, I have a good understanding of Mr. Mitchell's medical condition and treatment which he received, including a previous bone marrow transplant, and frequent transfusions including receiving irradiated red blood cells and platelets, following his transplant.

The affidavit included Dr. Markland's opinion, stated within a reasonable degree of medical certainty, that "the use of the blood and blood products as ordered by Dr. Lincoln and transfused by the staff of Baxter County Regional Hospital, was within the standard of care and did not in any way cause or contribute to Mr. Mitchell's death." Dr. Markland further opined that Mr. Mitchell's death occurred "as a result of his underlying chronic myelogenous leukemia, unrelated to the transfusion of blood or blood products by Dr. Lincoln or the staff of Baxter County Regional Hospital." Mr. Mitchell's death certificate, also attached to appellee's motion, listed chronic myelogenous leukemia as the cause of death.

Appellant filed her response to the motion for summary judgment, contending that genuine issues of material fact existed. Attached to her response was the January 6, 1995, letter from Dr. Gajewski, an assistant professor at M.D. Anderson Cancer Center who practiced in the section of bone marrow transplantation and department of hematology. The letter stated in part:

> Dear Doctor Lincoln:
>
> Thank you once again for assuming care of [Guy Mitchell], my patient with chronic myelogenous leukemia in second chronic phase who underwent a one-antigen HLA-mismatched transplant from his half-brother. For his post-transplant care, he will need to have twice-weekly electrolytes, BUN, creatinine, magnesium, calcium, and phosphate checks as well as a CBC, differential, and platelets.
>
> All blood transfusions need to be irradiated. His original blood type was A positive, his donor type is O positive. I would recommend, if he needs a blood transfusion, to transfuse him with O positive red cells. If he requires platelet products, at this point in time he should be transfused with B-positive platelets.

Dr. Gajewski included in the text of the letter his telephone and pager numbers for emergency contact, and he again thanked Dr. Lincoln "for helping with the care of this patient."

Appellant subsequently filed a first supplement to her response. She attached to it a clinic note by Dr. Gajewski dated March 27, 1995, wherein he stated that Mitchell "has received what we think is 6 units of Group A red cells inappropriately in Arkansas . . ., and we have previously recommended that he receive Group O RBCs." In a second supplement to her response, appellant attached an affidavit of Dr. Barry L. Singer, a hematologist-oncologist practicing in Pennsylvania. Dr. Singer's affidavit includes the following:

> Guy Mitchell had a bone marrow transplant at M.D. Anderson Cancer Center in Houston, Texas, in September 1994. At that time, M.D. Anderson was one of the leading cancer treatment centers in the United States.
>
> When Mr. Mitchell returned to Arkansas to be followed by Dr. Lance Lincoln as his primary care physician, Dr. James L. Gajewski sent a letter to Dr. Lincoln dated January 6, 1995. A copy of the letter is attached hereto as Exhibit "B" and made a part hereof as if set out herein word for word.
>
> I have reviewed the medical records of Guy Mitchell concerning his chronic myelogenous leukemia. The standard of care would require a primary care physician, such as Dr. Lincoln, to follow the

> recommendations of a specialist, such as Dr. Gajewski. Transfusing Mr. Mitchell with A positive red cells, as was done in this case, was a violation of the standard of care. In my opinion, within a reasonable degree of medical certainty, the failure to transfuse Mr. Mitchell with O positive red cells and B positive platelets was a significant contributing factor in the recrudescence of his disease and ultimate demise.

The trial court heard appellee's motion for summary judgment on July 8, 2003, and entered its order granting the motion on October 6, 2003. The order noted that appellee's response to appellant's first set of requests for admissions included the following admissions: that the January 6, 1995, letter was written to appellee; that Dr. Gajewski recommended that Mr. Mitchell be transfused with B positive platelets; and that appellee did not require that Mitchell be transfused in accordance with Dr. Gajewski's recommendation at least on some occasions. The court also noted appellee's denial that the failure to act in accordance with this recommendation was a violation of the standard of care. The order included the court's observations about Dr. Gajewski's letter of January 6, 1995:

> The letter only addresses itself to what the physician who wrote it said should be done on January 6, 1995 before the action complained of was taken. It does not demonstrate that the writer of the letter knew what the standard of care in Baxter County or in Arkansas was nor does, or could, it address . . . the circumstances which were to come about after the letter was written as the case progressed, or what was in fact done or whether what was done was a breach of the applicable standard of care or a cause of harm to the patient.

The trial court observed that the March 27, 1995, clinic note from Dr. Gajewski was not in the form of a document to be used to rebut an affidavit; it also noted appellee's argument that the substance of the note and Dr. Gajewski's letter was not of such a nature as to rebut the assertions of Dr. Markland. Regarding Dr. Singer's affidavit, the court agreed with appellee's argument that Singer's failure to state a familiarity with the standard of care in Arkansas was fatal to the competency of his affidavit to rebut the affidavit of Dr. Markland. In granting appellee's motion for summary judgment, the court concluded:

> Based on the standard of care in Arkansas, the affidavit supplied by defendants provides proof from a medical expert, to a reasonable

> degree of medical certainty, that there was no negligence which was the proximate cause of the injury complained of. Once that is placed in the record, the Plaintiff has the burden of meeting proof with proof. There is nothing in this record from the Plaintiff of an evidentiary nature which shows what the applicable standard is or that Dr. Lincoln's failure to follow the advice of Dr. Gajewski was a violation of the applicable standard of care, or a cause of harm to the patient.

On October 15, 2003, appellant filed a motion for reconsideration, to which she attached an amended affidavit from Dr. Barry Singer. Appellee responded to the motion for reconsideration and moved to strike the supplemental affidavit. On November 17, 2003, the trial court entered an order denying the motion for reconsideration and granting the motion to strike the supplemental affidavit on the basis that it was not timely filed. Noting Dr. Markland's opinion that Mr. Mitchell's death resulted from his underlying chronic myelogenous leukemia rather than from the transfusion of blood or blood products, the court concluded:

> [T]he affidavit of . . . Dr. Markland gives proof that to a reasonable degree of medical certainty, the conduct complained of was within the standard of care and that what was done did not in any way cause or contribute to Mr. Mitchell's death. . . . In order to avoid summary judgment Plaintiff must meet that proof with proof. *Because the matters herein complained of are not within the common knowledge of a jury*[,] *that proof must come from a medical professional who demonstrates the applicable standard, that he knows what that standard is, that the conduct complained about fell short of the standard and that it was the proximate cause of the Plaintiff's harm.*

(Emphasis ours.) The trial court amended its previous order granting summary judgment to include the findings made in its order of November 17, 2003.

Appellant contends on appeal that the trial court erred in granting appellee's motion for summary judgment. The well-settled standard of review for cases in which summary judgment has been granted was recently reiterated by our supreme court:

> 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. 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. 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. 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. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable persons might reach different conclusions from those undisputed facts.

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

Burden of Proof

Arkansas Code Annotated section 16-114-206(a) (1987) specifies that the plaintiff shall have the burden of proving the following in actions for medical injury:

> (1) The degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality;
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> (2) That the medical care provider failed to act in accordance with that standard; and
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> (3) That as the proximate result thereof, the injured person suffered injuries which would not otherwise have occurred.

Although expert testimony may be required to prove these three propositions, it is not needed *per se* in every malpractice case. *See Dodd v. Sparks Reg'l Med. Ctr.*, 90 Ark. App. 191, 204 S.W.3d 579 (2005). It is well-settled that the plaintiff must present expert testimony only when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, when the applicable standard of care is not a matter of common knowledge, and when the jury must have the assistance of experts to decide the issue of negligence. *Id.* (citing *Haase v. Starnes*, 323 Ark. 263, 915 S.W.2d 675 (1996)).

Appellant asserts that the issue in this case, whether an internist was negligent in not following the recommendations of a specialist, is within the understanding of a layperson and therefore requires no expert testimony. She asserts that Dr. Singer's affidavit meets the locality rule and establishes an issue of material fact on proximate cause. She also asserts that the trial court incorrectly interpreted Dr. Gajewski's January 6, 1995, letter to mean that the course of treatment he recommended applied only to the course of treatment to be administered on the date of the letter. We agree.

Again, expert testimony from third-party medical witnesses is not essential or even necessary in every medical malpractice case. *Pry v. Jones*, 253 Ark. 534, 487 S.W.2d 606 (1972). Expert testimony is not required in medical malpractice cases when the asserted negligence lies within the comprehension of a jury of laymen, such as a surgeon's failure to sterilize his instruments or to remove a sponge from an incision before closing it. *Eady v. Lansford*, 351 Ark. 249, 92 S.W.3d 57 (2002).

In *Lanier v. Trammell*, 207 Ark. 372, 180 S.W.2d 818 (1944), a patient developed a severe infection in his left eye and then lost vision in it following minor eye surgery; the supreme court concluded that the jury was authorized to find that the infection was proximately caused by the doctor's negligence in failing to sterilize his instruments and wash his hands before performing the surgery. The *Lanier* court wrote:

> Jurors of ordinary intelligence, sense, and judgment, although not skilled in medical science, are capable of reaching a conclusion without the aid of expert testimony as to whether it is good surgery to permit a wound to heal superficially with nearly half a yard of gauze deeply imbedded in the flesh, and likewise are capable of determining whether or not injurious consequences of some character would probably result. The exact nature and extent of the evil consequences, resulting therefrom, of course, laymen would not be competent to determine without the aid of medical science. *Walker Hospital v. Pulley*, 74 Ind. App. 659, 664, 127 N.E. 559, 128 N.E. 933.

207 Ark. at 380, 180 S.W.2d at 822. In *Pry, supra*, where the patient's left ureter was severed during surgery to remove her left ovary, the supreme court rejected an argument that evidence lacking expert medical testimony was insufficient to permit a jury inference that the alleged acts or omissions were a proximate cause of the alleged damages.

We agree with appellant's argument that it is not beyond the common knowledge of a layperson to know if a non-specialist should follow the instructions of a specialist as to the blood products to be used in the transfusion of a leukemia patient who has undergone a bone-marrow transplant; it is no more complicated than a physician's leaving gauze in a surgical site or severing a ureter during removal of an ovary. Thus, no expert opinion was required regarding the standard of care on this issue, that a non-specialist doctor who assumes the care of a patient with complex medical issues should follow the recommendations of a specialist who has been directly involved in the patient's care. Because it was not necessary for appellant to present expert testimony that the local standard of care required appellee to follow Dr. Gajewski's recommendation of the blood products to be used in Mr. Mitchell's transfusions, we hold that the trial court erred as a matter of law in requiring appellant to produce such evidence.

We also hold that the trial court erred in finding that Dr. Gajewski's letter addressed only what he said should be done on January 6, 1995, the date of the letter. Resolving all doubts and inferences against the moving party, although the letter is dated January 6, 1995, Dr. Gajewski's recommendation could be interpreted to apply prospectively to the blood types to be used "if" the patient requires a blood transfusion or "if" the patient requires platelet products. Viewing the evidence in the light most favorable to appellant, against whom the motion for summary judgment was filed, we agree with her that the letter could be interpreted as a recommendation for Mr. Mitchell's treatment following January 6, 1995, and encompassing the times that the allegedly faulty blood transfusions were performed under the direction of appellee.

Appellee argues that, even assuming that appellant created a question of fact on the issue of negligence, her claims would still fail in the absence of expert testimony on the issue of proximate causation. We agree with appellant's response that the affidavit of Dr. Singer is evidence of an issue of fact on proximate cause. Dr. Singer stated his opinion, within a reasonable degree of medical certainty, that "the failure to transfuse Mr. Mitchell with O positive red cells and B positive platelets was a significant contributing factor in the recrudescence of his disease and ultimate demise." This was in contrast to the affidavit of Dr. Gary Markland, presented on behalf of appellee, that Mr. Mitchell's death

"occurred as a result of his underlying chronic myelogenous leukemia, unrelated to the transfusion of blood or blood products by Dr. Lincoln."

In summary, we hold that, because the asserted acts of negligence by appellee are within a lay jury's comprehension as a matter of common knowledge, appellant is relieved of the obligation to produce expert evidence of the standard of care in the locality. Further, although appellant must produce evidence in the form of expert testimony at trial that the asserted negligence was the proximate cause of Mr. Mitchell's death, *see Lanier, supra,* we hold that Dr. Singer's affidavit stating that the alleged faulty blood transfusions were "a significant contributing factor in the recrudescence of [Mitchell's] disease and ultimate demise," when contrasted with the affidavit of Dr. Markland that the transfusions were unrelated to Mr. Mitchell's death, creates a genuine issue of material fact as to the proximate cause of Mr. Mitchell's death. Therefore, we reverse the granting of the motion for summary judgment, and we remand for trial.

Reversed and remanded.

GRIFFEN, J., agrees.

ROBBINS and BAKER, JJ., concur.

CRABTREE and ROAF, JJ., dissent.

JOHN ROBBINS, Judge, concurring. I agree with the prevailing opinion that the trial court erred in granting summary judgment to appellee and that this appeal should be reversed and remanded. I write only to express my disagreement with the opinion's resolution of one point on appeal, which is whether expert testimony was required to be presented on the issue of negligence. I believe that such evidence was necessary and was provided in this case sufficient to survive the motion for summary judgment.

The prevailing opinion states that whether a non-specialist physician should follow the instructions of a specialist in these circumstances is no more complicated than leaving gauze in a surgical patient or severing a ureter during ovarian surgery. I disagree. The issue is whether not following a specialist's recommendations constitutes medical negligence. I cannot hold this issue is so simple that laypersons could reach such a conclusion without the aid of expert testimony. *See Haase v. Starnes, supra; Robson v. Tinnin,* 322 Ark. 605, 911 S.W.2d 246 (1995). This is especially

true where, as here, the defense provided expert opinion from a pathologist that failure to abide by those recommendations was not negligent and did not cause or contribute in any way to Mr. Mitchell's death. Because appellee filed a motion for summary judgment with a supportive affidavit, it was incumbent upon appellant to meet proof with proof on both the existence of negligence and proximate cause. *See Rice v. Tanner, supra.*

To that end, appellant provided such proof in the form of expert testimony from Dr. Singer, whose affidavit is set forth in the majority opinion. The only fault that the trial court found with the affidavit was its failure to state explicitly that Dr. Singer was familiar with the standard of care for a physician in Dr. Lincoln's locality. A subsequent supplemental affidavit put in those "magic words," but it was struck by the trial court. It must be remembered that this case came for consideration on a motion for summary judgment, where all doubts should be resolved and any reasonable inferences should be drawn in favor of the non-movant. *See Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998). In that light, Dr. Singer's affidavit meets the threshold requirement on standard of care.

The affidavit, without reciting the entirety of it, sets forth that Dr. Singer is a board certified specialist in hematology/oncology from Pennsylvania, that he knew of the specific details of the patient's care both in Texas under Dr. Gajewski and in Arkansas under Dr. Lincoln, that he knew of the recommendations in the letter sent by Dr. Gajewski to Dr. Lincoln, and that he had reviewed the medical records concerning the patient's chronic myelogenous leukemia. The affidavit then goes on to state that:

> [T]he standard of care would require a primary care physician, such as Dr. Lincoln, to follow the recommendations of a specialist, such as Dr. Gajewski. Transfusing Mr. Mitchell with A positive red cells, as was done in this case, was a violation of the standard of care. In my opinion, within a reasonable degree of medical certainty, the failure to transfuse Mr. Mitchell with O positive red cells and B positive platelets was a significant contributing factor in the recrudescence[1] of his disease and ultimate demise.

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[1] "Recrudescence" is defined in *Webster's Dictionary* as "a new outbreak after a period of abatement or inactivity: Renewal." It is synonymous with "return."

This affidavit sets forth the standard of care for Dr. Lincoln and others like him, a primary care physician practicing in Mountain Home, Arkansas. The trial court found the defense expert's opinion viable when he stated a familiarity with the standard of care for primary care doctors that applied to the entire state of Arkansas, which would include Baxter County, where Dr. Lincoln practices. Interestingly, the trial court approved of a state-wide standard, although the purpose of the locality rule is to prevent higher standards ordinarily found in the more urban areas from being applied where less demanding standards tend to prevail. *See Gambill v. Stroud*, 258 Ark. 766, 531 S.W.2d 945 (1976). Nonetheless, when viewing the affidavit provided by appellant's expert under the proper standard, it meets with the statutory requirements of Ark. Code Ann. § 16-14-206(a)(1) (1987) and was sufficient to allow the case to go forward.

As to causation, I agree with the prevailing opinion that appellant's expert testimony provided evidence of causation sufficient to withstand the motion for summary judgment. I add my recognition of The Medical Malpractice Act, which applies to all causes of action for "medical injury." The Act defines "medical injury" in Ark. Code Ann. § 16-114-201, which provides in relevant part that it means:

> any adverse consequences arising out of or sustained in the course of the professional services being rendered by a medical care provider, whether resulting from negligence, error, or omission in the performance of such services[.]

Id. at subsection (3). Breaching the standard of care thereby causing a deadly disease to recur and hasten the patient's death is an adverse consequence.

For the foregoing reasons, I concur.

BAKER, J., joins in this opinion.

ANDREE LAYTON ROAF, Judge, dissenting. I would affirm the trial court's grant of summary judgment. First, I do not agree that the nature of the alleged negligence here is such that no expert testimony is needed. The majority concludes that using a different blood type than the one "recommended" in a letter by the deceased's treating physician in Texas is clear negligence. Without

additional expert testimony about the nature or import of the recommendation, along with the other alternatives recommended in the treating physician's letter to the appellee, Dr. Lincoln, there is no way that a lay person could even guess that the failure to follow this recommendation was negligence per se. However, the majority concludes that it must be because the letter was from a "specialist" to a "non-specialist," and that such negligence is no more complicated to comprehend than when a surgeon leaves a foreign object in the surgical site after an operation or severs a ureter during removal of an ovary. This is ludicrous, and it is certainly not readily apparent from the ambiguous nature of the letter's directive whether any harm might result from the failure to follow the "recommendation." This case is not at all analogous to the facts of the case relied upon in part by the majority, *Lanier v. Trammell*, 207 Ark. 372, 180 S.W.2d 818 (1944), in which the court in essence held that jurors could make the leap between dirty hands and instruments to a resulting an eye infection without expert testimony. I cannot make such a leap in this case to conclude that there would be "injurious consequences" resulting from the use of a different blood type, and the majority most certainly could not either.

The appellant thus was required to prove, with expert testimony, "the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he practices or in a similar locality." Ark. Code Ann. § 16-114-206(a)(1) (1987). An expert witness need not be one who has practiced in the particular locality, or one who is intimately familiar with the practice in it, in order to be qualified as an expert to testify in a medical malpractice action "if an appropriate foundation is established to demonstrate that the witness is familiar with the standard of practice in a similar locality, either by his testimony or by other evidence showing the similarity of localities." *Grice v. Atkinson*, 308 Ark. 637, 826 S.W.2d 810 (1992).

In this instance, because appellant's expert, Dr. Singer, failed to establish the standard of care in Baxter County, Arkansas, or a similar locality, the trial court granted Dr. Lincoln's motion for summary judgment. Dr. Singer, a hematology-oncology expert located in Pennsylvania, was silent in his original affidavit as to any community standard, much less the standard of care applicable in

Arkansas. There was no evidence in his affidavit that he was familiar with the standard of care in Arkansas, and there was no attempt to compare his locale with Baxter County or anywhere in Arkansas. His original affidavit did not even identify the location of his current practice. His affidavit simply stated that "the standard of care would require a primary care physician, such as Dr. Lincoln, to follow the recommendations of a specialist." The trial court struck the supplemental affidavit of Dr. Singer in which he asserted familiarity with the standard of care in Arkansas, from the record; appellant does not argue that the trial court erred when it struck this supplemental affidavit from the record. Because Dr. Singer's original affidavit did not offer any proof as to the applicable standard of care, the appellant failed to meed her burden of proof according to Ark. Code Ann. § 16-114-206(a)(1). *See Reagan v. City of Piggott*, 305 Ark. 77, 805 S.W.2d 636 (1991) (granting summary judgment when the plaintiff presented no expert proof to establish the standard of care of a violation of the standard of care).

In addition, the trial court granted summary judgment alternatively based upon the appellant's failure to establish the required element of proximate causation. Proximate cause is defined, for negligence purposes, as that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *Kilgore, supra.* In other words, Ark. Code Ann. § 16-114-206(a) (1987) implements the traditional tort standard of requiring proof that "but for" the tortfeasor's negligence, the plaintiff's injury or death would not have occurred. *Ford v. St. Paul Fire & Marine Ins. Co.*, 339 Ark. 434, 5 S.W.3d 460 (1999).

Here, appellee's expert, Dr. Markland, stated that Dr. Lincoln's treatment did not cause or contribute to Mr. Mitchell's death and that his underlying condition, the leukemia, was the cause of his death. Dr. Singer, appellant's expert, stated that Dr. Lincoln's action was only "a significant contributing factor" to the ultimate demise of the decedent. This infers that another condition actually caused his death. Thus, even if Dr. Singer's original affidavit was sufficient to set forth the proper standard of care, it did not establish that, *but for* any violation of the standard of care on the part of Dr. Lincoln, the decedent would have survived, and such survival surely cannot be inferred from Dr. Singer's affidavit. While the affidavit may have sufficed in a medical malpractice case

to establish that some kind of medical injury to the deceased occurred, Dr. Singer's affidavit does not establish proximate causation for his death.

I would affirm.

CRABTREE, J., joins.

Charles W. UTLEY *v.* STATE of Arkansas

CA CR 04-490 219 S.W.3d 709

Court of Appeals of Arkansas
Opinion delivered December 7, 2005

[Rehearing denied January 18, 2006.]

Bearden Law Firm, by: *Mike Bearden*, for appellant.

Mike Beebe, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. Charles W. Utley appeals from his conviction for negligent homicide in the death of W.R. Perdue. He challenges the sufficiency of the evidence. Because the State failed to present evidence that appellant was criminally negligent, we reverse.[1]

On January 17, 2003, appellant was involved in a three-vehicle accident when the loaded garbage truck he was driving crossed the center line and collided with two vehicles on Highway 61 south of Blytheville. Brent Young was traveling in the northbound lane. Perdue was driving behind him. Young testified that, as he crossed a bridge while traveling north, he saw appellant's southbound truck cross the center line. Appellant's truck nicked Young's truck, shattering one of Young's windows and hitting the bed of Young's truck. Young then turned around and saw "a ball of fire on the bridge." He testified that he was driving around a curve and did not know that appellant was in his lane.

John Henderson testified that he was working at a cemetery near the bridge when the accident happened. He had his back to the bridge when he heard something that sounded like an explosion. He turned around and saw a fire on the bridge. Henderson testified that he saw appellant's truck slide past the bridge and into a ditch.

Officer James Creecy arrived at the scene at 1:15 p.m. He testified that it was a clear, cold day and that he did not see any problems with the road. He testified that he saw some skid marks, yaws (marks a vehicle makes when it is turning and bearing down instead of braking), and gouges between the first truck and appellant's truck. Creecy saw no impact conditions on the southbound side of the highway. On cross-examination, Creecy testified that appellant was calm and subdued when he saw him. He also testified that he did not know how close Perdue was driving to Young or whose fault the accident was. On redirect, he testified

[1] This case was originally submitted to this court on December 8, 2004. It was remanded for rebriefing because appellant failed to include a copy of the notice of appeal in his addendum. *See Utley v. State*, CACR 04-490 (Feb. 2, 2005) (not designated for publication). Appellant has submitted substantially the same brief, with the previous error corrected.

that he did not notice any defects in appellant's truck, but on recross, he admitted that he did not inspect appellant's vehicle.

Officer Darrell McClung diagramed the scene of the accident. He testified that the area of impact of the first collision was one hundred eleven feet from the beginning of the bridge and that the second area of impact was on the bridge and seven feet left of the center line. He saw no skid marks, yaws, or anything else to suggest that there had been any changes in one of the vehicles between the first area of impact and the second area of impact.

A Mississippi County jury found appellant guilty of negligent homicide and sentenced him to one year in the Arkansas Department of Correction and a $1,000 fine. This appeal followed.

For his sole point on appeal, appellant argues that the trial court erred in denying his motion for directed verdict. He contends that the State presented insufficient evidence to show that he was criminally negligent. A directed-verdict motion is a challenge to the sufficiency of the evidence. *Doubleday v. State*, 84 Ark. App. 194, 138 S.W.3d 112 (2003). We review the evidence in the light most favorable to the State. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* Only evidence supporting the verdict will be considered. *Id.* Circumstantial evidence provides the basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Von Holt v. State*, 85 Ark. App. 308, 151 S.W.3d 1 (2004). Whether the evidence does so is a question for the jury. *Id.*

Arkansas Code Annotated section 5-10-105(b)(1) (Supp. 2005) provides that "[a] person commits negligent homicide if he or she negligently causes the death of another person." A person is criminally negligent when "he should be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur." Ark. Code Ann. § 5-2-202(4) (Repl. 1997). The criminal code further states that "[t]he risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a *gross deviation* from the standard of care that a reasonable person would observe in the actor's situation."

Ark. Code Ann. § 5-2-202(4) (emphasis added). This is different from the definition of negligence in a civil case, which is merely the failure to do something that a reasonably careful person would do. *Wal-Mart Stores, Inc. v. Londagin*, 344 Ark. 26, 37 S.W.3d 620 (2001); *City of Little Rock v. Cameron*, 320 Ark. 444, 897 S.W.2d 562 (1995). The degree of negligence sufficient to establish civil liability is not sufficient to establish criminal liability. *Hunter v. State*, 341 Ark. 665, 19 S.W.3d 607 (2000); *Phillips v. State*, 6 Ark. App. 380, 644 S.W.2d 288 (1982).

Both appellant and the State cite several negligent-homicide cases. In *Ayers v. State*, 247 Ark. 174, 444 S.W.2d 695 (1969), both the appellant and the victim had a blood-alcohol level of 0.15. While the supreme court stated that "[t]he criminal negligence in this case falls most heavily on the driver who crossed the center line of the highway," it reversed the appellant's negligent-homicide conviction because there was no evidence concerning whether the defendant or the victim crossed the center line. *Id.* at 187, 444 S.W.2d at 695. Our supreme court in *Baker v. State*, 237 Ark. 862, 376 S.W.2d 673 (1964), affirmed a conviction for negligent homicide when the evidence showed that the appellant was speeding in the opposite lane of traffic and had three drinks of whiskey that afternoon. In *Lowe v. State*, 264 Ark. 205, 570 S.W.2d 253 (1978), the supreme court affirmed the appellant's negligent-homicide conviction when the State presented evidence that the appellant was excessively speeding when he hit a stopped car and left ninety-eight feet of scuff marks before the impact and forty-nine feet afterward. In *Hunter v. State*, *supra*, the evidence was sufficient to convict the appellant of negligent homicide when the appellant testified that he was familiar with the road and was attempting to pass a logging truck going uphill in the rain when the collision occurred.

The evidence here indicated that appellant's garbage truck crossed the center line, struck one car, and struck a second car over one hundred feet away. There were no markings on the ground to suggest that he braked or otherwise tried to prevent the accident. The State presented no other evidence in this case supporting the contention of criminal negligence. Any number of factors could have caused appellant's truck to cross the center line. In all of the aforementioned cases, the State presented some other evidence (excessive speeding, intoxication, driving in the opposite lane of traffic, passing another vehicle while driving uphill) show-

ing a gross deviation from the standard of care. The only factor that the State presented to show that appellant was criminally negligent was that he crossed the center line and that he made no apparent effort to prevent the collision with Perdue's automobile after he struck the first automobile. Perdue's family may have a civil negligence action against appellant for his failure to maintain his garbage truck on the right side of the road; however, the State presented insufficient proof that appellant's actions rose to the level of *criminal* negligence.[2]

We hold that the trial court erred in denying appellant's motion for directed verdict. Accordingly, appellant's conviction for negligent homicide is reversed.

Reversed and dismissed.

ROBBINS and BIRD, JJ., agree.

Katheryn NEVES da ROCHA and Mateus Neves da Rocha *v.* ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 04-915 219 S.W.3d 660

Court of Appeals of Arkansas
Opinion delivered December 7, 2005

[2] In reaching this observation we do not intend to suggest an opinion that appellant is or is not liable under a civil-negligence theory.

Jeff Rosenzweig, for appellants.

Gray Allen Turner, for appellee, Arkansas Department of Human Services.

Stasia D. Burk, Attorney ad Litem, for appellee V.N.

DAVID M. GLOVER, Judge. In an order entered November 16, 2004, the parental rights of Katheryn and Mateus Neves da Rocha, appellants herein, were terminated as to their daughter, V.N. Appellants now appeal that order, arguing that the trial court misapplied the doctrines of res judicata and collateral estoppel in this case, thereby improperly dispensing with DHS's burden of proof and depriving appellants of a proper opportunity to be heard. Under this broad point of appeal, appellants have delineated eight subpoint headings:

A. Definitions of res judicata and a particular type thereof: collateral estoppel.

B. The Neves da Rochas did not receive the full and fair hearing in the earlier proceedings required for application of the doctrines.

C. The preclusion doctrines are inapplicable because of differences in the standard of proof.

D. The preclusion doctrine is particularly inapplicable to the termination hearing because the case was on appeal at the time.

E. The circuit court abused its discretion by permitting the use of offensive collateral estoppel.

F. The apparent application of Ark. Code Ann. § 9-27-341 as a basis to apply preclusion doctrines is also flawed.

G. In addition to the structural problems caused by the circuit court's rulings, the Neves da Rochas can demonstrate actual prejudice from the denial of their right to call an expert witness.

H. The denial of continuances also prejudiced the Neves da Rochas.

In *Bearden v. Department of Human Services*, 344 Ark. 317, 328, 42 S.W.3d 397, 403-04 (2001) (citations omitted), our supreme court, citing *Ullom v. Department of Human Services*, 340

Ark. 615, 12 S.W.3d 208 (2000), set forth the well-settled standard of review in cases where parental rights have been terminated:

> We have held that when the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. Parental rights, however, will not be enforced to the detriment or destruction of the health and well-being of the child. The facts warranting termination of parental rights must be proven by clear and convincing evidence. In reviewing the trial court's evaluation of the evidence, we will not reverse unless the court's finding of clear and convincing evidence is clearly erroneous. Clear and convincing evidence is that degree of proof which will produce in the factfinder a firm conviction regarding the allegation sought to be established. In resolving the clearly erroneous question, we must give due regard to the opportunity of the chancery court to judge the credibility of witnesses. Additionally, we have noted that in matters involving the welfare of young children, we will give great weight to the trial judge's personal observations.

In the present case, a petition for emergency custody was filed by DHS on January 25, 2004. In the affidavit in support of that petition, Raeshunna Robinson, a DHS employee, stated that V.N., who was born on December 2, 2003, was taken to the emergency room at Arkansas Children's Hospital for a second time on January 15, 2004, where it was determined that she had multiple bone fractures all over her body that were of varying ages. She had previously been taken to the emergency room on January 10, 2004, at which time she was diagnosed with a broken clavicle and humerus. Robinson stated in her affidavit that V.N. was taken into DHS custody on January 22, 2004, because she had too many unexplained broken bones in her body and that the agency was concerned for her safety and welfare. An order of emergency custody was filed of record on January 26, 2004, placing custody of V.N. with DHS; appointing Stasia Burk as attorney ad litem for her; and setting the probable-cause hearing for January 30, 2004.

The probable-cause hearing was held on January 30, 2004, at which time the trial judge found that it was contrary to V.N.'s health and welfare to be returned to her parents due to the multiple number of fractures she had sustained without any explanation. At that hearing, both parents testified that they did not know what

caused all the fractures, and they denied harming their child. Katheryn Neves da Rocha testified that V.N.'s bone densitometry test and parathyroid and vitamin D levels were all normal; however, the results of a collagen test to determine whether she had osteogenesis imperfecta (brittle-bone disease) were not back at the time of this hearing. The trial judge scheduled the adjudication hearing for March 18 and 24, 2004, setting the date out as far as possible in order to hopefully have the results of the collagen test at that time, but stating that the matter absolutely had to be heard within sixty days, and that under no circumstances could the trial court continue the hearing any later than sixty days. *See* Ark. Code Ann. § 9-27-327(a)(1)(B) (Supp. 2005) (adjudication hearing to be held within thirty days after the probable-cause hearing; adjudication hearing can be continued for thirty days upon motion of court and parties for good cause shown, but the adjudication hearing shall not be completed more than sixty days after the probable-cause hearing).

The adjudication hearing was held on March 24, 2004. At the beginning of the hearing, appellants' attorney objected to holding the hearing that day, arguing that the statute mandating that the adjudication hearing be held within sixty days of the probable-cause hearing was unconstitutional and violated his clients' rights to procedural and substantive due process because the one definitive test regarding brittle-bone disease had not yet been completed.

In response, DHS cited *Hathcock v. Arkansas Department of Human Services*, 347 Ark. 819, 69 S.W.3d 6 (2002), in which our supreme court held that the purpose of the time limit on continuances for adjudication hearings was clear,[1] and that the limited continuance provision of the juvenile code controlled rather than Rule 40(b) of the Arkansas Rules of Civil Procedure because it served the specific purpose of expediting hearings involving children in out-of-home placements. Based upon this case, the trial court denied appellants' request to continue the hearing until the results of the brittle-bone test could be learned.

At the adjudication hearing, Katheryn Neves da Rocha testified again that she did not know what caused V.N.'s injuries.

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[1] The statutory provision in place at the time *Hathcock* was decided was fifty days, which has now been increased to sixty days. *See* Ark. Code Ann. § 9-27-315(d)(2) (Supp. 2005).

She stated that except for her husband dropping V.N. one time, they did not know who could have done this to their child. Mateus Neves da Rocha testified that one of the fractures could be explained by the incident when he accidentally dropped his daughter, but he did not have an explanation for any of the other fractures. Both parents expressed that they thought V.N. would be safe with them.

In its amended adjudication order, the trial court found that V.N. was dependent/neglected; that the injuries suffered by V.N. were not accidental; and that one or both of the parents were the likely ones who caused the injuries. The trial court noted that this was a sad case, but it had to rule on the testimony that had been presented. The trial court pointed out that both parents denied harming the child, but X-rays indicated fractures of varying ages, ranging from two to four weeks old. The trial court found that there were several types of fractures, some consistent with fractures that a child-abuse victim might have, including bucket-handle fractures and oblique fractures, and that the radiologist's findings were suspicious of trauma. The trial court also found that the evidence and observation of medical personnel did not reveal symptoms of brittle-bone disease, while noting that the results of the one test that would determine brittle-bone had not been returned. The trial court further found that V.N. was not safe in her parents' home. *The findings in this adjudication order were not appealed.*

At the disposition hearing on April 7, 2004, the trial court found that adoption should be the goal because it was in V.N.'s best interests due to her injuries and the fact that one or both of her parents likely caused the injuries. On May 13, 2004, the trial court entered a no-reunification-efforts order, finding that it was in V.N.'s best interests that no reunification services be provided. The trial court found that V.N. had been subjected to extreme and repeated cruelty; that the injuries were not accidental; and that one or both parents likely caused the injuries. The trial court also noted that the last bone test, the one for osteogenesis imperfecta, had come back with no abnormal findings.

At the no-reunification hearing, DHS's attorney moved to incorporate the record of the case into the hearing, and there were no objections. Also at that hearing, the trial court denied appellants' motion to allow Dr. Charles Hyman to testify regarding alternative theories of the source of V.N.'s injuries other than from her parents, finding that all of the issues that Dr. Hyman would

testify about had already been litigated, and that it was res judicata and not relevant to that stage of the proceeding. Appellants filed a notice of appeal after entry of the no-reunification order.[2]

The trial court entered an order on November 16, 2004, from the October 29, 2004 termination hearing finding that it was in V.N.'s best interests to terminate appellants' parental rights. In that order, the trial court noted that it incorporated into the record all of the pleadings and testimony in the case incurred before the termination of parental rights hearing; that it denied appellants' request to allow Dr. Hyman to testify; and that it granted the termination of appellants' parental rights. Appellants also filed a notice of appeal from this order.

Each of the first six subpoints of appellants' argument pertain to the trial court's refusal to allow appellants to present testimony from Dr. Charles Hyman at the no-reunification hearing that refuted a finding of child abuse on the part of appellants. The trial court refused to allow Dr. Hyman to testify, stating, "All the issues that Mr. Smith believes Dr. Hyman can testify about have already been litigated. It is res judicata. It is not relevant to this stage of the proceeding."

The process through which a parent or parents travel when a child is removed from their home consists of a series of hearings — probable cause, adjudication, review, no reunification, disposition, and termination. All of these hearings build on one another, and the findings of previous hearings are elements of subsequent hearings. "[T]he proceedings and orders pertaining to the termination of parental rights [are] in fact a continuation of the original dependency-neglect case." *Wade v. Arkansas Dep't of Human Servs.*, 337 Ark. 353, 361, 990 S.W.2d 509, 514 (1999). Furthermore, a second dependency-neglect adjudication is not required at the final hearing — DHS must only prove that the child has been previously adjudicated dependent/neglected. *Bearden v. Arkansas Dep't of Human Servs.*, 344 Ark. 317, 42 S.W.3d 397 (2001).

In this case, appellants had the opportunity at the adjudication hearing to present competing evidence to DHS's assertion that they had abused their child — yet they presented none. This

[2] This court granted appellants' motion to hold briefing in abeyance until the record from the termination hearing could be lodged.

was the place for Dr. Hyman's testimony — prior to the adjudication of V.N. as dependent/neglected and the trial court's findings that the injuries were not accidental, that appellants were the ones who likely caused the injuries, and that V.N. was in fact a victim of child abuse.

It is not necessary to address appellants' arguments concerning res judicata because they did not appeal the adjudication order, which is an appealable order. Ark. R. App. P. – Civ. 2(c)(3)(A). Because appellants failed to appeal this order, in accordance with our supreme court's decision in *Jefferson v. Arkansas Department of Human Services*, 356 Ark. 647, 158 S.W.3d 129 (2004), this court cannot now consider arguments relating to errors made during the adjudication hearing. Appellants are trying to relitigate the merits of the adjudication hearing with the introduction of Dr. Hyman's testimony at both the no-reunification hearing and the termination hearing, and *Jefferson* makes it clear that that is improper. *See also Lewis v. Arkansas Dep't of Human Servs.*, 364 Ark. 243, 217 S.W.3d 788 (2005).

In their next subpoint, appellants argue that they can demonstrate actual prejudice from the denial of their right to call Dr. Hyman as an expert witness. However, as discussed above, Dr. Hyman's intended testimony was offered to refute the earlier adjudication-hearing finding that V.N. had been abused, and that is not allowed under our supreme court's holding in *Jefferson, supra.*

Appellants' last subpoint, that the denial of continuances prejudiced them, is broken down into the denial of the original continuance in the dependency-neglect hearing and the denial of the continuance at the termination hearing. With regard to the denial of the continuance in the dependency-neglect hearing, it is clear that we are bound by the reasoning set forth above from *Hathcock v. Arkansas Department of Human Services, supra*, which is applicable in this case and which supports the denial of appellants' motion for continuance at the dependency-neglect hearing.

We also find no error with regard to the denial of the continuance at the termination hearing to afford Dr. Hyman an opportunity to examine V.N. As the trial court stated at the hearing, it could see no other purpose for Dr. Hyman's testimony than to refute the original cause of the injuries and the finding of

dependency neglect from the adjudication hearing, which, as discussed above, is not permitted by our supreme court's holding in *Jefferson, supra.*

Affirmed.

NEAL and VAUGHT, JJ., agree.

Donna SMITH *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 04-1309 219 S.W.3d 705

Court of Appeals of Arkansas
Opinion delivered December 7, 2005

DeNita D. Moak, for appellant.

Gray Allen Turner, for appellee.

Teresa McLemore, Attorney ad Litem, for appellee M.S.

ANDREE LAYTON ROAF, Judge. This is a no-merit appeal from a termination of parental rights. Counsel for Donna Smith has filed a motion to withdraw and a no-merit brief pursuant to *Linker-Flores v. Ark. Dep't of Human Servs.*, 359 Ark. 131, 194 S.W.3d 739 (2004) (*Linker-Flores I*), and Ark. Sup. Ct. R. 4-3(j)(1). Smith was provided a copy of counsel's brief, and filed *pro se* points for reversal pursuant to Ark. Sup. Ct. R. 4-3(j)(2). Arkansas Department of Human Services (DHS) has filed a brief in response. We affirm the trial court's termination of Smith's parental rights.

Because this is a no-merit appeal, only a brief recitation of the event that led to the minor child's removal from the home is necessary. On January 17, 2003, DHS exercised a seventy-two hour hold on M.S. after her mother, Donna Smith, was arrested on drug-related charges. DHS received a call reporting that five children, including M.S., had been found in a home in which there had been a methamphetamine lab raid. The lab, including chemicals and a Bunsen burner, was found in a closet adjacent to a room in which the children slept. The house was in disarray with a bad odor, and roaches were everywhere. M.S. was very sick and had to be taken to the doctor. After M.S. was taken into DHS custody, Smith was arrested, because DHS did not want the mother arrested in front of the children. DHS then filed a petition for emergency custody alleging that Smith's home was environmentally unsafe; that M.S.'s health and safety were at risk because there was a

methamphetamine lab next to the bedroom where she slept; and that M.S. had no appropriate caregivers because both of her parents were incarcerated.

The termination hearing in this case was held on July 7, 2004, a year and a half later. At that time, Smith was incarcerated, having been convicted of the methamphetamine-related offenses that led to her arrest at the beginning of the case. She was sentenced to seventy-two months' imprisonment. Because she was incarcerated, she was not in attendance at the hearing. Apparently, her attorney had only filed his request for transportation of Smith to the hearing a few days earlier. The request had not been granted, and he moved for a continuance. The motion was denied, and Smith's testimony was taken via telephone. The denial of Smith's motion for continuance is the sole adverse ruling resulting from the termination hearing, in addition to the trial court's ultimate decision to terminate.

In *Linker-Flores I*, *supra*, our supreme court held that the no-merit procedure set forth in *Anders v. California*, 386 U.S. 738 (1967), shall apply in cases of indigent-parent appeals from orders terminating parental rights. The court held that appointed counsel for an indigent parent on a first appeal from a termination order may petition to withdraw as counsel if, after a conscientious review of the record, counsel can find no issue of arguable merit for appeal. *Id.* Counsel's petition must be accompanied by a brief discussing any arguably meritorious issue for appeal. *Id.* The indigent parent must be provided with a copy of the brief and notified of her right to file points for reversal within thirty days. *Id.* If the appellate court determines, after a full examination of the record, that the appeal is frivolous, the court may grant counsel's motion and dismiss the appeal.[1] *Id.* If the court finds any of the legal points arguable on the merits, it will appoint new counsel to argue the appeal. *Id.* The court allowed Linker-Flores's counsel to file a no-merit brief. On November 17, 2005, the supreme court decided *Linker-Flores II*, based upon the *Anders* procedure. *Linker-Flores v. Ark. Dep't of Human Servs.*, 364 Ark. 224, 217 S.W.3d 107 (2005) (*Linker-Flores II*). In a companion case to *Linker-Flores II*, handed down on the same day, *Lewis v. Ark. Dep't of Human Servs.*,

[1] The appropriate procedure pursuant to *Anders* is to grant counsel's motion to withdraw and affirm the conviction, not dismiss the appeal. *See Moore v. State*, 362 Ark. 70, 207 S.W.3d 493 (2005).

364 Ark. 243, 217 S.W.3d 788 (2005), the court also held that a "conscientious review of the record" requires the appellate court to review all pleadings and testimony in the case on the question of the sufficiency of the evidence supporting the decision to terminate, when the trial court has taken the prior record into consideration in its decision. The supreme court further held that only adverse rulings arising at the termination hearing need be addressed in the no-merit appeal where there has been no appeal from the prior orders in the case, because the prior orders are considered final appealable orders pursuant to Ark. R. App. P. – Civ. 2(c)(3). Accordingly, this court must review the entire record on the issue of the trial court's ultimate decision to terminate, and, additionally, any adverse ruling made in the course of the termination hearing itself.

In this case, the trial court found that the child had come into care due to the parents' drug use and instability; that the child had been out of the home in excess of twelve months and conditions had not been remedied, that the mother was incarcerated again for drugs and had failed to provide support for the child, that the mother had been sentenced to 144 months in prison for having a meth lab in her home with the child present; that she had been incarcerated twice in the child's short life; and that she had failed to provide permanency, support, or for the basic needs of the child.

Based upon our review of the record, the trial court's findings in this regard are supported by the record and constitute more than clear and convincing evidence warranting termination, pursuant to Ark. Code Ann. § 9-27-341 (Repl. 2002) and the prior published case law from both this court and the supreme court. *See Trout v. Ark. Dep't Human Servs.*, 359 Ark. 283, 197 S.W.3d 486 (2004). There simply is no case authority upon which to base reversal of a trial court's decision to terminate under circumstances such as were present in this case, even where the parent has made some attempts to rectify her conditions. There were no such attempts made in this case in any event. An appeal on the merits of this case would indeed be wholly frivolous. *See Trout, supra*; *Camarillo-Cox v. Ark. Dep't of Human Servs.*, 360 Ark. 340, 201 S.W.3d 391 (2005).

With regard to the adverse ruling which occurred at the termination hearing, a trial court shall grant a motion for continuance only upon a showing of good cause and only for so long as is

necessary. *Green v. State*, 354 Ark. 210, 118 S.W.2d 563 (2003). The law is well established that the granting or denial of a motion for continuance is within the sound discretion of the trial court, and that court's decision will not be reversed absent an abuse of discretion amounting to a denial of justice. *Id.* When deciding whether a continuance should be granted, the trial court should consider the following factors (1) the diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the witness's attendance in the event of postponement; (4) the filing of an affidavit, stating not only what facts the witness would prove, but also that the appellant believes them to be true. *Id.* Additionally, the appellant must show prejudice from the denial of a motion for continuance. *Id.*

This issue also does not present a meritorious issue on appeal. Smith's counsel was not diligent in requesting the transportation order and did not make a motion for continuance until the day of the termination hearing, which was not diligent. Moreover, Smith was not prejudiced, as she was allowed to testify via telephone.

Finally, Smith has filed what purports to be points for reversal in the form of a letter to the clerk. Her letter advised that she expected to be out of prison by September 2005 and prayed that she be given more time to prove to the court that she can change. A subsequent letter advised that she is now out of prison, has a home and a job, and asks to see her daughter. Smith does not raise any issue in her letters which would provide a basis for a meritorious appeal. Accordingly, counsel's motion to withdraw is granted, and the trial court's order terminating parental rights is affirmed.

BIRD and BAKER, JJ., agree.

Tony MONCUS, Deceased *v.* BILLINGSLEY LOGGING
and American Interstate Insurance Company

CA 05-264 219 S.W.3d 680

Court of Appeals of Arkansas
Opinion delivered December 7, 2005

Hart Law Firm, L.L.P., by: *Neal W. Hart*, for appellant.

Michael E. Ryburn, for appellee.

ANDREE LAYTON ROAF, Judge. This is a workers' compensation case involving the "going-and-coming rule." Tony Moncus was killed in an automobile accident while on his way to work for appellee Billingsley Logging. The issue on appeal is whether he was performing employment services at the time he was killed. The ALJ found that Moncus was not performing employment services, and the Commission agreed. Moncus's representative ("Moncus") argues on appeal that this ruling is erroneous. We affirm.

Moncus worked as a log cutter for Billingsley Logging. On August 19, 2003, he was killed in a motor-vehicle accident while driving his personal truck to the site where he would be logging that day. Mitchell Billingsley, the owner of Billingsley Logging, testified that he tried to get Moncus to ride in a company truck but that Moncus insisted upon driving his personal truck to the job site because he wanted to leave the job site early for a personal errand. Billingsley told the whole logging crew to meet at a service station that was centrally located to everyone's house around 6:30 a.m. so that he could show them where they would be logging that day. Billingsley told the crew to follow him, and the caravan left the parking lot on their way to the new logging site with everyone riding in a company truck except for Moncus. According to Billingsley, the crew only met like this before work approximately four to five times a year because, most of the time, the crew knew how to get to the logging site where they would be working for the day.

Moncus was killed in a head-on motor-vehicle accident before he ever arrived at the logging site. He was driving his own pickup truck and there were no tools or equipment in his truck that belonged to Billingsley Logging. Moncus was paid according to the number of tons of wood that he cut, so he was paid nothing on the day of his death because he had not yet cut any wood.

A claim was filed for workers' compensation benefits on behalf of Moncus. The administrative law judge (ALJ) held that Moncus did not sustain a compensable fatal injury because he was not performing an employment service at the time the accident occurred. The ALJ found that the preponderance of the evidence did not prove that Moncus's death was the result of any injury that was compensable under the Workers' Compensation Act. The Arkansas Workers' Compensation Commission affirmed and adopted the decision of the ALJ.

In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if substantial evidence supports the decision. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). Substantial evidence exists if reasonable minds could reach the same conclusion. *Id.* The issue on appeal is not whether we might have reached a different result or whether the evidence would have supported a contrary finding. *Id.* If reasonable minds could reach the Commission's conclusion, we must affirm the Commission's decision. *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 Commission's conclusions. *Id.*

Arkansas Code Annotated section 11-9-102(4)(A)(1) (Supp. 2003) defines compensable injury as "an accidental injury causing internal or external harm . . . arising out of and in the course of employment. . . ." Employment services are performed when the employee does something that is generally required by his or her employer. *Collins v. Excel Spec. Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002); *Pifer v. Single Source Transp.* 347 Ark. 851, 69 S.W.3d 1 (2002). We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." *Collins, supra*; *Pifer, supra.* The test is whether the injury occurred "within the time and space boundaries of employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interests directly or indirectly." *Collins, supra*; *Pifer, supra.*

An employee traveling to and from the workplace is generally not acting within the course of employment. *Swearengin v. Evergreen Lawns*, 85 Ark. App. 61, 145 S.W.3d 830 (2004). The "going-and-coming" rule ordinarily precludes recovery for an injury sustained while an employee is going to or returning from work. *Id.* The rationale behind this rule is that an employee is not within the course of his employment while traveling to and from his job, and all persons, including employees, are subject to the recognized hazards of travel to and from work in a vehicle. *Id.*; *Am. Red Cross v. Hogan*, 13 Ark. App. 194, 681 S.W.2d 417 (1985). There are exceptions to the going-and-coming rule:

> (1) where an employee is injured while in close proximity to the employer's premises; (2) where the employer furnishes the transportation to and from work; (3) where the employee is a traveling salesman; (4) where the employee is injured on a special mission or errand; and (5) when the employer compensates the employee for his time from the moment he leaves home until he returns home.

Swearingen, supra (citing *Jane Traylor, Inc. v. Cooskey*, 31 Ark. App. 245, 792 S.W.2d 351 (1990)).

Appellant concedes that if Moncus had been killed while he was simply driving to work like he did on most days, to a location he already knew, this claim would not be compensable. Appellant argues, however, that the day in question was not a "normal" workday because Billingsley ordered his employees to meet him at a gas station so that he could have the employees follow him to the tract of land because only he knew where it was. Appellant asserts that Moncus was performing employment services when he was killed driving to the job site because Billingsley admitted that meeting at the gas station benefited his company and insured that he could successfully conduct his business on the day in question.

There is no question that meeting at the gas station and following Billingsley in convoy fashion to the job site was not normally how the employees got to work, and, in fact, this was quite rare. It is also clear that this case fits within the going-and-coming rule, and it does not meet any of the exceptions to this rule. At his own request, Moncus was traveling to the job site in his personal vehicle that contained none of Billingsley Logging's property. Moncus was not being paid at the time of the accident and would not have been paid until he arrived at the job site and began to cut trees.

The rationale of the ALJ, which was adopted by the Commission, was the following:

> In the present claim I find that [Moncus] was not performing an employment service at the time that the tragic accident occurred. As discussed above, employees of [Billingsley Logging] were responsible for providing their own transportation to and from the tracts of land where timber was cut each day. On rare occasions, approximately two to three times each year, work would begin on a new tract of land and the employees would not be familiar with the location of that tract of land. Although the employees meet Mr. Billingsley and follow him to the tract of land on the first day the

> timber is cut from such tracts, it cannot be said that their travel to the tract of land advances the employer's purpose or interest on those days any more than any other day when the employees travel to the tract of land where timber is to be cut.

We find that this case is analogous to *Hogan, supra,* where this court held that the going-and-coming rule precluded a nurse working in a bloodmobile from receiving workers' compensation benefits for injuries sustained while en route to meet the unit. In *Hogan,* the nurse was subject to risks common to all others on streets and highways and there was no substantial evidence to support the conclusion that it was the Red Cross's customary practice to provide transportation during inclement weather even though, on at least one occasion, it had provided transportation. *Id.* In the present case, while it was not customary for the logging employees to meet at the gas station to follow Billingsley, they did do this a few times per year when commencing work at a new job site. In either case, Moncus was required to travel to the actual job site where his work would begin, and his case does not fall within one of the recognized exceptions to the going-and-coming rule. For these reasons, his claim is not compensable.

Affirmed.

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

BIRD, J., dissents.

SAM BIRD, Judge, dissenting. I respectfully disagree with the conclusion of the majority that appellant, Tony Moncus, was not performing employment services at the time of his accidental death. Appellee Billingsley Logging[1] was in the business of harvesting logs under contract with Weyerhaeuser. Moncus was employed by Billingsley as a log cutter who was paid according to the weight of the logs that he cut. The site of the log harvesting varied in location from time to time and was determined by Billingsley in coordination with Weyerhaeuser. Under normal circumstances, Moncus would know the location of the job site on any given day, and would drive his personal truck from his home to the site, where he would begin his

[1] Billingsley Logging is a sole proprietorship owned by Mitchell Billingsley. Billingsley Logging and Mitchell Billingsley will be referred to interchangeably throughout this dissenting opinion simply as Billingsley.

assigned job of cutting logs. However, on rare occasions, "two or three times a year" according to Billingsley, a work site would be unknown to Billingsley's employees in advance, so they would be instructed by telephone to meet at a location specified by Billingsley, from which location the employees would follow Billingsley in convoy fashion to the day's work site. The day that Moncus was killed, August 19, 2003, was one of those rare occasions.

Billingsley testified that on August 19, he instructed Moncus and the other employees to meet him at the Shell gas station in Nashville, Arkansas, "because we [were] moving to a new tract of timber over in the Hope area and they would have to follow me to work to know where they were going. They didn't know where it was. I did." Billingsley further testified that meeting at the Shell station "was not an optional meeting, it was mandatory if they wanted to work that week," and that "[w]e did not discuss how we were going to get to the new tract of land. I just told them to stay behind me. To follow me. It was kind of like a convoy. I was leading. I expected them to follow me." Moncus was killed in a head-on automobile collision while following Billingsley to the new job site. In my opinion, Moncus was performing employment services at the time of his fatal automobile accident, and his death was therefore a compensable workers' compensation claim.

I disagree with the majority's holding that this case is analogous to *American Red Cross v. Hogan*, 13 Ark. App. 194, 681 S.W.2d 417 (1985). In *Hogan*, a nurse was precluded by the going-and-coming rule from receiving workers' compensation benefits when she was injured in an automobile accident while she was en route to a location where she was to meet a bloodmobile that would transport her to a designated place of work. However, Moncus's death did not occur while he was en route to the Shell station. Had that been the case, I would agree that his trip would have been within the going-and-coming rule and that his death would not be compensable under our workers' compensation law. Rather, here, Moncus had safely arrived at the Shell station where Billingsley had instructed his employees to meet him, and he was later killed while performing the task he was directed to perform, following his employer to the new work site.

In my view, the majority's analysis of this case misses the mark by failing to acknowledge that workers' compensation cases involving the going-and-coming rule, both before and after the passage of Act 796 of 1993, have been analyzed in the light of whether an employee was acting at the direction of his or her

employer. Simply put, when a claimant is doing something that is generally required by his or her employer, the claimant is providing employment services. *Ray v. Univ. of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999). *See also Linton v. Arkansas Dep't of Correction*, 87 Ark. App. 263, 190 S.W.3d 275 (2004); *Shults v. Pulaski County Special Sch. Dist.*, 63 Ark. App. 171, 976 S.W.2d 399 (1998). The phrase "performing employment services" is synonymous with the phrase "acting within the course of employment," in that the test for determining both is whether the injury occurred "within the time boundaries of employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interests directly or indirectly." *Collins v. Excel Spec. Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002).

I disagree with the Commission's finding that it could not be said that the employee's travel to a tract of land where new work would begin, which location was not familiar to the employees, advanced the employer's purpose or interest any more than any other day when the employees travel to a tract where timber was cut. As the majority notes, Billingsley admitted that having his employees meet him at the gas station benefitted his company and insured that he could successfully conduct his business on the day at issue. Moncus was placed on the highway at his employer's direction, dutifully following the employer from Nashville to an unknown location near Hope to learn where he was to cut logs that morning.

The majority repeatedly notes that Moncus was driving his own vehicle at the time of his fatal accident, apparently to make it clear that Moncus's accident did not fall within the employer-provided-transportation exception to the going-and-coming rule. It seems to be the position of the majority that the employees who advanced Billingsley's interests by going to the unknown logging site in Billingsley's trucks would have been afforded workers' compensation protection, while employees, like Moncus, who advanced Billingsley's interests by following Billingsley to the unknown work site in their private vehicles would not have been afforded workers' compensation protection. In my opinion, this approach makes the controlling issue the manner in which an employee carried out his advancement of the employer's interests, instead of whether the employee was performing employment services at the time of his or her accident.

The majority also emphasizes that Moncus was not engaged in log cutting, and therefore was not being paid, at the time of his

fatal accident. The majority ignores well-established precedent that employment, for workers' compensation purposes, is not limited to the task that a person was hired to do. Whatever the normal course of employment may be, the course of employment may be enlarged when the employer assigns tasks outside the usual scope of employment. *Bell v. Tri-Lakes Servs.*, 76 Ark. App. 42, 61 S.W.3d 867 (2001). The fact that an employee is not compensated during travel is not dispositive in determining whether employment services are being performed; however, whether an employee requires an employee to do something may be dispositive of whether the activity constituted employment services. *Id. See also Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997); *Matlock v. Arkansas Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001); *Ray v. Univ. of Arkansas, supra; Arkansas Dep't of Correction v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (1991).

I would hold that Moncus, even though traveling in his own vehicle so that he could leave early in the afternoon, was carrying out his employer's purpose and directly advancing the employer's interests by following him to the new job site in the morning. I would hold that Moncus was performing employment services and, thus, that his claim was not precluded by the going-and-coming rule.

I would reverse the denial of benefits in this workers' compensation claim. Therefore, I respectfully dissent.

Myron BASS, on behalf of L.B. *v.* STATE of Arkansas

CA 05-553 219 S.W.3d 697

Court of Appeals of Arkansas
Opinion delivered December 7, 2005

Myron L. Bass, for appellant.

Gray Allen Turner, Office of Chief Counsel, Department of Human Services, for appellee.

ANDREE LAYTON ROAF, Judge. Myron Bass brings this appeal on behalf of his minor daughter, L.B., from the circuit court's order finding L.B. to be a member of a Family in Need of Services (FINS) under Ark. Code Ann. § 9-27-303(23)(B) (Supp. 2003). Mr. Bass contends (1) that the evidence was insufficient to support the judgment that L.B. was habitually disobedient to her mother; (2) that the trial court denied L.B. due process and her Sixth and Fourteenth Amendment rights based upon the inadequacy of her court-appointed counsel; and (3) that L.B.'s mother's petition and affidavit were not credible enough to allow the State to charge L.B. as a delinquent. Mr. Bass, in bringing this appeal, has engaged in the unauthorized practice of law by a non-attorney. Furthermore, the order appealed from is further not a final appealable order. We dismiss the appeal.

Myron Bass and Maria Green were married for a period of sixteen years; their union produced four children. Myron and Maria divorced on August 17, 2004. The couple worked out a joint-custody agreement whereby each would keep the children for six months of the year. Immediately after divorcing Myron, Maria married Kenneth Green.

On February 10, 2005, Maria Green filed a FINS petition alleging that L.B. refused to obey the "reasonable and lawful orders of her parent." Apparently, L.B. became enraged at her mother after Maria refused to allow L.B. to attend an after-school game. Maria's affidavit claims that she tried to explain to L.B. that her baby sister was sick but that L.B. got upset and started talking in a disrespectful manner, stating that she no longer wanted to live with Maria, that she did not like her room, that she wanted to be able to watch television and use the telephone for as long as she wanted, and that she wanted to be able to stay out all night at a friend's house.

After a hearing on February 28, 2005, in which L.B. and both of her parents appeared, the judge found L.B. to be a member of a Family in Need of Services as defined under Ark. Code Ann. § 9-27-303(23)(B) as a result of L.B. "being habitually disobedient to the reasonable and lawful commands of her parent, guardian, or custodian." There was no out-of-home placement, and there were no additional findings or orders made. L.B. and both Myron Bass and Marie Green were shown as parties on the trial court's adjudication order.

Myron Bass objects to the placement of his daughter into the juvenile system and purports to bring this appeal on L.B.'s behalf,

arguing (1) that the evidence did not support a finding that L.B. "habitually" disobeyed authority; (2) that L.B. was denied due process, equal protection, and her Sixth and Fourteenth Amendment rights, because her court-appointed attorney was so inadequate and ineffective as to be virtually nonexistent and because she did not have the opportunity to file motions or engage in pre-trial discovery; (3) that Maria Green's petition and affidavit were not credible enough to allow the State to charge L.B. as a delinquent; and (4) that the open hearing conducted violated L.B.'s right to confidential proceedings. Bass further asserts that he now has full custody of L.B.

The State has filed a motion to dismiss this appeal on the bases that (1) Bass is not a licensed attorney and although a party to the FINS case, cannot appeal on behalf of his daughter; (2) there was no out-of-home placement, and the FINS adjudication order appealed from is thus not a final, appealable order; and (3) Bass has not abstracted any of the testimony from the hearing. In his response to the State's motion, Bass denies that he is a party to this case and denies that the FINS order is not appealable. However, he affirms that he is not a licensed attorney and that he is bringing this appeal solely on behalf of his daughter, stating that "the true appellant here is L.B."

We must agree with the State that because Mr. Bass is not a licensed attorney, this appeal is a nullity. According to Ark. Code Ann. § 16-22-206 (Repl. 1999), no one can engage in the practice of law in this state unless admitted to practice by the Arkansas Supreme Court. Therefore, it is illegal for Mr. Bass to attempt to represent his daughter in this appeal. A non-attorney may appear *pro se* on his own behalf; however, he has no authority to appear as an attorney for anyone other than himself. *See Abel v. Kowalski*, 323 Ark. 201, 913. S.W.2d 788 (1996) (holding that a *pro se* appellant could represent himself but could not file motions on behalf of the other appellants). Other jurisdictions have recognized that a parent cannot file an order on behalf of a minor child without retaining counsel.[1]

Moreover, the juvenile has an absolute right to counsel in the circumstances of this case. Arkansas Code Annotated section

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[1] *See, e.g., Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997); *Osei-Afriyie v. Med. Coll. of PA*, 937 F.2d 876 (3rd Cir. 1991); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986).

9-27-316(a)(1) (Supp. 2003) provides that a juvenile and parents in FINS cases be advised that the juvenile has the right to be represented in all stages of the proceedings by counsel. Section 9-27-316(c) provides that if counsel is not retained, counsel shall be appointed to represent the juvenile at all appearances before the court, unless the right to counsel is waived in writing as set forth in § 9-27-317. However, § 9-27-317(e) (Repl. 2002) states that "no waiver of the right to counsel shall be accepted in any case in which the parent, guardian or custodian has filed a petition against the juvenile, initiated the filing of a petition against the juvenile, or requested removal of the juvenile from the home." Here, L.B. was represented by court-appointed counsel at the hearing, was required to have counsel since her mother had filed the petition against her, and counsel for L.B. could not be waived in this circumstance. Just as Bass was not authorized to appear as counsel before the trial court on L.B.'s behalf, he is not authorized to prosecute this appeal on her behalf without retained or appointed counsel.

The State also asserts that this court does not have jurisdiction because the FINS adjudication order did not include an out-of home placement and, therefore, is neither final nor appealable, as required by Rule 2(c)(3) of the Arkansas Rules of Appellate Procedure. This rule provides for the appeal of orders from certain interim proceedings in juvenile cases only where out-of-home placement has been ordered. We agree that this would also provide a basis for dismissing this appeal. Accordingly, the appeal is dismissed.

Appeal dismissed.

CRABTREE and BAKER, JJ., agree.

Deborah G. COZZENS *v.* Jeffrey A. COZZENS

CA 05-273 220 S.W.3d 257

Court of Appeals of Arkansas
Opinion delivered December 14, 2005

Herring Law Firm, P.A., by: *D. Floyd Herring*, for appellant.

Shepherd & Allred, by: *Allison R. Allred*, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The parties in this child-custody case were divorced by a decree granting primary physical custody of their children to appellant. Subsequently, appellant was involved in a head-on collision in which two of the children were injured because they were not properly restrained, and after which appellant tested positive for methamphetamine use. Appellee filed a petition to change custody that, after a hearing on August 6, 2004, was granted. On appeal, appellant contends that the trial court erred in using the "preponderance of the evidence" standard to determine whether there had been a material change of circumstances, and that there was insufficient evidence to support a finding that there had been a material change in circumstances. We affirm.

We disagree with appellant's assertion that a material change of circumstances must be shown by an unspecified "higher standard" than preponderance of the evidence. Although our supreme court has noted that a more stringent standard applies to custody modifications than to initial custody determinations, *see, e.g., Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996), this refers to the need in such cases to prove additional factors, *i.e.*, that there has been a change of circumstances since the initial determination, and that the change in circumstances was material to the best interest of the child. *See id.* These additional factors must be proven by a preponderance of the evidence, as shown by the following excerpt from an opinion written by the learned Justice Fogleman:

> Appellees contended in the trial court that a change in the children's desires with respect to traveling to Utah was sufficient in and of itself to constitute "changed circumstances." Even if we were to recognize that such a condition constituted "changed circumstances" the appellees have failed to show *by a preponderance of the evidence* that such a change has in fact occurred. The testimony of the parties was conflicting, as was the testimony of a child psychologist consulted

> by Ruby Pyle. However, we find a visit to Utah made by one child subsequent to the decree, with no apparent ill effects, to be highly persuasive on the pertinent question. It appears that this visit was made without further order of the court, but an order of the court entered December 8, 1972, required that both girls visit with their mother in Utah for one-half of the Christmas vacation, thus, in effect, reinstating a portion of the prior decrees. The testimony of the child psychologist, that visits of the children with their mother in Utah would be quite beneficial to the children and that the chances that the younger child would be adversely affected were one in five that the older child would not be adversely affected, was also persuasive. Because of the factors recited, we find that the appellees did not show *by a preponderance of the evidence* that there were changed circumstances sufficient to justify modification of the earlier decree.

Pyle v. Pyle, 254 Ark. 400, 402-03, 494 S.W.2d 117, 119 (1973) (emphasis added).

Nor do we agree with appellant's assertion that there was insufficient evidence of a material change in circumstances to support a change of custody in the present case. There was evidence that appellant's behavior had changed since the divorce and that she was not the "same person." One witness, who described herself as a good friend of appellant, testified that, while she had trusted appellant to care for her son before her divorce, appellant had undergone a "big change" since then such that she would no longer trust appellant to care for her child. The testimony concerning appellant's increasing instability and poor judgment was corroborated by evidence that she had persistently failed to take the elementary precaution of properly restraining her children with seatbelts in the car.

There was testimony concerning an incident in which appellant was stopped by a police officer because her five-year-old daughter was observed sitting on the console rather than being properly seated and restrained. There was, in addition, evidence that appellant pled guilty to two counts of not using proper safety restraints for the children on April 13, 2004. Finally, there was evidence that, on May 27, 2004, appellant, driving with her three daughters in the vehicle, repeatedly crossed the center line and struck an oncoming vehicle head-on, resulting in serious injury to the driver of the other vehicle, to herself, and to two of her daughters, who had not been properly restrained. Appellant's

youngest daughter, who was properly restrained in a child seat, was uninjured. Appellant was transported to a hospital, where a diagnostic test performed on her was positive for the presence of amphetamine.

Appellant argues that the diagnostic test performed on her was unreliable because it was unconfirmed and therefore does not support the trial court's finding that she had been abusing amphetamine at the time of the accident. We do not agree. There was medical testimony that the test performed on appellant was used for diagnostic purposes, was reliable, and that false positives or negatives were almost unknown. There was also evidence that the reason that the results of this test were unconfirmed was because appellant refused to consent to a subsequent, additional test requested by a police officer. Refusal to consent to such a test is evidence of consciousness of guilt. *Spicer v. State*, 32 Ark. App. 209, 799 S.W.2d 562 (1990). Although appellant attempted to explain the positive test by testifying that she had ingested legal medications and substances that could result in a false positive result, the trial judge expressly found that her testimony lacked credibility. Given the foolhardiness of appellant's actions, and the danger that her behavior posed to her children, we cannot say that the trial court erred in finding a material change in circumstances warranting a change of custody.

Affirmed.

HART and GLADWIN, JJ., agree.

Terry Joe COX *v.* STATE of Arkansas

CA CR 05-336 220 S.W.3d 231

Court of Appeals of Arkansas
Opinion delivered December 14, 2005

Gregory Crain, for appellant.

Mike Beebe, Arkansas Attorney General, by: *Nicana Corinne Sherman*, Assistant Attorney General, for appellee.

JOSEPHINE LINKER HART, Judge. A jury found appellant, Terry Joe Cox, guilty of the crime of rape for engaging in sexual intercourse or deviate sexual activity with a person who was

less than fourteen years old, and he was sentenced to fifteen years' imprisonment. On appeal, he argues that (1) the evidence was insufficient to support his conviction; (2) the circuit court erred in allowing a witness for the State, Carmen Neighbors, to testify that the victim was telling the truth during an interview with Neighbors; (3) the circuit court erred in excusing Neighbors after she testified for the State. While we conclude that the evidence was sufficient to support his conviction, we reverse and remand for new trial, because we also hold that the court erred in allowing Neighbors to testify regarding the victim's credibility.

Before addressing appellant's arguments asserting trial errors, we must first address his challenge to the sufficiency of the evidence. *See, e.g.*, *Maples v. State*, 16 Ark. App. 175, 698 S.W.2d 807 (1985). A person commits the crime of rape if he "engages in sexual intercourse or deviate sexual activity with another person . . . [w]ho is less that fourteen (14) years of age." Ark. Code Ann. § 5-14-103(a)(1)(C)(i) (Supp. 2005). "Deviate sexual activity" is defined in pertinent part as "any act of sexual gratification involving" either the "penetration, however slight, of the anus or mouth of one person by the penis of another person" or the "penetration, however slight, of the labia majora or anus of one person by any body member or foreign instrument manipulated by another person." Ark. Code Ann. § 5-14-101(1) (Supp. 2005). In a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the State, considering only that evidence that supports the verdict, and we determine whether the verdict is supported by substantial evidence, which is evidence of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Wilson v. State*, 320 Ark. 707, 898 S.W.2d 469 (1995).

[redacted] At trial, the nine-year-old victim testified that her step-father, appellant, touched her "in a bad way" on ten occasions beginning when she was six. She stated that on four occasions he made her touch his "weeny" and "[g]o up and down on it." She further testified that appellant made her "[l]ick his private," and that this happened "a bunch," which was more than twice. Also, she stated that appellant made her "suck his weeny, and lick his weeny." According to her, when he made her put her mouth on his "private," it would "[t]aste salty."

As he did in his motions for a directed verdict, appellant argues that, because the victim's testimony was inconsistent in

certain respects, the evidence was insufficient to support his conviction for rape. We note, however, that the uncorroborated testimony of a rape victim is sufficient to support the verdict, and matters of the credibility of witnesses and conflicts in testimony are issues for the trier of fact to decide. *Id.* We conclude that there was substantial evidence that appellant committed the crime of rape, as the victim's testimony established that appellant engaged in deviate sexual activity with her and that she was less than fourteen years old.

Appellant next argues that the circuit court erred in allowing a witness for the State, Carmen Neighbors, to testify that the victim was telling the truth during an interview with Neighbors. In response, the State argues that the circuit court, in its discretion, properly admitted Neighbors's testimony because it was about the interview and Neighbors's role in the investigation, and the jury was still required to make its own determination regarding the victim's credibility. Further, the State argues that admission of Neighbors's testimony was permissible because appellant attacked the credibility of the victim in his opening statement. We, however, conclude that the court erred when it allowed Neighbors to testify that the victim's statement to Neighbors was credible. Accordingly, we reverse and remand for a new trial.

Neighbors, the Director of the Mercy Child Advocacy Center at St. Joseph Hospital in Hot Springs, testified for the State regarding the interview she conducted with the victim. She stated that she frequently gave expert consultation on child-abuse assessments and was a licensed social worker and a certified forensic interviewer. At the request of the State, the court qualified Neighbors as a certified forensic examiner. The State asked Neighbors if, "[b]ased on your interviews in the past and your interviews in this particular case, do you have an opinion as to whether this child is telling the truth?" Appellant objected, stating that "there's no way she can know about speculating whether this child is lying or not. He's trying to bolster her testimony.... He's also giving character evidence. . . ." The court overruled appellant's objections. Neighbors testified that she always gives a summary and recommendation in her report and speaks about the credibility of the child. She stated, "I believe the interview tape that the jury has seen to be highly credible." She believed that it was credible because of the victim's inappropriate sexual knowledge, of which she then gave examples. She also noted the victim's body language, which showed that the victim was scared, anxious, nervous,

embarrassed, and ashamed. Neighbors concluded, "I believe her to be credible, as credible as any child I've believed to be credible." Later, she testified, "I don't have a single doubt about her credibility. . . ."

Our supreme court has specifically stated that "it is error for the court to permit an expert, in effect, to testify that the victim of a crime is telling the truth." *Hill v. State*, 337 Ark. 219, 224, 988 S.W.2d 487, 490 (1999) (*citing Logan v. State*, 299 Ark. 255, 773 S.W.2d 419 (1989); *Johnson v. State*, 292 Ark. 632, 732 S.W.2d 817 (1987); *Russell v. State*, 289 Ark. 533, 534, 712 S.W.2d 916 (1986)).[1] Here, Neighbors testified repeatedly about the victim's high credibility. We are compelled to conclude that the court committed error in allowing Neighbors to testify regarding the victim's credibility.[2]

In reaching our holding, we are mindful of the State's alternative rationale for affirming on this point. Citing Rule 608(a) of the Arkansas Rules of Evidence, the State argues that admission of Neighbors's testimony was permissible because appellant attacked the credibility of the victim in his opening statement. We observe, however, that Rule 608(a) allows the credibility of a

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[1] In *Logan*, our supreme court reversed where it concluded that answers to hypothetical questions resulted in the doctors informing the jury that in their opinion the victim was telling the truth. In *Johnson*, the court stated that a doctor improperly conveyed to the jury his opinion that the victim was telling truth when the doctor opined that an act had occurred that was detrimental to the victim and that opinion was based only on the victim's statements to the doctor. And in *Russell*, the court held that a psychologist improperly testified that a victim's statements were consistent with a child who had suffered sexual abuse.

[2] We note that in *Hill*, a Department of Human Services caseworker testified regarding the criteria used by the Department in evaluating a child's statement when sexual abuse had been alleged, and the court held that the testimony was "valid evidence of the Department's procedures in general, and, in specific, constituted evidence of the procedures followed in this case by the Department in its investigation." *Hill*, 337 Ark. at 224–25, 988 S.W.2d at 491. The court concluded that the caseworker "testified as a fact witness about the Department's guidelines employed in this and similar cases to determine whether a child's allegations warrant an investigation." *Hill*, 337 Ark. at 225, 988 S.W.2d at 491. The court further noted that upon Hill's objection, the circuit court responded that "the jury was entitled to understand the State's interview and investigation techniques," and that "the witness would have to stop short of bolstering the children's testimony." *Id.* The case at bar, however, is distinguishable from *Hill*. Here, rather than Neighbors only providing information regarding the guidelines employed to determine whether the victim's allegations warranted an investigation, she instead provided bolstering testimony.

witness to be "supported by evidence in the form of opinion or reputation," but "the evidence may refer only to character for truthfulness or untruthfulness." Here, Neighbors's testimony did not fall within the strictures of Rule 608(a), as it was not limited to the victim's "character for truthfulness." *See Collins v. State*, 11 Ark. App. 282, 669 S.W.2d 505 (1984) (holding that the circuit court properly allowed the victim's schoolteacher to testify as to the victim's general reputation for truthfulness).

Finally, we cannot say that the evidence was so overwhelming and the error so slight so as to constitute harmless error as in *Russell*. The evidence supporting appellant's conviction consisted only of the victim's testimony at trial and her statements to third parties, and the outcome of the trial necessarily turned upon the victim's credibility. Thus, we are compelled to reverse and remand for new trial.

Appellant also argues that the court erred in excusing Neighbors as a witness after she testified for the State, as he also subpoenaed Neighbors. He states that, while testifying about drawings she made during her interview with Neighbors, the victim identified certain marks on the drawings as bug bites, and he argues that, because the court erroneously excused Neighbors, he could not recall Neighbors to the stand to testify that the victim never said anything to Neighbors about bug bites. Because on retrial appellant will have the opportunity to examine Neighbors on this matter, we do not address his argument on appeal, as the asserted error is not likely to recur.

Reversed and remanded.

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

Janie NEEL *v.* Denise C. HARRISON

CA 05-248 220 S.W.3d 251

Court of Appeals of Arkansas
Opinion delivered December 14, 2005

Legal Aid of Arkansas, by: *Margaret Reger*, for appellant.

Osmon & Ethredge, P.A., by: *David L. Ethredge*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Janie Neel appeals the entry of a decree by the Baxter County Circuit Court on November 9, 2004, granting the adoption of her eight-year-old daughter Jessica by Jessica's stepmother, appellee Denise Harrison. Appellant contends on appeal that the trial court clearly erred (1) in finding that appellee proved by clear and convincing evidence that appellant's consent to the adoption was not necessary, and (2) in then finding that granting the adoption was in the child's best interest. We hold that the trial court clearly erred as to point one on appeal, which mandates that we reverse. Therefore, we do not reach the second issue on appeal.

The facts leading to the present appeal are not in material dispute. Jessica was born to appellant Janie and her then-husband Aaron on December 15, 1995. Janie and Aaron divorced in 1996, and Janie was granted custody at that time. Aaron married appellee Denise in 1998; they eventually bore a daughter of their own. Janie

also remarried and bore another child within that marriage. On one occasion in 1999, Janie learned that her husband Joe had thrown Jessica against the wall in their home. Janie called for help and filed a police report; Joe was incarcerated for his actions. This led to Janie and Aaron entering into an agreement that Aaron would have custody of Jessica with Janie having alternate weekend visitation. This agreement was approved in an agreed order filed on December 11, 2000, in their Baxter County domestic relations case. There is no dispute that Aaron did not ask for child support, and the agreed order was silent as to child support. The agreed order stated that Joe was not to be around Jessica unless Janie or other family members were present.

Janie's husband Joe was thereafter released from imprisonment and returned to their marital home. Aaron and Denise harbored concerns after Joe was back in the home, so Aaron and Denise allowed Janie sporadic weekend visitation, but only during the daytime when Joe worked so that Jessica would not be exposed to him. Janie admittedly sought a protective order against Joe one time in April 2001 due to him physically attacking her, not the children.

Also in 2001, Aaron and Denise separated. Denise took their daughter and Jessica into her physical custody. By December 2002, Aaron and Denise did not permit Janie to see Jessica due to their belief that Janie had multiple boyfriends with checkered pasts and due to suspicions of drug use. However, Janie gave Jessica presents that December for her birthday. After December 2002, Janie was not allowed to see Jessica, despite phone calls, showing up at Aaron's work and Denise's home, and despite showing up at Jessica's school yard. Aaron and Denise simply did not think that Janie was stable enough to provide a safe and nurturing environment for Jessica. Janie admittedly gave up in her efforts for most of 2003 because she was tired of being criticized for being a bad mother and tired of being denied her child. She said she did not have the money for an attorney to enforce her visitation rights. In October 2003, Janie asked to have Jessica for a visit because Jessica's half-sister was celebrating a birthday; this visit was also not allowed. In November 2003, Janie said she came to Denise and demanded to be allowed her court-ordered weekend visitation, which was denied. In December 2003, Janie attained representation through legal aid and filed a motion in the domestic relations action seeking to modify the December 2000 custody order. In that motion, Janie sought to change custody to her arguing that

Aaron had effectively abandoned Jessica to his estranged wife when they separated in 2001, and furthermore he had denied her access to Jessica.

On January 28, 2004, Denise filed a new action in probate court seeking to adopt Jessica. She appended Aaron's consent to the adoption and alleged that Janie had not seen or supported Jessica for a year. In February 2004, Janie responded by denying that she would consent to the adoption, specifically noting that she was prevented from seeing her daughter, and asking that the domestic relations and adoption proceedings be consolidated. There is no indication that the cases were ever consolidated.

The hearing on the adoption petition was conducted in May 2004, resulting in the order on appeal. At that time, Denise and Aaron were still married but had been separated for three years. Aaron lived apart from Denise and had a girlfriend. The testimony reflected that Janie was not an ideal mother with multiple boyfriends and different fathers for each of her three children. Janie was presently raising her newest baby with a boyfriend who was not the biological father, and she did not have the financial means to provide a home for herself and her children without needing roommates. Janie explained that she worked sixteen hours per week at a minimum wage job, but half of her earnings went toward rent, and the rest went to pay other bills, including old medical bills. Janie said that she was prevented from seeing Jessica no matter how much she protested, and she recalled giving Jessica some gifts in 2002, including a fish tank, a blanket, and some clothing. Janie had also tried to deliver flowers to Jessica at school in December 2003, but Aaron told the school not to accept them. Janie agreed she did not send Aaron or Denise child support money, but she explained that she was not under any court order to do so and had not been specifically asked.

Aaron and Denise admitted worrying about Jessica when she was in Janie's care, particularly with history of the incident with Janie's former husband. Aaron and Denise did not deny that they, either separately or together, did not want Jessica around Janie very much and especially without supervision. They recalled that Janie saw Jessica in July 2002 when Janie bought her a fish and fish tank and a sleeping blanket and then on Jessica's birthday in December 2002, but that was the last time.

On this evidence, the trial judge announced that he found that there was clear and convincing evidence to show that appellant had failed significantly for at least a year to provide for the care

and support of her daughter. The trial judge elaborated that he was not talking about "dollars and cents" but more about the efforts toward keeping the relationship alive. He found the token gifts in 2002 were not enough because failure had to be, not totally, but significantly. He stated that in spite of her ability, meaningful care and support was required but was lacking. Moving to the best interest of the child, the judge chastised Aaron for overt prevention of visitation but nonetheless focused on the best interest as between Denise as the "operative parent" and Janie. The judge specifically found Denise and her witnesses to be credible about lack of contact with the child, noting the gap between July 2002 and December 2002, and then a dramatic gap thereafter. The judge found Janie's life situation and choices to be marginal and sometimes risky. At the end, the judge concluded that Jessica's best interest was to stay with the parent she was and had been living with — Denise. The order granting the adoption was filed in November 2004, and a timely notice of appeal followed.

"Adoption statutes are strictly construed, and a person who wishes to adopt a child without the consent of the parent must prove that consent is unnecessary by clear and convincing evidence." *In re Adoption of Lybrand*, 329 Ark. 163, 169, 946 S.W.2d 946, 949 (1997). We review adoption proceedings de novo, and the trial court's decision will not be disturbed unless clearly erroneous, giving due regard to the opportunity and superior position of the trial court to determine the credibility of the witnesses. *Vier v. Vier*, 62 Ark. App. 89, 93, 968 S.W.2d 657, 659 (1998). *See also Ray v. Sellers*, 82 Ark. App. 530, 120 S.W.3d 134 (2003). The statute at issue is Ark. Code Ann. § 9-9-207(a)(2) (Repl. 2002), which provides in pertinent part that:

> Consent to adoption is not required of . . . [a] parent of a child in the custody of another, if the parent for a period of *at least one (1) year has failed significantly without justifiable cause* (i) to communicate with the child or (ii) *to provide for the care and support of the child as required by law or judicial decree*[.]
>
> (Emphasis added.)

A year accrued before the petition in January 2004 where non-support could be found. Nor is there an issue of whether appellant paid child support; she did not. What she did provide was meager such

that the trial court did not clearly err in finding her failure to support "significant." It is not required that a parent fail "totally" in these obligations in order to fail "significantly" within the meaning of the statutes. *Pender v. McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979). It denotes a failure that is meaningful or important. *See id.* Therefore, the question on appeal is narrowed to whether appellant's failure was without justifiable cause, which has been interpreted as "intentional" or "willful." *Manuel v. McCorkle*, 24 Ark. App. 92, 749 S.W.2d 341 (1988). We hold that on these unique facts, the trial court clearly erred in finding the petitioner to have presented clear and convincing evidence that appellant's significant failure to provide for the care and support of the child was without justifiable cause.

There is no dispute that the divorce proceedings and orders therein did not command her to pay child support. Aaron admitted that he did not ask for child support when they agreed to a change in custody in December 2000.[1] Janie argues that she relied on the child custody order on that issue, and further, to the extent that she tried to give gifts and see her daughter, she was refused. Appellant cites to *In the Matter of Adoption of Nicole Michelle Glover*, 288 Ark. 59, 702 S.W.2d 12 (1986), in support of her reliance on the order in the divorce case. We find her argument compelling.

The supreme court in *Glover* noted the general rule that it is a parent's duty and obligation, independent of any court order or statute, to support their child. *See also Brown v. Brown*, 233 Ark. 422, 345 S.W.2d 27 (1961); *Watkins v. Dudgeon*, 270 Ark. 516, 606 S.W.2d 78 (Ark. App. 1980). The *Glover* opinion nonetheless affirmed the probate court finding that the mother's consent to the adoption petition had not been proven unnecessary. In that case, appellant mother and father were divorced; the father was ordered to pay child support but the order did not direct appellant to do so; and appellee paternal grandparents had actual custody and were seeking adoption. The probate court therein relied on *In Re C.J.U.*, 660 P.2d 237 (Utah 1983), which held that when parties to a divorce proceeding are under a domestic relations order concerning child support:

[1] The dissent repeatedly asserts that Janie was requested to pay support. There was evidence that on a single occasion, *after* the custody order was entered, Aaron asked Janie to assist in paying daycare expenses. Aaron did not, however, seek a modification of the custody order.

> A noncustodial parent whose obligation to provide support is being supervised by such a court order cannot be said to have any "duty" to provide beyond that imposed by the court.

Glover, 288 Ark. at 62. The *Glover* opinion upheld the finding that the mother's consent was necessary despite her having contributed no support because of these special circumstances. *See also Loveless v. May*, 278 Ark. 127, 644 S.W.2d 261 (1983)(consent to adoption necessary where natural mother was led to believe, in view of previous court order and advice given her, that she was not expected to furnish support for her child, who was in the custody of relatives); *Tisdale v. Seavey*, 286 Ark. 222, 691 S.W.2d 144 (1985)(consent was necessary in petition to adopt by mother and stepfather where Ohio divorce decree ruled that natural father was no longer required to pay child support to natural mother). *Compare Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001) (holding that in a termination of parental rights case there was no "willful" failure to provide support; DHS conceded that it never requested contributions of material support from Dinkins, nor did the trial court ever order her to pay child support).

We emphasize our recognition that as a general rule, all parents have a duty to provide their children with support. The proof herein of failure to support "without justification" was diluted significantly by Aaron and Denise's refusal to accept gifts and refusal to permit contact. The trial court specifically noted its displeasure with the overt prevention of contact between appellant and her daughter. Notwithstanding this statement, the trial court then found that appellant's consent to adoption was unnecessary because she had failed to support her child, stating:

> When the Court talks about support, the Court talks about that as a parent to a child. The Court doesn't talk in terms of dollars and cents. The Court talks in terms of making sure that the nature of the relationship is kept alive by cards or homemade gifts or presents or remembrance at birthdays or Christmas or special events.

In performing our appellate review, we are guided by our supreme court's declaration in *Glover, supra*, that:

> [T]he law is solicitous toward maintaining the integrity of the natural relation of parent and child; and in adversary proceedings in adoption, where the absolute severance of that relation is sought,

> without the consent and against the protest of the parent, the inclination of the courts, as the law contemplates it should be, is in favor of maintaining the natural relation. . . . [I]f the statute was open to construction and interpretation it should be construed in support of the right of the natural parent.

We hold that the petitioner seeking adoption, appellee herein, did not prove by clear and convincing evidence that appellant's significant failure for at least one year to provide for the care and support of her child was "without justification." The trial judge's conclusion to the contrary was clearly erroneous. This holding renders the second issue on appeal moot.

Reversed.

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

GLADWIN, GRIFFEN, CRABTREE, and BAKER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. As noted by the majority, the question on appeal is whether appellant's failure to provide support was without justifiable cause. While the majority recognizes the obligation to support one's child exists in the absence of a support order, they go on to find such a failure to provide support justifiable in this case due to the absence of an order directing the appellant to support her child. I cannot agree.

The child custody order at issue is not contained in the record and we are left to speculate as to what it contained. The majority concludes, based on the testimony, that the order was silent in regard to support. The majority notes specifically that Aaron Harrison testified that he did not ask for child support when he and Janie agreed to change custody in December 2000. The problem with this analysis is twofold.

First, because the custody order is absent from the record, it is impossible for this court to know what it contained. In addition, even if the majority were correct in their assumption that the custody order is silent at to child support, its silence would not relieve appellant of her support obligation. A parent cannot simply turn a child's care and support over to another and thereby be excused from the duty of providing support for the child, a duty exists whether ordered or not. *In re Adoption of Glover*, 288 Ark. 59, 702 S.W.2d 12 (1986) (citing *Pender v. McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979)).

Second, the majority emphasizes Aaron's admission that he did not ask for child support at the time the change of custody was granted, yet fails to mention that both appellant and Aaron testified that he subsequently asked her for support.

Appellant testified that she had provided no support for over a year and that it had been a year and a half since she had seen J.H. She admitted that in 2003 she made probably $550.00 every two weeks. Additionally, she stated that Aaron had asked her to help pay for daycare around Easter 2003, and went on to say that she "did not feel [she] should have had to pay child support to someone for not letting [her] do what they are supposed to let [her] do."

The majority relies on *Glover*, in holding that the mother's consent was necessary because her failure to support J.H. was justifiable. In *Glover*, the father was ordered to pay child support and the original divorce complaint provided that the caretakers should remain responsible for the support and maintenance of the child while they had custody. Here, if the majority is correct that the custody order was silent as to support, no one was ordered to support J.H., nor were there other custodians responsible for her support and maintenance. In fact, there is no evidence that in granting Aaron Harrison's ex parte petition to change custody the trial court even considered the issue of child support. Certainly there is no implication that appellant was relieved by the court of her duty to support her child. In *Lovelace v. May*, 278 Ark. 127, 644 S.W.2d 261 (1983), the appellant could not find employment, had no funds, and there was evidence of employment for only three months. In this case, appellant admitted to having employment and testified in regard to her income. In *Tidsdale v. Seavey*, 286 Ark. 222, 691 S.W.2d 144 (1985), the parents obligation of support was terminated by court order. Finally, in *Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001), contributions for support were never requested. Here, appellant admitted that a request for support, specifically for childcare, was made.

The trial court after hearing the testimony in this case found that appellant had for a period in excess of one year failed to support her child without justifiable cause. Based on the record before us this finding is not in error; yet the majority, relying on an order that is not before us, reverses the trial court and holds that appellant's undisputed failure to support her child was justified.

The majority's holding abandons the longstanding principle that a parent has a duty to provide support for her child, whether or not she is ordered to do so by a court. Because the majority's decision contravenes this basic principle, I must respectfully dissent.

GLADWIN, GRIFFEN, and CRABTREE, JJ., join.

Glenda BROTHERTON *v.*
WHITE RIVER AREA AGENCY ON AGING
and Federated Mutual Insurance Company

CA 05-476 220 S.W.3d 219

Court of Appeals of Arkansas
Opinion delivered December 14, 2005

[Rehearing denied January 11, 2006.*]

* ROBBINS, J., would grant rehearing.

Frederick S. Spencer, for appellant.

Friday, Eldredge & Clark, by: *Betty J. Demory*, for appellee.

WENDELL L. GRIFFEN, Judge. Glenda Brotherton appeals from the denial of workers' compensation benefits, arguing that the Workers' Compensation Commission erred in determining that she was not performing employment services for appellee White River Area Agency on Aging ("the agency") when she was injured. Because we agree, we reverse and remand for an award of benefits.

Brotherton was employed by the agency and by Mary Jane Foster. Her duties for each involved serving as a personal-care aide for elderly or disabled individuals who lived with Foster. In total, five elderly or disabled women lived with Foster, who was paid by the women's families to provide twenty-four-hour care to the women. Foster is also a personal-care aide employed by the agency; four of Foster's five clients were agency clients, as well. The agency paid Brotherton to provide three hours of personal-care services per client to two of Foster's clients, one of whom was Maxine Raines. The duties to be performed for each client were prescribed pursuant to an agency care plan, that included feeding, toileting, bathing, grooming, dressing, meal preparation, and housekeeping services. Raines, in particular, was bedfast, requiring Brotherton to bathe her in her bed and to frequently assist her in using the toilet.

Although the normal routine for an agency personal-care aide is to go to a client's home, help that client for a specific number of hours, and then go to another home, the agency knew that was not the routine that Brotherton and Foster kept. As established by the testimony of Brotherton, Foster, and Leanne Kronnister, the agency's human-resources director, the agency knew that Brotherton also worked for Foster. The agency also knew that instead of working two successive three-hour shifts in which care was devoted exclusively to a "scheduled" client during each three-hour period, Brotherton arrived at Foster's home at 8:00 a.m. and worked for six hours. Brotherton was scheduled to work for Raines from 10:00 a.m. until 1:00 p.m. However, the agency knew that at any given time on her shift, Brotherton performed services for any of Foster's clients who needed assistance, including Raines.

Brotherton and Foster normally bathed the clients between 8:00 a.m. and 10:00 a.m. It is undisputed that at approximately 9:00 a.m. on July 16, 2002, Brotherton and Foster were in the process of bathing clients when Brotherton assisted Raines in using the toilet.[1] Raines began to slip as Brotherton moved her from her bed to a toilet at the end of the bed; as Brotherton lifted Raines onto the toilet, she experienced pain and a burning sensation in her neck. Brotherton experienced more severe pain when she again lifted Raines from the toilet and returned her to her bed. Brotherton immediately reported her injury to Foster.

Brotherton reported the injury to the agency on July 29, 2002, indicating that the injury occurred at 9:00 a.m. when she was helping Raines to use the toilet. Brotherton subsequently had surgery on her back. The agency controverted the claim, asserting that Brotherton was working for Foster when the injury occurred.

After a hearing, an Administrative Law Judge (ALJ) concluded that Brotherton sustained a neck injury at approximately 9:00 a.m. on July 16. In addition, based on the abnormal MRI findings and the doctor's records indicating that he removed disc fragments during surgery, the ALJ concluded that Brotherton established the existence of her injury by objective medical findings. The ALJ further found that the injury was causally related to the incident involving Raines.

Nonetheless, the ALJ concluded that the injury was not compensable because Brotherton was not performing employment services within the time and space boundaries of her employment with the agency because her injury did not occur within the time period that she was scheduled to work for Raines. Noting Kronnister's testimony indicating the agency's knowledge of the "unique" circumstances of Brotherton's employment situation, and because the agency offered no evidence that it lacked knowledge of the precise nature and timing of the various tasks performed by Brotherton in Foster's home, the ALJ concluded that the agency knew or should have known that Brotherton and Foster had a "set routine" by which they did not on July 16 follow the "precise schedule" supplied by the agency.

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[1] It appears that Brotherton had just finished bathing Raines when the injury occurred. In her deposition testimony, Foster stated that Brotherton went to Raines room to "bathe her and get her up." Brotherton testified that she had just laid Raines's back in her bed when she said she needed to use the toilet.

The ALJ also inexplicably stated that had Brotherton become injured while assisting Raines to the *toilet between 10:00 a.m. and 1:00 p.m.*, her injury "would almost surely" have been compensable and that, had she been *bathing* Raines when she was injured, the injury might have been compensable, notwithstanding that she was scheduled to work from 10:00 a.m. to 1:00 p.m. Because he found that toileting occurred throughout the course of the day, the ALJ determined that it was a service that could be performed for either Foster or the agency. However, the ALJ concluded that Brotherton's act of assisting Raines to the toilet at 9:00 a.m. was an employment service performed for Foster, not the agency. Accordingly, he denied benefits. The Commission affirmed and adopted the ALJ's findings.

Brotherton now argues that the Commission erred in determining that her injury was not sustained in the course of her employment with the agency. In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Whitlach v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004). Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Id.* When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Id.* The Commission is not required to believe the testimony of any witness, and it may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Holloway v. Ray White Lumber Co.*, 337 Ark. 524, 990 S.W.2d 526 (1999). The Commission may accept or reject medical opinions and determine their medical soundness and probative force. *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999).

A claimant may simultaneously work for multiple employers. *Cook v. Recovery Corp.*, 322 Ark. 707, 911 S.W.2d 581 (1995). If an employee is performing for and is under the control of two employers at the same time, then liability for workers' compensation benefits is joint. *Id.* However, if the work is separable, then the employer for whom the employee was providing services at the time of the injury is liable. *Id.*

A compensable injury is an accidental injury causing internal or external harm that arises out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(I) (Supp. 2005). A compensable injury does not include an "[i]njury which was inflicted upon the employee at a time when employment services were not being performed." Ark. Code Ann. § 11-9-102(4)(B)(iii). An employee is performing employment services when he or she is doing something that is generally required by his or her employer. *Collins v. Excel Spec. Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002). The test for determining whether an employee was injured while performing employment services is the same as the test for determining whether an injury occurred out of and in the course of employment: whether the injury occurred within the time and space boundaries of the employment when the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly. *Id*; *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999); *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). Thus, the critical issue is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury. *Collins, supra.*

Brotherton argues that because toileting is one of the services that she is required to perform for the agency and because it is undisputed that she was injured while performing toileting services on one of the agency's clients, the only reasonable conclusion that can be reached is that she was performing services within the time and space boundaries of her employment when she was injured. The agency counters that accepting Brotherton's argument would mean that she performed employment services *anytime* she was with a person who happened to be an agency client.

We do not agree that Brotherton's argument goes that far. We reverse the Commission's order because we believe that fair-minded persons could not find that Brotherton was not performing within the scope of her employment for the agency when she was injured. First, it is noteworthy that the agency does not dispute that the work is separable; in fact, it implicitly concedes that the work is separable because it maintains that Brotherton was performing work *solely* for Foster when she was injured. The agency is correct that the work was separable, but is incorrect in concluding that Brotherton was working for Foster at the time of her injury. In short, the services Brotherton performed for the agency were completed during her six-hour shift that began at 8:00 a.m., and therefore, were separable from the other work she performed for Foster before or after that time, even though the work involved the same tasks.

Moreover, Brotherton was performing within the time and space boundaries of her employment with the agency because her six-hour shift for *the agency* began at 8:00 a.m., and she was injured at 9:00 a.m. Thus, she was clearly "on the agency's clock" when she was injured. The Commission's decision ignores this fact and, instead, places undue emphasis on the fact that Brotherton was injured outside of the time period that she was scheduled to work specifically for *Raines*.

Even if it were true that Brotherton was injured during a time when the agency was not compensating her, that would not preclude a finding that her injury was compensable. Clearly, an injury that occurs during non-scheduled work time may be compensable if the claimant is furthering her employer's interests at the time or if the employer requires the employee to provide assistance if needed during that non-scheduled work time. *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002) (affirming a finding that a claimant was performing employment services when, pursuant to her employer's rules, she returned to her locker to secure her personal items before returning to work after an unpaid break). Thus, despite the agency's argument to the contrary, the fact that Brotherton was not injured during the three-hour period that she was "scheduled" to work for Raines does not preclude a finding that she was directly or indirectly furthering the interests of her employer.

In any event, it is clear that Brotherton was injured during *agency-scheduled* work hours. Furthermore, she was injured while performing an *agency-contracted service* (one of an especially sensitive nature) for her *own agency client*. On these facts, the agency's argument is rather unpersuasive that in doing so, Brotherton performed work that the agency did not generally require of her or that she did not directly or indirectly advance the agency's interests. In fact, Kronnister admitted that the agency benefited when an aide assisted another person in the residence who was creating a disturbance (which would be expected of a person who needs assistance to use the toilet when that assistance is not forthcoming).

The fact that the agency received a benefit is further demonstrated by the fact that it would have been a *detriment* to the agency had Brotherton *refused* to assist Raines because she was not "scheduled" to help her. This was recognized by Kronnister who testified that as an employer, she "probably" would not abide an aide's refusal to assist one client who needed assistance because the need arose during the time blocked off for another client. It is

manifestly unjust to deny a claimant benefits where she was injured performing a service for which she could lose her job had she *not* performed these same services.

Finally, the Commission's decision ignores the effect of the agency's acquiescence to this unique employment situation. *Arkansas Methodist Hosp. v. Hampton*, 90 Ark. App. 288, 205 S.W.3d. 848 (2005) (holding that an intensive-care nurse who received no scheduled breaks was performing employment services where she was injured while going to the cafeteria to purchase breakfast for herself and her fellow nurses because the hospital acquiesced in the practice and expected her to advance the hospital's interest no matter where she was in the hospital). Here, the agency knew that it employed Brotherton and Foster, knew that four of Foster's five clients were also agency clients, knew that Brotherton also worked for Foster, and knew that these employees did not, and in fact, could not, strictly observe the agency's service schedule. Specifically, the agency knew even though Brotherton was "scheduled" to work for Raines from 10:00 a.m. to 1:00 p.m., she in fact, assisted Raines at any time during the entire six-hour period for which the agency compensated her. Further, Kronnister's testimony clearly establishes that, like the employer in *Hampton, supra*, the agency here expected Brotherton to advance the agency's interests as long as she was "on the clock."

This is not to say that any injury Brotherton received while working for one of the agency's client's in Foster's home would have been compensable. Rather, the holding in this case is limited to the unique manner in which employment services were performed to which the employer clearly acquiesced. Here, the claimant's injury was compensable considering the specific facts that, with the employer's knowledge and implicit consent, she was clearly performing a service for her own agency client that she was specifically contracted to perform and did so during her agency-scheduled hours. On these facts, we believe that reasonable minds would not have reached the Commission's conclusion. *Whitlach, supra*. Accordingly, we reverse the Commission's order and remand for an award of benefits.

Reversed and remanded.

BIRD, CRABTREE, BAKER, and ROAF, JJ., agree.

ROBBINS, J., dissents.

JOHN B. ROBBINS, Judge, dissenting. I respectfully disagree with the majority opinion, which concludes that there is no

substantial evidence to support the Commission's finding that Brotherton's injury was not sustained in the course of her employment with White River Area Agency on Aging.

The majority cites *Arkansas Methodist Hospital v. Hampton*, 90 Ark. App. 288, 205 S.W.3d 848 (2005), as an example of when "performing employment services" may include an employee's mere availability to act for the employer, if needed. That case is hardly relevant and is easily distinguished because it did not involve a second employer who was compensating the employee at the time of the injury, as the Commission found in the instant case. Furthermore, I take issue with the majority opinion's statement that the Commission ignored the Agency's acquiescence to a less-than-rigid work schedule. To the contrary, the Commission acknowledged that this was a unique work situation and offered an alternate scenario that might have proved compensable despite the timing of the injury.

More to the point, the majority opinion has resorted to fact finding in order to reverse the decision of the Commission in this instance. A review of the evidence that supports the Commission's decision, and the relevant facts found therein, include the following:

> (1) Brotherton worked for the Agency part time and for Mary Jane Foster part time at Foster's residence where five elderly ladies resided and received assistance.
>
> (2) Brotherton began her day's work at approximately 8:00 a.m. and worked until she and Foster were "caught up."
>
> (3) The Agency paid Brotherton to provide three hours of personal care services each day to Maxine Raines, one of Foster's residents.
>
> (4) The Agency also paid Brotherton to provide three hours of personal care services each day to Flora Shinaro, another of Foster's residents.
>
> (5) Foster paid Brotherton $1100 per month to provide services for any of Foster's five residents, and the pay was for any service rendered when Brotherton was not "on the clock" for the Agency.
>
> (6) Brotherton's work schedule with the Agency reflected that her three hours of services for Maxine Raines were to be rendered from 10:00 a.m. to 1:00 p.m.

(7) The record does not reflect when Brotherton was scheduled to render the three hours of services to Flora Shinaro.

(8) Brotherton was injured while assisting Raines to the toilet at 9:00 a.m. on July 16, 2002.

(9) Maxine Raines routinely and often requested toileting assistance.

(10) The billing form Brotherton provided to the Agency set forth that on July 16, 2002, she provided services to Maxine Raines from 10:00 a.m. to 1:00 p.m.

(11) Many portions of Brotherton's testimony at the hearing were deemed suspect.

I submit that the foregoing evidence constitutes substantial evidence in support of the Commission's finding that Brotherton failed to prove that she was performing employment services for the Agency at the time of her injury. To conclude otherwise requires fact finding, a function that is left to the Commission and not the appellate courts. The majority agrees that the employments are separable even though the tasks are the same, and it then *finds* that Brotherton's Agency employment time was 8:00 a.m to 2:00 p.m. There is no such evidence of record. Our task is to review the evidence favorable to the Commission's decision and decide if such evidence is substantial. In other words, could reasonable minds conclude that Brotherton failed to prove that she was "on the clock" for the Agency when she was hurt? Under proper application of the standard of review, the answer is yes. The majority opinion errs by holding otherwise.

ESTATE OF Randall Glen CARPENTER, Deceased *v.* Nita CARPENTER

CA 05-403 220 S.W.3d 263

Court of Appeals of Arkansas
Opinion delivered December 14, 2005

Harrelson, Moore & Giles L.L.P., by: *Steve Harrelson*, for appellant.

Chuck Gibson, for appellee.

DAVID M. GLOVER, Judge. Randall and Nita Carpenter were divorced in April 2002. In the decree of divorce, Randall was ordered to pay Nita temporary alimony in the amount of $500 per week for a period of five years. Randall died on December 19, 2004. Nita filed an affidavit of claim against Randall's estate, contending that Randall became delinquent in his payment of alimony as of October 23, 2003, and that his estate was liable not only for the alimony arrearage but also for the alimony remaining to be paid for the five-year period for which the trial judge had awarded alimony. After a hearing on Nita's claim, the trial judge found that her claim was valid, and he entered a judgment in her favor for $89,449.75 in alimony and $8,944.74 in attorney's fees, for a total of $98,394.50, which was ordered to be paid from estate assets. The estate filed a timely notice of appeal from this judgment, and it now argues to this court that the trial court erred in granting this claim

because alimony terminates by law upon the death of the obligor. We hold that the alimony obligation terminated upon Randall's death, but that the estate is liable for the alimony arrearage that existed at the time of Randall's death.

Probate cases are reviewed *de novo*, and the trial judge's findings of fact will not be reversed unless they are clearly erroneous; however, the appellate court is free in a *de novo* review to reach a different result required by the law. *Conner v. Donahoo*, 85 Ark. App. 43, 145 S.W.3d 395 (2004). The appellate court reviews issues of statutory construction *de novo*, as it is for the appellate court to determine what a statute means. *Id.*

Arkansas Code Annotated section 9-12-312(b) (Repl. 2002) is the applicable statutory provision in this case. That statute provides:

> In addition to any other remedies available, alimony may be awarded under proper circumstances to either party in fixed installments for a specified period of time subject to the contingencies of the death of either party, the remarriage of the receiving party, or such other contingencies as are set forth in the award, so that the payments qualify as periodic payments within the meaning of the Internal Revenue Code.

We hold that the plain language of the statute resolves the issue in this case — alimony for a certain term is subject to the contingency of the death of either party. The statute specifically provides that the fixed installments of alimony are "subject to the contingencies of the death of either party, the remarriage of the receiving party, or such other contingencies as are set forth in the award." The language clearly means that if either party dies or if the payee spouse remarries, the alimony ends. This is so regardless of whether these specified contingencies are included in the decree. The only contingencies that must be set forth in the decree are ones other than death or remarriage.

The judgment included a sum payable to Nita for the period of time that Randall failed to pay her alimony while he was alive. We hold that this portion of the judgment is a viable claim against the estate, as Randall remained under the court order at the time of his death to pay weekly alimony of $500 but had stopped paying it sometime in October 2003, according to Nita's affidavit. We remand this issue to the trial judge for determination of the sum

Nita is owed with regard to the alimony arrearage that had accrued prior to Randall's death as well as the proper attorney's fee due.

Reversed and remanded.

NEAL and VAUGHT, JJ., agree.

Gary Ray DAVIS *v.* STATE of Arkansas

CA CR 04-1339 220 S.W.3d 248

Court of Appeals of Arkansas
Opinion delivered December 14, 2005

F. Lewis Steenken, for appellant.

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

OLLY NEAL, Judge. Appellant Gary Davis was found guilty of aggravated assault, a violation of Ark. Code Ann. § 5-13-204; felon in possession of a firearm, a violation of Ark. Code Ann. § 5-73-103; and use of a firearm in commission of a felony, a violation of Ark. Code Ann. § 16-90-120. He was sentenced to 120 months in the Arkansas Department of Correction. On appeal, appellant does not contest his aggravated-assault and felon-in-possession convictions. However, he does challenge his use of a firearm in the commission of a felony conviction. He specifically argues that "the trial court erred in instructing the jury as to the charge of use of a firearm in the commission of a felony when that [sic] underlying felony required use of a firearm as an element of the conviction." We affirm.

Appellant's argument on appeal is essentially a double-jeopardy argument. However, before reaching the merits of appellant's argument, we must first determine if it is preserved for appellate review. The State argues that appellant failed to raise a specific double-jeopardy argument below. The abstract indicates that appellant raised the following objection:

> I object to Number 19 having to do with firearm enhancement. The primary element of the underlying aggravated assault is displaying a firearm. Enhancing that conviction enhances the punishment for what the legislature determined to be a Class "D" felony. You can't commit aggravated assault unless you display a firearm. The elements duplicate themselves. The firearm enhancement law should not be permitted to be used to enhance a crime that requires the use of a firearm in order to be committed.

Although appellant failed to specifically use the words "double jeopardy," his objection below was sufficient to preserve this matter for appeal.

The double-jeopardy clause consists of several protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments of the same offense.

Garrett v. State, 347 Ark. 860, 866, 69 S.W.3d 844, 848 (2002) (quoting *Schiro v. Farley*, 510 U.S. 222 (1994)). A person commits

aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he either (1) purposely engages in conduct that creates a substantial danger of death or serious physical injury to another person, or (2) purposely displays a firearm in such a manner that creates a substantial danger of death or serious physical injury to another person. Ark. Code Ann. § 5-13-204(a) (Supp. 2005). Arkansas Code Annotated section 16-90-120 (1987) provides, in pertinent part:

> (a) Any person convicted of any offense which is classified by the laws of this state as a felony who employed any firearm of any character as a means of committing or escaping from the felony, in the discretion of the sentencing court, may be subjected to an additional period of confinement in the state penitentiary for a period not to exceed fifteen (15) years.
>
> (b) The period of confinement, if any, imposed pursuant to this section shall be in addition to any fine or penalty provided by law as punishment for the felony itself. Any additional prison sentence imposed under the provisions of this section, if any, shall run consecutively and not concurrently with any period of confinement imposed for conviction of the felony itself.

Appellant specifically argues that, because displaying a firearm was a necessary element of his aggravated-assault conviction, section 16-90-120 should not have been applied to further enhance his sentence. Based upon our supreme court's recent decision in *Williams v. State*, 364 Ark. 203, 217 S.W.3d 817 (2005),[1] we hold that appellant's argument lacks merit. In *Williams*, upon looking at the clear language in section 16-90-120, the supreme court observed that the legislature intended for the section to serve as an enhancement of the original sentence

[1] In *Williams*, the appellant was convicted of aggravated robbery and sentenced to twelve years imprisonment. Section 16-90-120 was used to impose an additional five years' to the appellant's sentence, resulting in a total sentence of seventeen years' imprisonment. On appeal, the appellant in *Williams* argued that (1) the five-year sentence imposed on him for having used a firearm to commit aggravated robbery was forbidden by the plain meaning of Arkansas Code Annotated § 5-4-104(a) (Repl. 1997); and (2) five years of his seventeen-year aggregate sentence of imprisonment was illegal because it resulted from stacking a general statute imposing a sentence for use of a firearm to commit a felony offense onto the specific sentence enhancement for the use of a deadly weapon contained in the definition of aggravated robbery.

imposed for the crime upon which the defendant was convicted. The court reasoned that, where the stand-alone offense does not contain a separate enhancement provision, the legislature, by enacting section 16-90-120, gave the sentencing court discretion to enhance the sentence up to fifteen years when a firearm is employed in the commission of a felony.

We interpret the court's holding in *Williams* to mean that, when section 16-90-120 is used to enhance a defendant's sentence, the double-jeopardy clause is not offended. Therefore, we hold that the trial court did not err when it instructed the jury on the charge of use of a firearm in the commission of a felony when the underlying felony required the use of a firearm as an element of that offense. Accordingly, we affirm.

Affirmed.

GLOVER and VAUGHT, JJ., agree.

HELENA CHEMICAL COMPANY *v.* Jerry CAERY, Jr. and Jerry Caery, Sr.

CA 04-385 220 S.W.3d 235

Court of Appeals of Arkansas
Opinion delivered December 14, 2005

Barrett & Deacon, P.A., by: *Ralph W. Waddell* and *D.P. Marshall Jr.*, for appellant.

Roscopf & Roscopf, P.A., by: *Charles B. Roscopf*, for appellee.

Lax, Vaughan, Fortson, McKenzie & Rowe, P.A., by: *Roger D. Rowe* and *Grant E. Fortson*, for The National Ass'n of Credit Management, Mi-South Unit, as *amicus curiae*.

LARRY D. VAUGHT, Judge. Helena Chemical Company appeals the trial court's grant of summary judgment to appellee Jerry Caery, Sr., concerning a guaranty agreement he made involving purchases from Helena made by his son, appellee Jerry Caery, Jr. Helena argues two points for reversal: that the trial court erred as a matter of law in voiding the guaranty for lack of mutuality and that the trial court erred as a matter of law when it refused to enforce the guaranty upon Caery Jr.'s default. We need not address Helena's first point because the second point is dispositive of this appeal, and we affirm.

On April 8, 1988, Helena entered into a credit sales agreement with Caery Jr. to allow him to purchase supplies on credit. The credit application signed by Caery Jr. indicated that he planned to conduct his farming operation as a sole proprietorship. That same day, Helena also entered into an agreement with Caery Sr. for him to unconditionally guarantee payment for goods delivered to Caery Jr. The guaranty agreement provided that it would cover the present balance, together with any and all future indebtedness. The guaranty agreement also provided that it was a continuing guaranty that would remain in effect until Caery Sr.

gave written notice to Helena not to make any further advances under the agreement. Finally, the guaranty agreement provided that Caery Sr. waived notice that Caery Jr. was in default prior to Helena's being allowed to proceed against Caery Sr. under the guaranty agreement.

In 1995, Caery Jr. defaulted on his obligations, and Helena refused to extend credit to him for the years 1996 and 1997. Caery Jr.'s 1995 debt was paid off in either 1996 or 1997. In December 1996, Caery Jr. formed a partnership known as JLC Farms. Helena extended credit to JLC Farms in 1998 under its original individual credit application with Caery Jr.

Helena originally filed suit against both Caerys in 1999, seeking payment of the outstanding balance of $308,000 owed on credit extended to JLC Farms. Helena and Caery Jr. entered into a "Standstill Agreement," whereby Caery Jr. would pay $120,000 upon execution of that agreement, another $50,000 by December 31, 1999, and the remaining balance in annual installments beginning December 2000. Caery Jr. failed to make the December 1999 payment. In July 2000, Helena and Caery Jr. negotiated an addendum to the Standstill Agreement, and Caery Jr. paid an additional $30,000 but failed to make other payments under the Standstill Agreement or its addendum. That suit was dismissed without prejudice in January 2000.

Helena filed the present suit on February 21, 2002, seeking payment of the outstanding balance of $167,000. The complaint alleged that the defendants were jointly and severally liable for the debt. The complaint also sought prejudgment interest and attorney's fees. The defendants answered, denying that Caery Sr. was liable for repayment of the sums owed by Caery Jr.

Caery Sr. obtained separate counsel and filed a separate amended answer, admitting that he signed the guaranty agreement but otherwise denying the allegations of the complaint. He also asserted that the goods were delivered to JLC Farms and thereby were not covered under the guaranty agreement and that this change constituted a material alteration of his obligation under the guaranty agreement. Caery Sr. later amended his answer to assert as additional affirmative defenses lack of mutuality, failure of consideration, and fraud.

Helena moved for summary judgment as to both defendants. Caery Sr. filed a cross-motion for summary judgment, asserting that he was entitled to judgment as a matter of law because he did

not guarantee the account sued upon and that the terms and conditions of the guaranty agreement had been materially altered, thus discharging him from his obligation under that agreement. Attached to Caery Sr.'s motion for summary judgment was Helena's answer to an interrogatory stating that Caery Jr. had paid off the debt that existed at the time of his default in 1997. In his affidavit, Caery Sr. stated that he did not agree to guarantee credit to JLC Farms. In response to Caery Sr.'s motion, Helena argued that Caery Sr. remained liable because Caery Jr., as a partner of JLC Farms, was still personally liable for the partnership's debts. Helena stated, both in its response to the motion and at the hearing, that it was seeking to hold Caery Sr. liable for purchases made by JLC Farms.

In its letter opinion, the trial court ruled that the guaranty agreement lacked mutuality, reasoning that, because Helena could revoke Caery Jr.'s credit sales at any time, it was entirely optional with Helena as to whether it would perform its obligation to Caery Jr. The court concluded that the guaranty agreement was not binding on Caery Sr. The court further found that Caery Sr. only guaranteed the debts of Caery Jr. and not those of JLC Farms. Summary judgment was granted in favor of Helena against Caery Jr. for the outstanding balance of $167,000. This appeal followed.

The parties filed opposing motions for summary judgment and thus, in essence, agreed that there are no material facts remaining. Summary judgment, therefore, was an entirely appropriate means for resolution of this case. As often stated, 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. *McCutchen v. Patton*, 340 Ark. 371, 10 S.W.3d 439 (2000); *Mashburn v. Meeker Sharkey Fin. Group, Inc.*, 339 Ark. 411, 5 S.W.3d 469 (1999).

Helena argues that the trial court erred in not enforcing the guaranty agreement against Caery Sr. For his part, Caery Sr. argues that the trial court correctly refused to enforce the agreement because his obligation had been materially altered when Helena extended credit to JLC Farms without seeking a new guaranty from Caery Sr. We agree with Caery Sr.

In *Morrilton Security Bank v. Kelemen*, 70 Ark. App. 246, 16 S.W.3d 567 (2000), we discussed the obligation of a guarantor:

> A guarantor, like a surety, is a favorite of the law, and her liability is not to be extended by implication beyond the expressed terms of the agreement or its plain intent. *National Bank of Eastern Arkansas v. Collins*, 236 Ark. 822, 370 S.W.2d 91 (1963); *Moore v. First National Bank of Hot Springs*, 3 Ark. App. 146, 623 S.W.2d 530 (1981). A guarantor is entitled to have her undertaking strictly construed and she cannot be held liable beyond the strict terms of her contract. *Inter-Sport, Inc. v. Wilson*, 281 Ark. 56, 661 S.W.2d 367 (1983); *Lee v. Vaughn*, 259 Ark. 424, 534 S.W.2d 221 (1976). Any material alteration of the obligation assumed, made without the consent of the guarantor, discharges her. *Wynne, Love & Co. v. Bunch*, 157 Ark. 395, [248 S.W. 286] (1923); *Continental Ozark, Inc. v. Lair*, 29 Ark. App. 25, 779 S.W.2d 187 (1989).

Id. at 247-48, 16 S.W.3d at 568. Further, alteration of a guaranty agreement is not material unless the guarantor is placed in the position of being required to do more than his original undertaking. *Vogel v. Simmons First Nat'l Bank*, 15 Ark. App. 69, 689 S.W.2d 576 (1985).

It has long been held that a guarantor is discharged when the principal debtor changes the form of his business from a sole proprietorship to a partnership and credit is extended to that partnership without the knowledge or consent of the guarantor. *Conn. Mut. Life Ins. Co. v. Scott*, 81 Ky. 540 (1884); *Zeo v. Loomis*, 141 N.E. 115 (Mass. 1923); *Parham Sewing Mach. Co. v. Brock*, 113 Mass. 194 (1873); *White Sewing Mach. Co. v. Hines*, 28 N.W. 157 (Mich. 1886); *Spokane Union Stockyards v. Maryland Cas. Co.*, 178 P. 3 (Wash. 1919). As the Massachusetts court in *Parham* explained:

> This was a material change in the . . . liability of the sureties. A new person was introduced, having equal powers with [the principal] to purchase machines and manage the business. While they might be willing to be sureties for [the principal], and may have been influenced to do so from personal or family considerations, or from confidence in his integrity and business capacity, it does not follow that they can be bound, or have consented to be bound, for the acts of any one whom [the principal] may have taken into partnership. They had made no contract to that effect, there is no evidence of their consent to the change, and they are exonerated from liability for the purchases of the plaintiff's agent after the change.

113 Mass. at 197. Helena argues that the fact that Caery Jr. created a partnership with himself as a member is immaterial because, under

principles of partnership law, the debt of JLC Farms is a debt of Caery Jr. However, the Michigan court in *White Sewing Machine, supra,* rejected such an argument on the same basis as *Parham.*

Another factor supporting our conclusion that there was a material alteration resulting in a discharge of Caery Sr.'s liability is the substantially increased risk provided by the 1998 contract. *See Restatement (Third) of Suretyship & Guaranty* § 41(b)(i) (1996). The credit extended by Helena to Caery Jr. increased over time from $5000 in 1988, to $7500 in 1991, to $30,000 in 1993, and finally to $40,000 in 1995. Caery Jr. paid off the debt each year, with the exception of the 1995 debt noted above. The original credit application approved a credit limit of $5000. The line of credit extended to JLC Farms in 1998 was $250,000.

The final basis for affirming the trial court is that the payment of the principal debt extinguished the obligation of the guarantor. *Nat'l Bank of E. Ark. v. Collins,* 236 Ark. 822, 370 S.W.2d 91 (1963). Here, proof was submitted in the form of Caery Jr.'s affidavit that he paid his individual 1995 debt. Helena agreed, in an answer to an interrogatory, that the pre-JLC Farms debt had been paid.[1] There was no further debt owed to Helena until 1998, when Helena extended credit to JLC Farms. It was this new debt that the present suit was filed to collect.

Affirmed.

GLOVER and NEAL, JJ., agree.

[1] The record is unclear on whether the debt was paid in 1996 or 1997. Nonetheless, it is clear that the debt was paid prior to further credit being extended to Caery Jr. in 1998.

Gary ANDERSON *v.* STATE of Arkansas

CA CR 05-172 220 S.W.3d 225

Court of Appeals of Arkansas
Opinion delivered December 14, 2005

Dustin D. Dyer, for appellant.

Mike Beebe, Arkansas Attorney General, by: *Laura Shue*, Assistant Attorney General, for appellee.

TERRY CRABTREE, Judge. A jury in Saline County found appellant guilty of rape and sexual assault in the first degree for which he was sentenced to consecutive terms of thirty and twenty years in prison. Appellant raises three issues on appeal. He argues that: (1) the trial court erred in denying his motion to dismiss for the violation of his right to a speedy trial; (2) the trial court erred in denying his motion to dismiss on grounds of double jeopardy; and (3) the trial court erred in denying his motion in limine to exclude prior bad acts in contravention of Ark. R. Evid. 403. We affirm.

Appellant's present convictions arose from an information filed in Saline County on April 8, 2004, wherein he was charged with two counts of rape involving his step-daughter A.H. Previously, on September 22, 2002, appellant had been arrested on bench warrants issued in Hot Spring County on sex-based charges involving A.H., and another child, A.M. On May 29, 2003, appellant pled guilty in a Hot Spring County Circuit Court to sexual assault in the first degree of A.M., and the rape of A.H., for which he was sentenced to cumulative terms of twenty years' imprisonment.

In the case at bar, appellant filed several pretrial motions that were premised on the Hot Spring County proceedings. Based on his arrest there on September 22, 2002, appellant contended that the speedy-trial period in the present case had expired. Appellant also argued that the former prosecution barred the current charges on grounds of double jeopardy. Appellant further contended that the pursuit of the present charges violated the plea agreement entered in the Hot Spring County Circuit Court.[1] Finally, appellant moved in limine to preclude the State from introducing any evidence regarding his prior conduct with regard to A.H.

The pretrial hearings took place over the course of several days. Doug Shuffield, a child abuse investigator with the Arkansas State Police, conducted the investigation in Hot Spring County. He interviewed appellant on August 14, 2002, and during the interview appellant confessed to having sexual contact with A.H. After the interview, appellant was placed under arrest by Officer Frazier Ford of the Malvern Police Department, but he was released after forty-eight hours. Bench warrants were later issued

[1] Appellant raises no argument with regard to this motion in this appeal.

after formal charges were filed with regard to appellant's conduct with A.H. and A.M. The warrants were served and appellant was arrested on September 22, 2002.

Detective Shuffield testified that appellant was not arrested on charges arising in Saline County, and he said that he was not aware that appellant had raped A.H. in Saline County after the August 14 interview. He did know that appellant had left Hot Spring County after the forty-eight-hour hold, but he did not know where appellant had gone. He alerted DCFS on September 4, 2002, that A.H. could not be found, and he contacted the Malvern Police Department to issue a BOLO for appellant and the family. Officer Ford also testified that he arrested appellant based on conduct that occurred with A.H. in Hot Spring County.

Appellant was represented by attorneys Phyllis Lemons and Craig Crain on the Hot Spring County charges. Crain testified that appellant's guilty plea concerned only the Hot Spring County cases, and he said that he was unaware of any allegations regarding appellant's conduct in Saline County. Lemons also testified that the plea agreement only involved the charges in Hot Spring County and that she had no knowledge of any charges out of Saline County. Richard Garrett, a deputy prosecutor in Hot Spring County, stated that the charges in Hot Spring County were based on events that took place in that county, and that at the time of the plea, he was not aware that appellant had committed any offenses in Saline County.

The trial court, after hearing the evidence, denied appellant's motions to dismiss and his motion in limine. Appellant renewed these motions at various stages of the trial.

At the trial, A.H. testified that appellant had been her mother's boyfriend for five years, beginning when she was ten years old and ending when she was fifteen. At the outset, she, her mother, her brother, appellant, and his mother lived in an apartment in Malvern. A.H. recalled that she had knee surgery on August 18, 2002. When she got home from the operation, she lay on a mattress watching television, and she testified that appellant had sexual intercourse with her on the mattress. A.H. said that appellant had raped her on previous occasions as well, and that she had told her mother about the rapes, but that her mother did not care and did not want to hear what she had to say. A.H. said that appellant had been arrested in Hot Spring County because of his raping her and that he had just gotten out of jail when he raped her on August 18.

A.H. further testified that they all moved into a house-trailer in Benton sometime after the August 18 rape. She said that her mother was running from DHS because her mother did not want her to divulge what was going on between her and appellant. One day, after she had gotten off the school bus, she recalled that she was sitting on the couch watching television and that appellant inserted a plastic Coke bottle into her vagina. She said that appellant's mother witnessed this and asked him to stop. A.H. testified that this hurt her and caused her to bleed. A.H. further testified that appellant also raped her one morning before school. When waking her up, he pulled down her pajamas and inserted his penis into her vagina. A.H. said that appellant's mother witnessed this incident as well. A.H. testified that she told Detective Shuffield about the rapes in Hot Spring County. She was certain that the Coke-bottle incident and the intercourse before school occurred in Saline County.

A.M. testified that she was a friend of A.H.'s when they lived in the same apartment complex in Malvern. She said that appellant was "touchy feely" and that he felt her breasts some fifty times, her crotch about fifteen times, and her bottom around fifty times. When she stayed the night with A.H., she and A.H. slept in the apartment's only bedroom with appellant. When they were in bed, she was aware of appellant rubbing A.H. She saw appellant touch A.H.'s vagina, and she said that appellant would kiss A.H. on the lips in front of A.H's mother and appellant's mother. She once heard appellant's mother chiding appellant for doing something inappropriate to A.H., which she took to mean sexual intercourse.

The first issue appellant raises concerns his allegation that he was denied the right to a speedy trial. He contends that he was first arrested on September 22, 2002, and that his trial in this case held on September 29, 2004, exceeded the speedy-trial limitations period. Rule 28.1(b) of the Arkansas Rules of Criminal Procedure requires the State to try a defendant within twelve months, excluding any periods of delay authorized by Rule 28.3. The time for trial begins to run from the date the charge is filed; however, the time begins to run from the date of the arrest if the defendant is continuously held in custody to answer for the same offense or an offense based on the same conduct. Ark. R. Crim. P. 28.2(a). Once a defendant demonstrates a prima facie case of a speedy trial violation, the burden is on the State to show that the delay was the result of the defendant's conduct or was otherwise justified. *Zangerl v. State,* 352 Ark. 278, 100 S.W.3d 695 (2003). If a defendant is not

brought to trial within the requisite time, Ark. R. Crim. P. 30.1(a) provides that the defendant will be discharged, and such discharge is an absolute bar to prosecution of the same offense. *Id.*

The trial court ruled that appellant had failed to establish a prima facie case because the evidence showed that appellant was arrested on September 22, 2002, only with regard to the charges in Hot Spring County, which were separate and apart from those arising in Saline County. We agree with the trial court's ruling. Rape is not defined as a continuing offense. *Rains v. State,* 329 Ark. 607, 953 S.W.2d 48 (1997). When a victim testifies as to multiple acts of rape of a different nature, separated in point of time, there is no continuing offense as a separate impulse was necessary for the commission of each offense. *Id.* The record in this case is abundantly clear that appellant was arrested, charged, and pled guilty to raping A.H. for his conduct that occurred in Hot Spring County. None of the officials in Hot Spring County, nor appellant's attorneys in that matter, were even aware that appellant had engaged in similar conduct in Saline County. Because these were different offenses, the speedy-trial period was not triggered by the date of his arrest on the charges in Hot Spring County. Instead, the period began to run on the date the Saline County charges were filed, April 8, 2004. At the time of trial, September 29, 2004, the speedy-trial period had not expired. Therefore, the trial court correctly ruled that appellant had failed to establish a prima facie case and that he was not denied the right to a speedy trial. We affirm on this point.

Appellant's double-jeopardy argument fails for the same reason. His argument is premised on the assertion that the Hot Spring County and Saline County offenses were based on the same conduct. As that is not the case, this argument is likewise without merit.

Appellant's final argument is that the trial court erred in allowing A.H. to testify regarding the sexual activities that occurred in Hot Spring County and in allowing evidence of his prior convictions in Hot Spring County. When the alleged crime is child abuse or incest, we have approved allowing evidence of similar acts with the same or other children in the household when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship. *Berger v. State,* 343 Ark. 413, 36 S.W.3d 286 (2001). This is known as the "pedophile exception" to Rule 404(b) of the

Arkansas Rules of Evidence. *Parish v. State,* 357 Ark. 260, 163 S.W.3d 843 (2004). Further, it is admissible to show the familiarity of the parties and antecedent conduct toward one another and to corroborate the testimony of the victim. *Id.* The rationale for recognizing this exception is that such evidence helps to prove the depraved sexual instinct of the accused. *Flanery v. State,* 362 Ark. 311, 208 S.W.3d 187 (2005).

Appellant does not contend that the evidence was not admissible under this exception. Instead, it is his argument that the evidence was unfairly prejudicial and thus inadmissible under Ark. R. Evid. 403. Rule 403 provides 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. Trial courts have broad discretion in deciding evidentiary issues, and their decisions are not reversed absent an abuse of discretion. *Smith v. State,* 351 Ark. 468, 95 S.W.3d 801 (2003). Here, the appellant presented evidence denying that any acts of abuse occurred in Saline County, and he sought to discredit the testimony of A.H. with letters she had written to him in jail in which she spoke favorably of him.[2] The evidence of the prior occurrences thus tended to corroborate the testimony of A.H. and demonstrate his proclivity for engaging in similar conduct with A.H. We are not able to say that the trial court abused its considerable discretion in concluding that the probative value of the evidence exceeded the danger of unfair prejudice.

Affirmed.

BAKER, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. In Gary Anderson's trial in Saline County for the rape of A.H., a fourteen or fifteen-year-old girl, the State was allowed to introduce into evidence the fact that Anderson had also been prosecuted for rape of the same victim during the same time frame in Hot Spring County and that Anderson had already pled guilty to the Hot Spring County

[2] In the letters, A.H. referred to appellant as "dad" and wrote, generally, that she loved and missed him and that she awaited his return home. A.H. testified that her mother forced her to write the letters.

charge. The question is not so much whether this evidence is prejudicial, but whether anything could be more prejudicial to Anderson's right to a fair trial.

Nevertheless, I join in affirming the conviction. There is simply no basis in our case law for a reversal based upon a Rule 403 objection, and certainly not where an alleged pedophile is on trial. The majority appropriately deals with this issue in a brief paragraph. The case it relies upon, *Flanery v. State*, 362 Ark. 311, 208 S.W.3d 187 (2005), treats *Flanery's* Rule 403 issue with similar brevity. You will search high and low and not find any real substantive discussion of Rule 403 in the annals of Arkansas law. The abuse of discretion standard is always cited, and maybe a few facts regurgitated followed by the conclusion that no abuse of discretion occurred.

The bottom line is that, pursuant to Rule 404(b), the supreme court has consistently recognized the "pedophile exception," which provides that evidence of similar sexual acts with the same child or other children in the same household is admissible to show a "proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship" or to "prove the depraved sexual instinct of the accused." *Dougan v. State*, 330 Ark. 827, 957 S.W.2d 182 (1997); *Douthitt v. State*, 326 Ark. 794, 935 S.W.2d 241 (1996); *Mosley v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996); *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996); *Thompson v. State*, 322 Ark. 586, 910 S.W.2d 694 (1995). That being the case, there simply cannot be a sincere effort to perform the Rule 403 balancing step or such highly prejudicial evidence would never be allowed in, especially in cases such as this, where the evidence is not even necessary to the State's case.

Rule 403 is supposed to provide the necessary "parameters" for this balancing act. In response to an objection that evidence is unfairly prejudicial, the probative value of the evidence must be weighed against the danger of unfair prejudice. *Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998); *George v. State*, 306 Ark. 360, 813 S.W.2d 792 (1991). What "parameters" could they possibly have reference to? The Advisory Committee Note to Rule 403 explains that "unfair prejudice" within the context of the rule means "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one."

In this regard, Anderson asserts in his brief that his conviction was a foregone conclusion once the State was allowed to

inform the jury that he had already pled guilty to the same conduct and crime against the same victim in Hot Spring County. Of course he is right. However, it is not considered unfair in Arkansas or indeed in many other jurisdictions to allow such damning evidence as proof of guilt. The "balancing" never really takes place, at either the trial court level or on appeal. Nevertheless, our supreme court precedent mandates that I must concur in affirming this case.

Rodger and Dana BRIDGES *v.* Denise BUSH

CA 05-352 220 S.W.3d 259

Court of Appeals of Arkansas
Opinion delivered December 14, 2005

J. Slocum Pickell, for appellants.

Carl J. Madsen, for appellee.

KAREN R. BAKER, Judge. Appellants, Rodger and Dana Bridges, appeal a Grant County Circuit Court order setting aside an adoption. Appellants have four points on appeal: that the trial court erred in setting aside appellants' adoption of the minor child; that the trial court erred in finding appellants committed fraud upon the court in obtaining the adoption; that the trial court erred in

finding appellants' failure to file genetic, health and social history regarding the child was not in compliance with adoption statutes; that there was insufficient evidence to set the adoption aside based on fraud, duress, or intimidation.

Appellants filed a petition for adoption of minor A.B. on January 13, 2003. Appellee, Denise Bush, and her husband adopted A.B. from her biological parents. On January 10, Ms. Bush and her husband signed consents to adopt and relinquishments of parental right forms. The forms were signed in the Bush home with Ms. Bridges present, but without the presence of a notary public. The following day, Ms. Bridges took the papers to her attorney's secretary, who notarized the consents despite not being present when the forms were signed. Four days after the consents were signed, Ms. Bush's husband died.

On January 29, appellants appeared before the court to obtain the adoption, but the court denied their request because a home study had not been completed. They were informed that the adoption decree would be entered once a home study was completed and was satisfactory. However, testimony regarding the adoption was taken so that appellants would not have to appear before the court again. A home study was eventually completed and filed and an adoption decree was entered on April 16. In September, an amended adoption decree was entered, granting appellee visitation with A.B.

Appellee filed a motion to set aside the adoption on April 2, 2004. She asserted that appellants obtained her consent through fraud, duress, and intimidation and that appellants did not strictly comply with the adoption statutes. Following a hearing, the adoption was set aside on October 20. This appeal followed.

Although appellants enumerate four issues for reversal of the trial court's decision, their arguments may be combined into essentially two issues. In their first, second and fourth points, appellants challenge the trial court's finding of fraud. In their third issue, appellants challenge the trial court's finding that their failure to file genetic, health, and social history regarding A.B. did not comply with the adoption statutes.

We review adoption proceedings de novo, and the trial court's decision will not be disturbed unless clearly erroneous, giving due regard to the opportunity and superior position of the trial court to determine the credibility of the witnesses. *Vier v. Hart*, 62 Ark. App. 89, 968 S.W.2d 657 (1998). In cases involving

minor children a heavier burden is cast upon the court to utilize to the fullest extent all its power of perception in evaluating the witnesses, their testimony, and the children's best interests. *Reid v. Frazee*, 72 Ark. App. 474, 41 S.W.3d 397 (2001). This court has no such opportunity, and we know of no case in which the superior position, ability, and opportunity of the court to observe the parties carries as great a weight as one involving minor children. *Id.*

Appellants contend that the trial court erred in setting aside the adoption based upon fraud. They argue that there was insubstantial evidence to support such a finding. In *McAdams v. McAdams*, 353 Ark. 949, 109 S.W.3d 649 (2003), the court explained:

> The fraud for which a decree will be canceled must consist in its procurement and not merely in the original cause of action. It is not sufficient to show that the court reached its conclusion upon false or incompetent evidence or without any evidence at all, but it must be shown that some fraud or imposition was practiced upon the court in the procurement of the decree, and this must be something more than false or fraudulent acts or testimony the truth of which was, or might have been, in issue in the proceeding before the court which resulted in the decree assailed.
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> . . . .
>
> The law is settled that the fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the cause, and does not consist of any false or fraudulent act or testimony the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment assailed. It must be a fraud practiced upon the court in the procurement of the judgment itself.

See also Wunderlich v. Alexander, 80 Ark. App. 167, 92 S.W.3d 715 (2002). We have also noted that the party seeking to set aside the judgment has the burden of showing that the judgment was obtained by fraud, and the charge of fraud must be sustained by clear, strong, and satisfactory proof. *McAdams, supra.*

[redacted] It is undisputed that on January 10, 2003, appellee and her husband signed consents to adopt and relinquishments of parental rights. It is also undisputed that the papers were taken to the Bush's attorney, where they were notarized; however, the notary was not present when the consents were signed.

This issue is critical due to appellee's assertion that she did not know what she signed. Ms. Bush testified that on January 5, she and Ms. Bridges had discussed A.B. staying with the Bridges while her husband was ill. Ms. Bridges agreed, but informed Ms. Bush that she wanted to enroll A.B. in day care but there were papers that needed to be signed. When Ms. Bridges went to the Bush's home on January 10, to get A.B., she brought some papers and told Ms. Bush that she and her husband needed to sign them. When Ms. Bridges was questioned about what the papers were, she informed Ms. Bush that they were "the papers we talked about." Ms. Bush assumed they were papers to get A.B. into daycare and signed them without reading them, as did Mr. Bush.

In contrast, Ms. Bridges testified that on January 5, Ms. Bush called and asked "when do you want to come get your little girl," and that Ms. Bush told her that Mr. Bush would sign the adoption papers. Ms. Bridges also stated that when she went to the Bush's home on January 10, she placed the papers on the kitchen table and went into the playroom to visit A.B. A few minutes later Ms. Bridges returned to the kitchen and Ms. Bush told her that the papers were signed.

Disputed facts and the determination of the credibility of witnesses are within the province of the circuit judge, sitting as the trier of fact. *Taylor v. George*, 92 Ark. App. 264, 212 S.W.3d. 17 (2005). Confronted with this testimony, the trial court found Ms. Bridge's testimony incredible.

Additionally, the court found that the evidence presented was extrinsic to the matter tried before the court and therefore was fraud upon the court. In support of its finding the trial court stated that "the consents were presented to the court as being authentic original documents, properly executed by the two subscribing parties, before a commissioned officer, a notary public, who attested that the signatures were made by the persons named and were made in their presence and were made for the purposes stated in the documents." The court also held that the consents were in violation of Ark. Code Ann. § 9-9-208(a)(1) (Repl. 2002), which requires consents to be executed in the presence of the court or in the presence of the person authorized to take acknowledgements.

Based on the foregoing, we cannot say the trial judge's finding that a fraud was practiced on the court in procuring the decree is clearly erroneous.

Finally, we address appellants' issue that the trial court erred in finding their failure to file genetic, health and social history

regarding A.B. was not in compliance with the adoption statutes. The trial court specifically stated in its order that this alone was not conclusive to its finding to set aside the adoption, therefore the case was decided on fraud rather than non-compliance with the adoption statute. Consequently, any decision we might render on this issue would be moot and as a general rule, we will not address moot issues. *See Forrest Const., Inc. v. Milam*, 345 Ark. 1, 43 S.W.3d 140 (2001).

Affirmed.

GLADWIN, CRABTREE, VAUGHT, and NEAL, JJ., agree.

ROAF, J., dissents.

ANDREE LAYTON ROAF, Judge, dissenting. The trial court set aside the final adoption order based primarily upon a finding that there had been a fraud practiced upon the court in the manner in which the two parental consents to the adoption had been executed. The other matters cited by the trial court do not rise to the level of fraud, and there was clearly no duress used in obtaining the consents.

While it is appropriate that the trial court determine the credibility of the witnesses, it is troubling that the court apparently did not consider, nor does the majority mention, the fact that appellee, Denise Bush, began to fraudulently collect a social security check for the child of over $800/month when her husband died several days after they had signed the consents, that she continued to collect these checks for a number of months after the adoption was final, the post-decree modification to the adoption order that she procured providing for visitation with the child, and the fact that Mrs. Bush waited until almost a year after the decree was entered, and after the social security check was cut off, to contest the adoption. Mrs. Bush admitted that she and her spouse signed the consents but claims not to have read them or to have known what they were, even though she and her spouse had themselves adopted the child in question during the events that transpired in this case. This is incredible, as the forms were captioned in bold type "CONSENT TO ADOPTION AND RELINQUISHMENT OF PARENT AND CHILD RELATIONSHIP." Because Mrs. Bush acknowledged that she had executed the form, I would reverse and remand.

Richard P. JACKSON *v.* Nora PITTS

CA 05-463 220 S.W.3d 265

Court of Appeals of Arkansas
Opinion delivered December 14, 2005

Richard Young, for appellant.

Len W. Bradley, for appellee.

KAREN R. BAKER, Judge. Appellant Richard Jackson owns land in Johnson County with a southern boundary line that adjoins the northern boundary line of appellee Nora Pitts. The appellee filed a complaint against the appellant, claiming he, or

persons acting on his behalf, bulldozed valuable trees on her land where it borders that of the appellant. Following a bench trial, the Johnson County Circuit Court found that the appellant and co-defendant John Moore trespassed on land belonging to the appellee and destroyed marketable timber. The circuit court entered judgment for damages against the appellant and his co-defendant, jointly and severally, and assessed the value of the destroyed timber at $1,157.20. Treble damages allowed under Ark. Code. Ann. § 18-60-102 (Repl. 2003) were awarded for a total judgment of $3,471.60. Appellant Jackson raises two points on appeal: 1) the evidence was not sufficient to support the judgment; 2) the court erred in crediting the testimony of Johnson County Extension Agent Blair Griffin. We disagree and affirm.

Arkansas Code Annotated section 18-60-102(a)(1) provides that a person committing trespass shall treble the value of trees damaged, broken, destroyed, or carried away. The imposition of treble damages pursuant to Ark. Code Ann. § 18-60-102(a) requires a showing of intentional wrongdoing, though such intent may be inferred from the carelessness, recklessness, or negligence of the offending party. *See, Hackleton v. Larkan*, 326 Ark. 649, 933 S.W.2d 380 (1996); *Auger Timber Co. v. Jiles,* 75 Ark. App. 179, 56 S.W.3d 386 (2001). The trial judge in this case applied the fair market value of the timber as the measure of damages, not the difference in before-and-after value of the land, although the use of either method has been approved. *Stoner v. Houston*, 265 Ark. 928, 582 S.W.2d 28 (1979); *Laser v. Jones*, 116 Ark. 206, 172 S.W. 1024 (1915); *Auger, supra.* The evidence in each case determines what measure of damages is to be used. *See*; *White River Rural Water Dist. v. Moon*, 310 Ark. 624, 839 S.W.2d 211 (1992); Linebarger v. Owenby, 79 Ark. App. 61, 83 S.W.3d 435 (2002). Timber is generally valued according to its "stumpage value," which is the value of the timber standing in the tree. *Burbridge v. Bradley Lumber Co.*, 218 Ark. 897, 239 S.W.2d 285 (1951).[1]

The appellant's first point on appeal maintains that there was insufficient evidence to support the judgment against him, arguing that there was no allegation in the complaint concerning an employment or agency relationship that would impute liability for

[1] For a detailed discussion on the development of the application of stumpage values as a measurement of damages in Arkansas caselaw, *see Burbridge, supra.*

the damaged timber.[2] According to the appellant, it was never shown at trial that his employee and co-defendant John Moore was acting within the scope of his employment or acting as the appellant's agent when the alleged trespass and destruction of timber occurred. We disagree.

In bench trials, the standard of review on appeal is whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Found. Telecomms., Inc. v. Moe Studio, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000); *Neal v. Hollingsworth*, 338 Ark. 251, 992 S.W.2d 771 (1999). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, when considering all of the evidence, is left with a definite and firm conviction that a mistake has been committed. *Neal, supra.* This court views the evidence in a light most favorable to the appellee, resolving all inferences in favor of the appellee. *Ark. Transit Homes, Inc. v. Aetna Life & Cas.*, 341 Ark. 317, 16 S.W.3d 545 (2000). Disputed facts and determinations of the credibility of witnesses are within the province of the fact finder. *Ford Motor Credit Co. v. Ellison*, 334 Ark. 357, 974 S.W.2d 464 (1998).

The appellee's son, Lloyd Pitts, testified at trial that he witnessed John Moore operating a bulldozer in the area of the destroyed timber, which was located on Pitts's property where the appellant's property adjoins hers.[3] Lloyd Pitts stated that he walked along his mother's land shortly afterward and observed that there were holes where trees had been removed from the bulldozed ground. Gerald Johnson, the appellee's son-in-law, also testified he witnessed the bulldozer activity on the appellee's property and that the bulldozer operator told him that he had been directed by the appellant to perform the work.

John Moore testified that he was employed by the appellant and that he was directed by the appellant to perform bulldozing work in the area adjoining the appellee's property. Moore further

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[2] The appellant did not make a specific motion for a directed verdict at trial. However, the Arkansas Rules of Civil Procedure do not require such motions to challenge the sufficiency of the evidence when there has been a bench trial. *See* Ark. R. Civ. P. 50(e) (2005); *Firstbank of Ark. v. Keeling*, 312 Ark. 441, 850 S.W.2d 310 (1993).

[3] This area also includes a utility easement held by Arkansas Valley Electric Company covering the northernmost section of appellee Pitts's property for its full length.

stated that, in the process of clearing land and erecting and relocating a fence for the appellant, he removed trees, brush, and vegetation in the easement area along the appellee's land.

The appellant himself testified that he hired John Moore and his brother, Denver Moore, to perform work on his property involving the use of a bulldozer and a trackhoe. The appellant stated that he instructed Mr. Moore and his brother to erect a fence on the appellee's property in what he described as an effort to "induce" her to move a fence in another location that he believed was improperly placed. The appellant stated that he knew that the fence he instructed Mr. Moore and his brother to construct was not on his property. The appellant also testified that if any trees had been removed in the easement area located on the appellee's property that it "would have been done by Mr. Moore and his brother who were working for me."

The testimony of the parties in this case clearly shows a relationship between appellant Jackson and Moore sufficient to establish liability for trespass and destruction of timber by a preponderance of the evidence.

For his second point on appeal, the appellant contends that the trial court abused its discretion in crediting the testimony of Blair Griffin — University of Arkansas Extension Agent for Johnson County. The appellant asserts that the circuit court erred in giving weight to Mr. Griffin's expert opinion of the estimated number of trees destroyed by the appellant and their market value at the time because it was "based upon a hypothetical when the basis for the hypothetical was not in evidence." We find no merit in this argument.

Arkansas Rule of Evidence 702 provides that if 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 to the matter in the form of an opinion or otherwise. *See Mearns v. Mearns*, 58 Ark. App. 42, 946 S.W.2d 188 (1997). Determination of the credibility of a witness is within the province of the factfinder. *Neal, supra.* Whether a witness may give expert testimony rests largely within the discretion of the trial judge. *Williams v. Ingram,* 320 Ark. 615, 899 S.W.2d 454 (1995). A trial judge's decision regarding admissibility will not be reversed absent an abuse of discretion. *Id.* On appeal, the burdensome task of dem-

onstrating that the trial judge has abused his discretion is on the appellant. *Id.* Recognition must be given to the trial judge's superior opportunity to determine the credibility of the witnesses and the weight to be given to their testimony. *Gosnell v. Indep. Serv. Fin., Inc.*, 28 Ark. App. 334, 774 S.W.2d 430 (1989). A circuit court, however, is required to make a preliminary assessment of whether the reasoning or methodology underlying expert testimony is valid and whether the reasoning and methodology used by the expert has been properly applied to the facts in the case. *Coca-Cola Bottling Co. of Memphis, Tenn. v. Gill*, 352 Ark. 240, 100 S.W.3d 715 (2003).

The appellant did not object to Mr. Griffin's qualification as an expert. At trial, the appellant's objection was initially based on an assertion that Mr. Griffin's expert opinion relied, at least in part, on hearsay. According to Ark. R. Evid. 703, an expert may base an opinion on facts or data otherwise inadmissible, as long as the facts or data are of the type reasonably relied on by experts in that particular field. Rule 703 allows an expert witness to form an opinion based on facts learned from others despite it being hearsay. *Carter v. St. Vincent Infirmary*, 15 Ark. App. 169, 690 S.W.2d 741 (1985); *Ark. State Hwy. Comm'n v. Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985). The issue raised by the appellant at trial and in his brief concerning credibility and validity is therefore determined by examining Mr. Griffin's testimony concerning the quantity and value of the trees the court determined were destroyed by the appellant.

Shannon Hignite, granddaughter of the appellee, contacted Mr. Griffin in his capacity as the county extension agent and requested information about finding an individual to assess the damage done to the trees. Mr. Griffin told Ms. Hignite that he could perform the service, and Ms. Hignite directed him to the site where the trees were allegedly bulldozed, and showed him the location of the property line and utility easement. Mr. Griffin followed testimony concerning his experience in valuing timber by describing the methodology he uses to compute timber value within a specified area. This methodology includes use of a measurement device called a Biltmore stick, diameter measurements of randomly-selected trees, and graph that provide an estimate of the timber volume. The estimated timber volume is then multipled by the density, or number of trees, within a specified area for the merchantable value of the trees. The esti-

mated market value is then determined through use of the Timber Market Report compiled by the University of Georgia.[4]

Mr. Griffin further testified on direct examination and cross-examination that he personally walked the area where the appellee claimed the trees were destroyed to conduct his measurements, performing what is known as a "timber cruise." Although Mr. Griffin initially stated that there are several ways to determine the density of a missing area of trees, and that he was not sure which method he used two years previously for his report, he subsequently testified he walked off the area that was bulldozed, and then went into the woods next to that area to measure a similar amount of land and counted the trees within it. This method was required because the stumps within the area cleared by the appellant had apparently been entirely removed. On cross-examination Mr. Griffin testified that he remembered that he was impressed by the uniform density of trees in the area while making his estimate.

Arkansas cases refer to the use of timber cruises to estimate timber value without offering detailed descriptions of the methodology employed. *See, e.g.*, *Ark. La. Gas Co. v. Bennett*, 256 Ark. 663, 509 S.W.2d 811 (1974). While timber value was determined by what the court termed a "stump cruise" in *Dillard v. Wade*, 74 Ark. App. 38, 45 S.W.3d 848 (2001), in the present case the stumps were entirely removed by a bulldozer. In our judgment, the reasoning or methodology underlying Mr. Griffin's expert testimony was valid and was properly applied to the facts in the case. Therefore, the circuit court did not err in admitting the expert opinion, nor in granting it weight in making a determination of the value of the appellee's destroyed timber.

Affirmed.

CRABTREE and ROAF, JJ., agree.

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[4] It is perhaps helpful to show the timber valuation process used here for the measurement of damages with an equation: Merchantable Value of Timber = Density (number of trees) x Volume. The merchantable value of the timber is then pegged to the fluctuating market value according to region, determined by such reports as the University of Georgia's Timber Market Report.

Joseph Stration PARKER *v.* STATE of Arkansas

CA CR 05-210 220 S.W.3d 238

Court of Appeals of Arkansas
Opinion delivered December 14, 2005

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

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

ANDREE LAYTON ROAF, Judge. A Logan County jury convicted appellant Joseph Stration Parker of three counts of raping H.S., who was a ten-year-old girl at the time of the offenses. He was sentenced to sixty years in prison. On appeal, he argues that the trial court erred by denying his directed-verdict motions, by allowing him to represent himself at trial, and by denying his motion to dismiss for violation of the speedy-trial rule. We agree that Parker did not make a knowing and intelligent waiver of counsel and reverse and remand.

The following evidence was presented at Parker's trial. H.S. testified that on January 6, 2003, Parker, a guest in her home, told her he wanted to tell her a secret in her parents' bedroom. H.S.'s sister C.S. followed her to the bedroom, and Parker let her in. Parker then removed H.S.'s clothing and ordered her to lie down. He began to rape and choke H.S. while she was pleading with him to stop. He then ordered H.S. to take a bath, followed her into the bathroom, and made her perform oral sex on him. Parker told H.S. and her sister to give him their clothing and told the girls that if they told anyone what he had done, they would be put into foster care. H.S. then helped Parker come up with a cover story to tell her parents to explain the injuries she had.

Regarding the sex acts to which she was subjected, H.S. testified that Parker put his penis inside her vagina and inside her "bottom," and that he put his penis inside her mouth while she was in the bathroom. When her parents returned home from

work, and while Parker was still in the house, H.S. told her mother that she had been assaulted by a boy on her bus. The next day, however, H.S. told her mother what Parker had done. H.S. was taken to the hospital for a medical examination, and police officers photographed H.S.'s injuries. H.S. found the training bra she was wearing during the incident, and she turned it over to the police.

Dr. William Daniel, a physician at the Booneville Community Hospital, examined H.S. on January 7, 2003. He stated that it was his medical opinion that H.S. had been sexually abused the night before. He noted that she had a bruise on her chin, a small cut inside her mouth, and bruises on her neck. He stated that there was evidence of labial penetration and tears and blood in her rectum.

Joe Patterson, of the Logan County Sheriff's Office, testified that he first saw H.S. at the hospital, and that he took pictures of her and collected her bra, which was sent to the Arkansas State Crime Laboratory for testing. Jane Parson, a forensic biologist at the Arkansas Crime Laboratory, identified semen on H.S.'s bra and submitted it to the DNA section for testing. Melissa Myhand, another forensic biologist, performed a DNA test on the semen found on H.S.'s bra and testified that, with all scientific certainty, it was Parker's.

During his case, Parker presented the testimony of H.S.'s mother, who testified that Parker had come to her house to start a new life and get a job. According to H.S.'s mother, she did not perform oral sex on Parker, and she did not initiate any kind of sexual contact with Parker. H.S.'s older sister, E.R., testified about her relationship with Parker. She testified that she did have sex with Parker but not with her consent.

Parker testified in his own defense. He denied raping H.S., claimed that H.S.'s mother performed oral sex on him on the date in question and suggested that as the source of the DNA on H.S.'s training bra. Parker also testified that H.S. and her mother got into an altercation that night that ended with H.S. falling and hitting a toy chest. He admitted that he had previously been convicted of rape.

The jury found Parker guilty of three counts of rape and sentenced him to twenty years in prison for each count, to run consecutively.

We must first address Parker's first and third points, as reversal of either of these points would require that we dismiss this

case. For his first point on appeal, Parker argues that the evidence against him was insufficient to sustain his convictions. He also argues that, with respect to one of the three counts, it should be dismissed because there was no substantial evidence that he had penetrated the victim's anus. A motion for directed verdict is a challenge to the sufficiency of the evidence. *Cook v. State*, 350 Ark. 398, 86 S.W.3d 916 (2002). Evidence, direct or circumstantial, is sufficient if it is substantial. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State. *Id.* This court will only consider evidence that supports the verdict. *Id.* "In cases of rape, the evidence is sufficient if the victim gave a full and detailed accounting of the defendant's actions." *Martin v. State*, 354 Ark. 289, 295, 119 S.W.3d 504, 508 (2003) (citing *Wilson v. State*, 320 Ark. 707, 898 S.W.2d 469 (1995)).

A person commits the offense of rape if he or she engages in sexual intercourse or deviate sexual activity with a person who is less than fourteen years old. Ark. Code Ann. § 5-14-103(a)(1)(C)(i) (Supp. 2003). Sexual intercourse is the "penetration, however slight, of the labia majora by a penis." Ark. Code Ann. § 5-14-101(10)(A) (Supp. 2003). "[A]ny act of sexual gratification involving . . . the penetration, however slight, of the anus or mouth of one person by the penis of another person" is deviate sexual activity. Ark. Code Ann. § 5-14-101(1)(A) (Supp. 2003). Here, the evidence against Parker is substantial. The victim testified that Parker put his penis inside her vagina, anus, and mouth, and she gave a full accounting of Parker's actions on the evening in question. This testimony alone is substantial evidence to support Parker's convictions. *See Martin, supra.*

Also, Dr. Daniel testified that H.S. had been sexually abused, and he noted a fresh bruise on her chin, a cut on the inside of her mouth, and bruises on her neck. He found evidence of labial penetration and noted that her rectum had tears and a small amount of bright red blood. A forensic biologist testified that she identified semen on H.S.'s bra and submitted it to the DNA section for testing. Another forensic biologist testified that she performed a DNA test on the semen and identified it as Parker's. H.S.'s testimony along with the other testimony is sufficient evidence to support Parker's convictions.

For his third point on appeal, Parker argues that the trial court erred when it denied his motion to dismiss for violation of the speedy-trial rule. An accused must be brought to trial within twelve months of the date he or she was arrested or the date the charges were filed, whichever is earlier, excluding any periods of necessary delay. Ark. R. Crim. P. 28.1(a) (2005); Ark. R. Crim. P. 28.2(a) (2005). If this rule is not followed, the defendant is entitled to a dismissal of the charges and a bar to prosecution. Ark. R. Crim. P. 28.1(e). "Once the defendant presents a *prima facie* case of a speedy-trial violation . . . the State has the burden of showing that the delay was the result of the defendant's conduct or was otherwise justified." *Romes v. State*, 356 Ark. 26, 36, 144 S.W.3d 750, 757 (2004).

Here, the felony information was filed on January 7, 2003, and Parker moved to dismiss on November 1, 2004, or 664 days after the speedy-trial time began running. A filing of a speedy-trial motion tolls the speedy-trial clock, and the speedy-trial date is assessed from the date the time began until the motion to dismiss was filed. *Doby v. Jefferson Co. Cir. Court*, 350 Ark. 505, 88 S.W.3d 824 (2002). The State therefore must account for 299 days in Parker's case.

When the defendant is scheduled for trial within the time for speedy trial, and the trial is postponed due to the need for the appointment of new counsel, this delay is excludable for good cause pursuant to Rule 28.3(h). *Romes, supra.* Here, the docket sheet indicates that on April 21, 2003, Parker's attorney was relieved, and new counsel was appointed. The case was passed and reset for trial on July 3, 2003. Thus, this seventy-three-day period from April 21, 2003, to July 3, 2003, is excludable for good cause.

The time period from December 9, 2003, to October 14, 2004, is also excludable. There are time periods that are excludable for different reasons and they overlap, but when considered together, they form a continuous excludable period of 309 days. After Parker's case was reset for July 3, 2003, it was rescheduled once on the motion of the State until December 12, 2003. On December 9, 2003, Parker filed a motion for further DNA analysis and for a continuance, requesting a delay in the trial so that he could obtain his own expert DNA analysis. On December 11, 2003, that motion was granted, and the case was continued until March 19, 2004, with the speedy-trial time tolled until the new trial date. The period from December 9, 2003, until March 19,

2004 is excludable as a "period of delay resulting from a continuance granted at the request of the defendant or his counsel." Ark. R. Crim. P. 28.3(c) (2005).

On March 17, 2004, Parker filed a motion to continue, arguing that there was insufficient time to prepare, and requested that, if the motion were granted the time occasioned by the delay be excluded from the speedy-trial calculation. The motion was granted on March 19, 2004, and the trial was continued until June 29, 2004. Thus, the period from March 17, 2004, until June 29, 2004, is excluded as a period attributable to a pretrial motion and as a continuance requested by the defendant or his attorney. *See* Ark. R. Crim. P. 28.3(a) and (c).

On May 5, 2004, Parker filed a series of pretrial motions, including a motion to sever a count of the felony information, a motion for a polygraph examination, a motion to admit certain evidence under the Rape Shield law, and a motion to compel discovery.[1] Over the next several months, the trial court conducted hearings on the outstanding motions. The last of these motions was disposed of on October 25, 2004. Thus, the period from May 5, 2004, to October 25, 2004, is excluded as a delay attributable to hearings on pretrial motions. *See* Ark. R. Crim. P. 28.3(a).

On June 9, 2004, Parker moved for a mental evaluation. The motion was granted, and a report was filed on August 30, 2004, stating that, at that time, Parker was incompetent to proceed with trial because of an inability to assist his attorneys. The trial court ordered further testing, and on October 14, 2004, a report was filed that found Parker competent to proceed to trial. Thus, the time period from June 9, 2004 to October 14, 2004, is also excludable as a "period of delay . . . resulting from . . . an examination . . . on the competency of the defendant." *See* Ark. R. Crim. P. 28.3(a).

The time period from December 9, 2003, to October 14, 2004, excluded 309 days and the time period from April 21, 2003, to July 3, 2003, excluded seventy-three days. A total of 382 days are excluded from the speedy-trial calculation and the minimum

[1] The delay in having the various motions heard was occasioned by Parker's request for a mental evaluation and a finding that he was incompetent to proceed.

the State had to account for was 299 days. Thus, Parker's speedy-trial right was not violated, and the trial court did not err when it denied his motion to dismiss.

For his second point on appeal, Parker argues that the trial court erred by allowing him to represent himself at trial and not sufficiently advising him of the consequences of proceeding to trial *pro se*. Parker therefore argues that he did not knowingly and intelligently waive his right to counsel. A defendant must knowingly and intelligently waive his right to counsel. *Hatfield v. State*, 346 Ark. 319, 57 S.W.3d 696 (2001). A defendant in a criminal case may invoke his right to defend himself *pro se* provided that (1) the request to waive the right to counsel is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. *Pierce v. State*, 362 Ark. 491, 209 S.W.3d 364 (2005). Here, there is no question that Parker's request to proceed *pro se* was unequivocal and timely asserted, and it does not appear that he engaged in conduct that prevented the fair and orderly exposition of the issues in this case.

The standard of review is whether the circuit court's finding that the waiver of rights was knowingly and intelligently made was clearly against the preponderance of the evidence. *Pierce v. State*, 362 Ark. 491, 209 S.W.3d 364 (2005). "The 'constitutional minimum' for determining whether a waiver was knowing and intelligent is that the accused be made sufficiently aware of his right to have counsel present and of the possible consequences of a decision to forego the aid of counsel." *Id.* The issue depends in each case on the particular facts and circumstances, including the background, the experience, and the conduct of the accused. *Id*; *Bledsoe v. State*, 337 Ark. 403, 989 S.W.2d 510 (1999). "A specific warning of the danger and disadvantages of self-representation, or a record showing that the defendant possessed such required knowledge from other sources, is required to establish the validity of a waiver." 337 Ark. At 407, 989 S.W.2d at 512-13. A defendant must "be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " *Faretta v. California*, 422 U.S. 806, 835 (1975).

Parker relies on *Bledsoe* for his assertion that he did not knowingly and intelligently waive his right to counsel. In *Bledsoe*, our supreme court reversed a conviction for rape where the trial

court allowed the defendant to proceed *pro se* and failed to make him aware of the ramifications of proceeding *pro se*. *Id.* The trial court warned the defendant that he would be required to follow all of the rules and procedures of the court and this would most likely be difficult for him given his lack of formal legal education. *Id.* The trial court, however, never explained to the defendant the consequences of failing to comply with the rules, such as the inability to secure the admission or exclusion of evidence or the failure to preserve arguments for appeal. *Id.* There was no discussion about the substantive risks of proceeding without counsel. *Id.*

Here, there were multiple discussions concerning Parker's wish to proceed without counsel, and he signed a form stating that he was freely, knowingly, and intelligently waiving his right to counsel. The trial court explained to Parker that it would hold him to the same standards as an attorney and that it could not assist him or advise him in any way. The court also explained to Parker that it would likely be difficult for him to understand and abide by the rules because he had no formal legal training, and strongly advised him against representing himself. However, the trial court did not advise Parker at all about the substantive risks of proceeding without counsel or inquire about his educational background as required by *Bledsoe*, *supra*, or *Pierce*, *supra*. Although these cases are analyzed on a case-by-case basis, there must still be a specific warning of the substantive dangers of *pro se* representation in each case.

Moreover, even if this court concludes that Parker's waiver was involuntary, it must also determine whether the assistance of Parker's appointed stand-by counsel rendered the involuntary waiver moot. The assistance of standby counsel may rise to a level sufficient for this court to moot an assertion of involuntary waiver of right to counsel. *See Hawkins v. State*, 88 Ark. App. 196, 196 S.W.3d 517 (2004) (citing *Bledsoe*, *supra*). Whether the assistance rises to this level is a question to be determined by looking at the totality of the circumstances. *Id.* To moot an assertion of involuntary waiver, the assistance must be substantial, such that standby counsel was effectively conducting the defense. *Id.* Here, Parker fired his attorney because his attorney refused to file pretrial motions that Parker had drafted on his own. Parker stated that he had been in court a total of "about ten times." Parker requested that the attorney "be appointed as co-counsel" and for the trial court to let him represent himself. Parker moved on his own to dismiss his charges, making arguments that his right to a speedy

trial had been violated. He also made and renewed other motions, including a successful motion that the State be prohibited from introducing his prior convictions for any purposes other than impeachment, a renewal of a previously denied rape-shield motion, and a *motion in limine* to exclude certain testimony as hearsay.

Parker asked questions during *voir dire* of the panel. He also delivered an opening statement, in which he set forth his defense that the witnesses against him were fabricating their testimony and that their testimony was inconsistent with other evidence. He conducted his own cross-examination of witnesses and demonstrated he was familiar with certain types of evidentiary matters, such as using a recorded recollection to refresh a witness's memory. He also made objections to the admissibility of photographs taken of the victim, arguing that the photographs were not relevant and were unfairly prejudicial. Parker's counsel remained at counsel table throughout the trial, but conducted only the questioning of Parker when he testified in his own behalf.

The State contends that the record establishes that Parker had sufficient background and experience in legal matters and that he was aware of the dangers and disadvantages of self-representation. The State points out that he had obtained two GED's while previously incarcerated, had prior experience in "law enforcement," and had been an investigator for Alcohol Beverage Control. The trial court, however, did not inquire about this information. The State cites this information from a mental evaluation that was entered into evidence.

An assessment of how well or poorly a defendant mastered the intricacies of the law is not relevant to an assessment of his knowing exercise of the right to defend himself. *Hatfield v. State*, 346 Ark. 319, 57 S.W.3d 696 (2001). Here, the trial court did not make an inquiry as to Parker's understanding of the legal process, and it did not *specifically* warn Parker of the *substantive* risks of proceeding without counsel. We do not agree with the State that the record shows that Parker was sufficiently familiar with trial practice and procedure, because a defendant's technical legal knowledge is not relevant to an assessment of his knowing exercise of the right to defend himself. *See Hatfield, supra* (citing *Faretta, supra*). The trial court here discouraged Parker from proceeding *pro se* and warned him that it would hold him to the same standard as an attorney regarding court rules, but this alone does not adequately inform him of the substantive risks of proceeding *pro se*.

See Hawkins, supra. Moreover, Parker's standby counsel did not substantially assist him such that the standby counsel was effectively conducting the defense. His standby counsel merely questioned Parker when he took the stand in his own defense and was available at the table for consultation. The record does not reflect that standby counsel actively participated enough to render deficiencies in the trial court's inquiry moot. In accordance with supreme court precedent in *Bledsoe, Pierce* and *Hatfield*, we have no choice but to reverse and remand this case for retrial.

Reversed and remanded.

CRABTREE, J., agrees.

BAKER, J., concurs.

KAREN R. BAKER, Judge, concurring. I agree that this case must be reversed; however, I write separately to address the difficulty faced by trial courts in determining if a defendant has validly waived his right to counsel.

Although determining whether an intelligent waiver of the right to counsel has been made depends in each case on the particular facts and circumstances, including the experience, and the conduct of the accused, several specific warnings of the dangers and disadvantages of self-representation are required. *Bledsoe v. State*, 337 Ark. 403, 989 S.W.2d 510 (1999). Additionally, a defendant should be made aware of the fundamentals of trial strategy and how to conduct cross-examinations of witnesses. *See Hatfield v. State*, 346 Ark. 319, 57 S.W.3d 696 (2001).

In this case, the trial judge repeatedly discouraged appellant from proceeding pro se, told him that if he represented himself he would be held to the same standards as an attorney and specified that the trial court would not be able to assist him in conducting the case. We hold that this was insufficient to apprise appellant of the dangers of self-representation, but do not explain what specific warnings are required.

A recent Missouri Supreme Court case, *State v. Zink*, 181 S.W.3d 66 (2005), provides more detailed information that would perhaps be beneficial to trial courts in Arkansas. *Zink*, affirmed the trial court's finding of a voluntary, knowing, and intelligent waiver of appellant's right to counsel were he had signed a waiver of counsel form, Vernon's Annotated Missouri Statute section 600.051, which codifies all the requirements for waiver of counsel. This form provides defendants with the following information:

(1) That the defendant has been charged with the offense of ..... (nature of charge must be inserted);

(2) That the defendant has a right to a trial on the charge and further that the defendant has a right to a trial by a jury;

(3) That the maximum possible sentence on the charge is ..... imprisonment in jail and a fine in the amount of ..... dollars or by both imprisonment and fine. That the minimum possible sentence is ..... imprisonment in jail or by a fine in the amount of ..... dollars or by both such confinement and fine;

(4) That the defendant is aware that any recommendations by a prosecuting attorney or other prosecuting official are not binding on the judge and that any such recommendations may or may not be accepted by judge;

(5) That if defendant pleads guilty or is found guilty of the charge, the judge is most likely to impose a sentence of confinement;

(6) That, if indigent, and unable to employ an attorney, the defendant has a right to request the judge to appoint counsel to assist the defendant in his defense against the charge.

Given our supreme court's holding in *Hatfield, supra*, in addition to the six items enumerated in the Missouri waiver of counsel form, the trial court should also advise the defendant:

(7) That the State will be required to present the witnesses against the defendant in open court were the defendant will have the opportunity to cross-examine them and ask any questions he wishes, unless objected to by the State and ruled improper by the court;

(8) That after the State's witnesses have testified, the defendant will have an opportunity to call witnesses on his own behalf, which will be subject to cross-examination by the State, and may elect to testify in his own behalf, but can not be required to do so.

(9) That the introduction of evidence in court is governed by rules with which the defendant may not be familiar, but with which he must nevertheless comply;

(10) That the defendant's lack of knowledge concerning the law may be damaging to his defense and to any future appeals of his case if convicted.

As noted in *Zink*, Missouri also requires that whenever a judge has permitted a waiver of counsel and a plea of guilty or a finding of guilty on the charge is entered and before the imposition of a sentence of confinement (including probation, parole or suspended sentence), the judge shall determine: (1) That if a plea of guilty has been entered, there is a factual basis for such a plea and, upon inquiry of defendant, that defendant is in fact guilty of the charge; (2) That the defendant does not know of the existence of any witness or of any fact, circumstances or evidence which was not presented to the court, which would exonerate defendant of the charge; (3) That upon inquiry of the prosecuting attorney there are no witnesses or evidence which would cast a reasonable doubt on the defendant's guilt or defenses available to defendant not disclosed to the court.

Furthermore, the trial court in *Zink*, offered appellant two opportunities to reconsider his decision prior to trial and appellant declined. Prior to the introduction of evidence, the trial court again informed appellant that he could change his mind on self-representation at any time during trial by notifying the court. Precautions such as these confirm a valid waiver and protect a defendant's constitutional right to counsel.

Rebecca CAUSER *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 05-464 220 S.W.3d 270

Court of Appeals of Arkansas
Opinion delivered December 14, 2005

[Rehearing granted January 11, 2006.]

Kimberly Johnson, for appellant.

Deanna S. Evans, Attorney *Ad Litem*, for the children.

ANDREE LAYTON ROAF, Judge. This appeal arises from the Marion County Circuit Court granting a petition filed by appellee, Arkansas Department of Human Services (ADHS), to terminate the parental rights of appellant, Rebecca Causer, in a dependency-neglect action. Causer's attorney has filed a no-merit brief and a motion to withdraw, and Causer has filed a letter stating her pro se points for reversal. We must order rebriefing because counsel has failed to address all adverse rulings that occurred during the termination hearing.

Appellant Rebecca Causer is a thirty-two-year-old single mother of three children. On March 7, 2003, ADHS removed three children from her home because she was arrested for possession of methamphetamine. At the time they were removed from the home, the children were the following ages: D.M., age twenty months; B.C., age seven; and K.C., age thirteen. K.C. has cerebral palsy. Probable cause to remove the children was found on April 5, 2003. An adjudication that the juveniles were in need of services and were dependent/neglected was made on April 9, 2003. Reunification was set as the goal of the case and Causer was ordered to undergo a drug evaluation and random drug testing, to attend parenting classes, and to receive job skills training.

ADHS provided Causer with intensive family services, homemaker services, transportation, budgeting, and family/individual counseling. After treatment, Causer remained clean and sober, and she was put on probation for her criminal charges. Approximately nine months after the children were removed, they were returned to Causer's care on a trial placement in December 2003.

During a March 10, 2004 hearing, it was revealed that Causer had been arrested due to prescription drugs being found on her person. On March 12, 2004, the children were returned to

foster care because of Causer's arrest for disorderly conduct at her children's day clinic. K.C. and B.C. were behind in school and D.M. had lost twenty-five percent of her body weight during the time she was in her mother's care. During the three months that Causer had the children, she had been arrested three times. Causer's probation was then revoked because she tested positive for drugs. On March 22, 2004, the trial court found that there was probable cause to place the children back into foster care.

The permanency planning hearing continued the goal of reunification. The trial court found that Causer should have another chance to comply with the case plan to get her children back and to resolve her criminal issues. The trial court allowed B.C. to be placed in the custody of his father. On September 8th and 15th, a fifteen-month permanency planning hearing was held. At this hearing, the trial court found that Causer had not complied with the case plan and other orders of the court. Specifically, she continued smoking in the home, she failed to work on menus for nutritional meals, and she did nothing of her own volition and relied solely on assistance. The trial court found that reunification could not occur within a reasonable time frame consistent with the children's needs and that Causer does not know how to be a mother.

The termination hearing began on December 8, 2004. Melinda Fulton, a clinical social worker and therapist for K.C., testified that Causer has trouble treating K.C. like a child and Causer inappropriately divulges information to her. She also stated that K.C. was thrust into a parenting role with D.C. when Causer was not doing a good parenting job.

Diana Mitchell, a caseworker for ADHS, testified that ADHS has offered Causer numerous services and that there were no other services they could offer to Causer. She stated that she thought Causer was capable of parenting but that Causer was just not doing it.

Glenn Blacksher, one of the foster parents for the children, testified that he had noticed a positive change in Causer and noted that she was participating in drug court. He stated that the children were doing well in his home. Sharon Blacksher, the other foster parent, also stated that the children were doing well in their care. Sharon Blacksher stated that she thought it was in the children's best interest to return home to Causer.

Causer testified that she was participating in a drug court program. She stated that she had been clean for six months. She

wanted her children back and stated that she had done her best to comply with the case plan. She has been diagnosed with OCD and has been taking her medication. She completed the OMART rehabilitation program. She kept up with after-care meetings while someone was "looking over her shoulder." When it was up to her, though, she did not keep up with her after-care. K.C. testified at the hearing, and she stated that she wanted to live with her mother.

The trial court found that the conditions that caused removal from the home, drug use, had not been remedied and that Causer has manifested the incapacity to remedy subsequent issues (the inability to effectively parent) that have arisen since the original petition. The order stated that Causer has not demonstrated the ability to focus on her children while attending to her own needs. The trial court terminated the parental rights of Causer as to her three children. The trial court ordered K.C. and D.M. to be placed for adoption as a sibling unit and gave sole custody of B.C. to his father.

Causer now appeals the trial court's order terminating her parental rights. Our standard of review in termination-of-parental rights cases is well-settled.

> When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party to terminate the relationship. Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. Parental rights, however, will not be enforced to the detriment or destruction of the health and well-being of the child. The facts warranting termination of parental rights must be proven by clear and convincing evidence, and in reviewing the trial court's evaluation of the evidence, we will not reverse unless the court's finding of clear and convincing evidence is clearly erroneous. Clear and convincing evidence is that degree of proof which will produce in the fact finder a firm conviction regarding the allegation sought to be established. In resolving the clearly erroneous questions, we must give due regard to the opportunity of the trial court to judge the credibility of witnesses. Additionally, we have noted that in matters involving the welfare of young children, we will give great weight to the trial judge's personal observations.
>
> An order forever terminating parental rights must be based upon clear and convincing evidence that the termination is in the best interests of the child, taking into consideration the likelihood that the child will be adopted and the potential harm caused by

> continuing contact with the parent. In addition to determining the best interests of the child, the court must find clear and convincing evidence that the circumstances exist that, according to the statute, justify terminating parental rights. (Citations omitted.)

Johnson v. Ark. Dep't of Human Servs., 78 Ark. App. 112, 119, 82 S.W.3d 183, 187 (2002).

Our termination statute, Arkansas Code Annotated section 9-27-341 (Supp. 2003), states:

> (b)(1)(A) The circuit court may consider a petition to terminate parental rights if the court finds that there is an appropriate permanency placement plan for the juvenile.
>
> . . . .
>
> (3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:
>
> (A) That it is in the best interest of the juvenile, including consideration of the following factors:
>
> (i) The likelihood that the juvenile will be adopted if the termination petition is granted; and
>
> (ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by continuing contact with the parent, parents, or putative parent or parents, and
>
> (B) Of one (1) or more of the following grounds:
>
> (i)(a) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.
>
> . . . .
>
> (vii)(a) That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demon-

> strate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody of the parent.

Causer's attorney has filed a motion to withdraw and a no-merit brief pursuant to *Linker-Flores v. Ark. Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004). Causer did not appeal from final orders from the adjudication hearing, review, and permanency-planning hearings. Thus, we are precluded from reviewing any adverse rulings from these portions of the record. *See Lewis v. Ark. Dep't of Human Servs.*, 364 Ark. 243, 217 S.W.3d 788 (2005). Pursuant to Ark. R. App. P.–Civ. 2(c)(3), our review of the record for adverse rulings is limited to the termination hearing. *See id.* No-merit briefs in termination-of-parental-rights cases "shall include an argument section that consists of a list of all rulings adverse to the defendant made by the circuit court on all objections, motions, and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal." *See* Ark. Sup. Ct. R. 4-3(j); *Lewis*, *supra*. If a no-merit brief fails to address all the adverse rulings, we will generally send it back for rebriefing. *Lewis*, *supra*; *Linker-Flores v. Ark. Dep't of Human Servs.*, 364 Ark. 224, 217 S.W.3d 107 (2005) ("*Linker-Flores II*").

In this case, our review of the record reveals at least three rulings adverse to Causer in the termination hearing that were not abstracted or included in the argument sections. Causer made a hearsay objection during the testimony of Melinda Fulton, which the trial court overruled. ADHS objected to speculative testimony by Causer, and the trial court sustained the objection. During Causer's testimony, the trial court allowed a letter into evidence over Causer's objection. Because these adverse rulings were not abstracted and discussed, counsel's brief fails to comply with the requirements of Ark. Sup. Ct. R. 4-3(j) and supreme court precedent. *See Linker*, *supra*; *Lewis*, *supra*. Accordingly, we deny counsel's motion to withdraw and order rebriefing.

Rebriefing ordered.

GRIFFEN and VAUGHT, JJ., agree.

SUPPLEMENTAL OPINION UPON
GRANT OF REHEARING
JANUARY 11, 2006

Appeal from Marion Circuit Court; *Gary Isbell*, Judge;

Kimberly H. Johnson, for appellant.

Deanna S. Evans, Attorney *Ad Litem*, for the children.

ANDREE LAYTON ROAF, Judge. We previously rendered a decision in this case in which we ordered rebriefing for failure to comply with the requirements of *Linker-Flores v. Ark. Dep't of Human Servs.*, 364 Ark. 224, 217 S.W.3d 107 (2005), and *Lewis v. Ark. Dep't of Human Servs.*, 364 Ark. 243, 217 S.W.3d 788 (2005). *See Causer v. Ark. Dep't of Human Servs.*, 93 Ark. App. 483, 220 S.W.3d 270 (2005). In response our opinion, Causer's attorney has petitioned this court to reconsider its order to rebrief, contending that rebriefing in this case would cause further delay and that the four adverse rulings that were not fully discussed in the brief are not meritorious. After reviewing this case, we have treated the petition as a petition for rehearing, and we agree with Causer's attorney and affirm this case.

Causer's attorney has filed an attachment to her motion to reconsider that specifically addresses and discusses all adverse rulings in the termination hearing. The attachment complies substantively with the requirements for argument sections of termination-of-parental-rights no-merit briefs as set out in *Linker-*

Flores, *supra*, and *Lewis*, *supra*; therefore, rebriefing in this case is no longer necessary. After a review of the record, we find that all adverse rulings are clearly not meritorious. We affirm today without rebriefing so as to avoid any further delay of this case and grant the motion to withdraw as counsel.

PITTMAN, C.J., BIRD, GRIFFEN, VAUGHT, and NEAL, JJ., agree.

MUSSON CUSTOM BUILDING, INC. *v.*
Gilmar VALLADARES and Juan Guerrero
d/b/a/ J&M Roofing

CA 05-474 222 S.W.3d 214

Court of Appeals of Arkansas
Opinion delivered January 4, 2006

Taylor Law Firm, by: *Jason L. Watson*, for appellant.

Stephen M. Sharum, for appellee Gilmar Valladares.

SAM BIRD, Judge. This workers' compensation case involves Ark. Code Ann. § 11-9-402 (Repl. 2002), which assigns liability to a prime contractor for the compensation of a subcontractor's injured employee when the subcontractor has not secured compensation as required by statute. Appellant Musson Custom Building, Inc., raises one point on appeal, challenging the finding of the Workers' Compensation Commission that Musson was the prime contractor liable for compensation to appellee Gilmar Valladares. We affirm the decision of the Commission.

This claim was controverted in its entirety at proceedings before the administrative law judge. Valladares contended that he was employed by J&M Roofing, which was a subcontractor "contracted by Musson Custom Building, Inc. . . . as a general contractor on the residential real estate," and that Musson was therefore his statutory employer pursuant to Ark. Code Ann. § 11-9-402(a). Appellant Musson and appellee Juan Guerrero d/b/a J&M Roofing appeared as uninsured respondents.[1]

The parties stipulated that Valladares sustained injuries to his face, left leg, and left knee when he fell from the roof of a house being constructed at 1517 Northeast Dysart Wood Lane in Ben-

[1] The record in this case includes transcripts of two hearings: a first hearing was continued to allow the joinder of Edgar Villanueva as an uninsured respondent, but he did not appear at the second hearing.

tonville on January 25, 2003. They also stipulated that Musson "was the general contractor for the house and had subcontracted the roofing to Juan Guerrero dba J&M Roofing." The law judge accepted these and other stipulations in regard to the parties who offered them.

Gilmar Valladares testified that Edgar Villanueva hired him, that Juan Guerrero "had taken us to be contracted," that Guerrero paid Villanueva, and that Valladares received cash from Villanueva. Regarding his injury of January 25, 2003, Valladares testified that he was carrying a bundle of shingles when he slipped and fell from the roof, which was wet and a little icy.

Juan Guerrero testified that his business was J&M Roofing and that he had no employees. Guerrero testified that he used subcontractors to help him with his jobs for Musson, with whom he had a business relationship. Guerrero testified that, because of increased volume, he had hired Villanueva and his "crew services." Guerrero denied hiring or knowing Valladares, but he stated, "The day that Valladares got hurt he was working on the job that I was doing for Mr. Musson." Guerrero stated that he did not know if the home under construction was custom-built. He said that he "contracted with Musson to do the job by the squares and ... then contracted with Villanueva to do it by the square at a lesser price," and that Musson was the contractor on the job.

In an opinion of August 9, 2004, the administrative law judge found that appellee Juan Guerrero d/b/a J&M Roofing was the prime contractor of Edgar Villanueva, the employer of Valladares; the law judge also found that "Villanueva and Juan Guerreo dba J&M Roofing are jointly and [severally] liable" for Valladares's temporary total disability benefits and medical expenses. In its opinion of February 10, 2005, the Workers' Compensation Commission reversed the law judge's decision. The Commission found that Musson was the prime contractor and that Valladares was an employee of the subcontractor Villanueva, who in turn "had subcontracted for Juan Guerrero." Therefore, the Commission found that Musson was liable for Valladares's medical treatment and temporary total disability compensation.

Arguments on Appeal

Musson presents three arguments to support its contention that it was not the prime contractor in this case. It argues that no evidence shows that it was obligated to a third party for the work

performed by Valladares, that the Commission failed to strictly construe Ark. Code Ann. § 11-9-402, and that the Commission used inapplicable case law in determining Musson to be the prime contractor. We first will address the requirement of strict construction.

Musson correctly notes that the workers' compensation statutes must be strictly and literally construed, and that a particular provision must be construed with reference to the statute as a whole. *See* Act 796 of 1993; *Flowers v. Norman Oaks Constr. Co.*, 341 Ark. 474, 17 S.W.3d 472 (2000). Musson complains that nothing in Ark. Code Ann. § 11-9-402 says that general contractors are obligated to the employees of subcontractors of subcontractors. In the recent case of *Jones Bros., Inc. v. Journagan Constr. Co.*, 92 Ark. App. 406, 214 S.W.3d 870 (2005), however, we have ruled otherwise.

The claimant in *Jones* was injured while driving a dump truck for Whitlock Trucking. Whitlock had been hired by Aggregate Transportation Specialist, an immediate subcontractor of Journagan Construction Company. The Commission found that Jones Bros., Inc., was liable to the claimant for payment of workers' compensation benefits because it was the prime contractor within the meaning of section 11-9-402. We affirmed the decision of the Commission, explaining as follows:

> 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.

In the case now before us, under the precedent of *Jones*, we reject Musson's argument that strict construction prevents a finding of a general contractor's obligation to compensate injured employees of subcontractors of subcontractors.

We next address Musson's remaining arguments: that no evidence shows that Musson was obligated to a third party for the work performed by Valladares, and that the Commission used

inapplicable case law in determining that Musson was the prime contractor. The following portion of the Commission's decision is pertinent to these arguments:

> The parties stipulated that "Musson Building, Inc. was the general contractor [for] the house . . . and had subcontracted the roofing of the house to Juan Guerrero d/b/a/J&M Roofing." . . . In addition, Juan Guerrero testified that he had "a business relationship" with Musson Custom Building.
>
> . . . .
>
> The record indicates that the claimant was an employee of an uninsured subcontractor. Musson Custom Building was the prime contractor and was statutorily liable. Musson was contractually liable to a third party to build roofs. Musson hired Juan, who hired Edgar, who hired the claimant. The parties characterized Musson as a "general" contractor. The administrative law judge determined, "a 'general' contractor is not necessarily synonymous with a 'prime' contractor." The Arkansas Supreme Court implicitly found these terms synonymous in *Chevron USA v. Murphy Exploration & Prod. Co.*, 03-612 (Ark. 3-4-2004).

Musson acknowledges that under *Nucor Holding Corp. v. Rinkines*, 326 Ark. 217, 931 S.W.2d 426 (1996), and *Bailey v. Simmons*, 6 Ark. App. 193, 639 S.W.2d 526 (1982), the status of prime contractor presupposes work to be done for a third party. Musson complains that no evidence in this case showed that it was obligated to a third party "for the same task which Juan Guerrero dba J&M Roofing had contracted to do"; Musson asserts that, without this contractual obligation, it was not a prime contractor and J&M Roofing was not its subcontractor. Musson further asserts that "Juan Guerrero d/b/a J&M Roofing was responsible to a third party, Musson Custom Building, Inc.; therefore, . . . Juan Guerrero d/b/a J&M Roofing was in fact the prime contractor on the job on the day of the claimant's injury."

Musson recognizes that in *Chevron USA v. Murphy Exploration & Production Co.*, 356 Ark. 324, 151 S.W.3d 306 (2004), the supreme court interchangeably used the terms "prime contractor" and "general contractor." Noting that *Chevron* was a personal injury case in which the issue was whether a subcontractor could be liable for a general contractor's negligent acts, Musson asserts that "prime contractor" and "general contractor" are not synonymous for purposes of workers' compensation law.

We review the Commission's decision on appeal to determine 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. *Jones Bros., Inc., supra.* The Commission found from the testimony and stipulations that Musson was contractually liable to a third party to build roofs and had hired Guerrero, who hired Villanueva, who hired Valladares. We hold that the stipulations and testimony recited by the Commission, particularly that Musson was the general contractor for the house and had subcontracted the roofing of the house to Juan Guerrero d/b/a/ J&M Roofing, along with the *Chevron* court's interpretation of the terms "prime contractor" and "general contractor," constitute substantial evidence to support the Commission's finding that Musson was the prime contractor in this case and thus was statutorily liable for purposes of Ark. Code Ann. § 11-9-402.

Affirmed.

ROBBINS, J., agrees.

GRIFFEN, J., concurs.

WENDELL GRIFFEN, Judge, concurring. I concur with the judgment for the reasons outlined in my dissenting opinion in *Riddell Flying Servs. v. Callahan*, 90 Ark. App. 388, 206 S.W.3d 284 (2005) (Griffen, J., dissenting).

Linda Boss FOSTER *v.* EXPRESS PERSONNEL SERVICES and American Home Assurance Company

CA 05-602 222 S.W.3d 218

Court of Appeals of Arkansas
Opinion delivered January 4, 2006

Harrelson, Moore & Giles, L.L.P., by: *Greg Giles*, for appellant.

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

WENDELL L. GRIFFEN, Judge. Linda Boss Foster appeals from the denial of workers' compensation benefits. She argues that the Workers' Compensation Commission erred in finding that she was not performing employment services when she was injured. Because Foster was injured in an area in which employment services were expected of her and was furthering her employer's interests when she was injured, we reverse and remand for further proceedings.

Foster was employed by appellee Express Personnel Services and was assigned to work as a temporary employee in accounts receivable for McClarty Auto Mall. Her job required her daily to process, among other things, credit-card slips and e-checks retrieved from Shirley Munden, a McClarty employee who worked at the cashier's desk. Foster was also required at times to pick up warranty slips from the warranty clerk and to confer with the

service manager. While Foster typically reported to work at 8:00 a.m., when she reported earlier, she so indicated on her time slip and was compensated for that time.

Foster's office was on the second floor of McClarty's used-car building. The service manager's office and warranty clerk's office are located in the service building. Between the used-car building and the service building is the service-bay area, into which customers bring their vehicles to be serviced. Foster and other employees parked in the employee parking lot, which was behind the service building, and entered the building through the service bay. Foster's normal routine was to go past the time clock in the service-bay area (she was not required to clock in), turn left into the used-car building, bypass the stairs that lead to the second floor, and go directly to the cashier's desk on the first floor to pick up credit-card receipts before going to her own desk. However, there were times when other McClarty employees questioned Foster in the service-bay area before she reached the cashier's desk.

The Administrative Law Judge (ALJ) found that Foster's injury occurred as follows:

> On June 6, 2003, the weather was stormy and [it was] raining hard when the claimant arrived at work. In accord with her normal routine, she entered the facility in the service bay area. At some point after she entered the service bay area and was [en] route to the cashier's desk to pick up her credit cards and e-checks, she slipped and fell backwards. Her hips hit the concrete floor and her head hit one of the parked cars.

The ALJ further found that Foster was on McClarty's premises when she was injured. He noted that Foster's job was principally performed at her desk, but noted that she was also required to perform some job duties away from her desk, including picking up documents from the cashier's desk each morning and picking up warranty slips from the warranty clerk. The ALJ further noted Foster's testimony that she was subject to be called upon to perform employment duties at any time she was on McClarty's premises.

Nonetheless, he concluded that Foster was not performing employment services at the time of her injury because she was not in the area where she was required to perform her employment duties in that: 1) she was in the service-bay area and there was no evidence that her employer required her to be in that area as part

of her employment duties; 2) she was "not yet engaged in any activity required by McClarty or the respondent employer when she fell." The ALJ noted that Foster reported that the injury occurred at 7:50 a.m., ten minutes before she was required to report to work, and that there was no evidence that anyone had questioned her while she was in the service-bay area on the day she was injured.[1] Accordingly, the ALJ denied benefits. The Commission affirmed and adopted the ALJ's findings in full, and this appeal followed.

Foster argues that because obtaining credit-card slips from the cashier's desk was part of her job and because she was on her way to pick up the credit-card slips when she was injured, she was performing employment services at the time she was injured. For support, she relies primarily on *Caffey v. Sanyo Mfg. Corp.*, 85 Ark. App. 342, 154 S.W.3d 274 (2004), and *Shults v. Pulaski County Special Sch. Dist.*, 63 Ark. App. 171, 976 S.W.2d 399 (1998).

The employer asserts that Foster claims her injury is compensable merely because she was "walking in the general direction of her office." It counters that the "coming-and-going" rule precludes a finding that Foster's injury was compensable because she was merely on her way to her job and had not yet arrived at her work station. *Campbell v. Randal Tyler Ford Mercury, Inc.*, 70 Ark. App. 35, 13 S.W.3d 916 (2000); *Srebaul v. Rose Care*, 69 Ark. App. 142, 10 S.W.3d 112 (2000); *Hightower v. Newark Public Sch. System*, 57 Ark. App. 159, 943 S.W.2d 608 (1997). It further asserts that taking the steps necessary to arrive at work and begin the work day does not constitute employment services. Thus, according to the employer, Foster's work day did not begin until she "picked up the papers from Shirley Munden and began working."

In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Whitlach v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004). Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Id.* When a claim is denied because the claimant has failed to show an

[1] The ALJ based this finding on the time of injury stated on Foster's medical records. Foster testified that she submitted no time sheet for the day she was injured because she went to the emergency room.

entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Id.*

A compensable injury is an accidental injury causing internal or external harm that arises out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(I) (Supp. 2005). A compensable injury does not include an "[i]njury which was inflicted upon the employee at a time when employment services were not being performed." Ark. Code Ann. § 11-9-102(4)(B)(iii). An employee is performing employment services when he or she is doing something that is generally required by his or her employer. *Collins v. Excel Spec. Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002). The test for determining whether an employee was injured while performing employment services is the same as the test for determining whether an injury occurred out of and in the course of employment: whether the injury occurred within the time and space boundaries of the employment when the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly. *Id*; *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999); *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). Thus, the critical issue is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury. *Collins, supra.*

■ We reverse the Commission's decision and remand for further proceedings because, regardless of the fact that Foster had not reached her desk or the cashier's desk or was outside of the building in which her office was located, she was unquestionably injured in an area in which employment services were expected of her. In short, workers' compensation law does not require the infinitesimal scrutiny of a claimant's conduct posited by the employer in this case. The real issue is not whether Foster was "on the clock" when she was injured or whether she was on her way to the cashier's desk or her own desk. Rather, the issue is whether the injury occurred within the time and space boundaries of the employment when Foster was carrying out the employer's purpose or advancing its interests directly or indirectly. *Collins, supra.* As Foster argues, the facts of this case are analogous to the facts in *Caffey, supra,* and *Shults, supra,* in which we found that both claimants were performing employment services when injured.

In *Caffey*, the claimant was required to clock in at 7:30 a.m., requiring her to arrive at work in time to exhibit her identification badge to two security guards before clocking in. The *Caffey* claimant complied with these procedures on the day she was injured, but before clocking in, she slipped and fell within 200 feet of her workstation. In *Shults*, the building custodian's first duty was to enter the building and check the alarm system. When he opened the door, he thought that the alarm had been triggered; he fell and injured his leg when he ran to check the alarm.

In the instant case in adopting the ALF's findings, the Commission specifically recognized that Foster's duties sometimes took her away from her desk. Furthermore, the Commission specifically recognized that her duties required her to confer with the warranty clerk. In addition, both Foster and Munden testified that Foster's job required her to confer periodically with the warranty clerk and the service manager, both of whom worked in the service area. Foster testified that she was subject to perform her duties at any time she was on McClarty's premises and that, at times, the warranty clerk or customer-service manager would question her about work-related matters when she arrived at work. Munden also testified that Foster would have been "on the job" for Express as soon as she walked through the bay doors if the service manager needed her for something, because as soon as Foster walked through the doors "they are going to stop her right there. They are not going to wait until she goes to her desk." Janet Landon, co-owner of Express, testified that she had no reason to disagree with the testimony that Foster was required to communicate with employees in the service area.

In fact, according to Foster, the only time that she did not proceed directly to Munden's desk was when she was stopped in the service area. Thus, not only was Foster expected to render employment services *in the area in which she was injured* before she ever reached her desk or the cashier's desk, she was also required to visit that area as needed at other times during the work day. Accordingly, the Commission's finding that Foster was never required to be in the service-bay area as part of her employment duties is factually contrary to the record.

Express would have us hold that no act of Foster was compensable until she reached the cashier's desk, even if she was furthering its interests at the time. However, *Caffey* clearly demonstrates that an employee may be compensated for an injury that occurs even before she reaches her work station or before she is

"on the clock," if she is performing a service that is required by her employer and is directly or indirectly advancing her employer's interests.

Moreover, the facts here are even more compelling to support a finding that Foster was performing employment services than the facts in *Caffey,* because there was no testimony that the *Caffey* claimant would have been required to perform her specific job duties *while en route to her designated job site.* By contrast, it is clear that here, like the *Shults* claimant's, Foster's job duties began once inside the employer's building when she crossed the threshold of service bay area.

That Foster was not actually questioned by the service manager or warranty clerk on the day she was injured is not dispositive. In *Arkansas Methodist Hospital v. Hampton*, 90 Ark. App. 288, 205 S.W.3d. 848 (2005), we found that an injury was compensable where an intensive-care nurse was injured getting breakfast for her fellow nurses even though there was no evidence that she had been asked to assist any other patron while en route to get breakfast. Like the *Hampton* claimant, Foster was expected to advance her employer's interests away from her desk, and was specifically expected to advance her employer's interests in the area where she was injured.

Finally, the "coming-and-going rule" has no application to this case whatsoever. Foster was not driving to work; nor was she injured in McClarty's parking lot while walking to her job. Express cites no cases in which we have used the coming-and-going rule to affirm a finding of noncompensability on facts similar to the instant case.

We hold that fair-minded people could not have reached the Commission's conclusion that Foster was not performing employment services at the time she was injured, and reverse and remand for further proceedings consistent with our opinion.

Reversed and remanded.

ROBBINS and BIRD, JJ., agree.

Sheila Lynette ISON *v.*
SOUTHERN FARM BUREAU CASUALTY COMPANY
and Farm Bureau Mutual Insurance Company of Arkansas, Inc.

CA 05-313 221 S.W.3d 373

Court of Appeals of Arkansas
Opinion delivered January 11, 2006

Huckabay, Munson, Rowlett & Moore, P.A., by: *John E. Moore* and *Sarah E. Greenwood*, for appellants.

David A. Hodges, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. This is an appeal from a summary judgment entered by the Pulaski County Circuit Court for appellees Southern Farm Bureau Casualty Insurance Company and Farm Bureau Mutual Insurance Company of Arkansas, Inc., declaring that appellees have no duty to defend appellant Sheila Ison in her individual capacity and as her son's parent, or to pay benefits for damages caused by her son in an accident on March 8, 2003. The

circuit judge based his decision on his ruling that, as a matter of law, appellant's son's use of the vehicle was without permission. We agree and affirm the award of summary judgment to appellees.

After Mrs. Ison and her former husband, Gordon Brown, were divorced, they shared joint custody of their son. Mrs. Ison remarried, and her husband, Richard Ison, had an auto insurance policy with appellees. Appellant's son had a driver's permit, but did not have a license, and was not a named insured or driver on either of his parent's insurance policies. Under the "Bodily Injury" and "Property Damage" subsection of the "Auto Liability" section, the Isons' policy stated:

> **We** will pay damages for **bodily injury** and **property damage you** are legally obligated to pay, except **punitive** damages, caused by an accident, and arising out of the ownership, maintenance, and use of **your auto**. For the purpose of this coverage, the words "**covered person(s)**" include any members of your household and any person or organization legally responsible for the use of **your auto** with **your** permission.

The policy defined "covered person" as "the persons and organizations specifically indicated as entitled to protection under the coverage being described."

In the "Auto Liability" section, the "Coverage Extensions" subsection provided in relevant part:

> When **your** policy insures a **private passenger auto** for Bodily injury and Property Damage Liability Coverage, **we** will provide those same coverages for the use of certain other **private passenger autos**.
>
> 1. Use of Other **Private Passenger Autos**.
>
> Coverage applies to **you** or dependent relatives living in **your** household while using another **private passenger auto**. However, the **private passenger auto** cannot be:
>
> a. owned by **you** or dependent relatives of **your** household; or
>
> b. furnished or available for regular use by **you** or dependent relatives of **your** household.
>
> . . . .

These coverage extensions do not apply to accidents:

1. that involve any **auto you** are driving without permission that is stolen or is reasonably suspected to be stolen . . . .

Under the "Coverage Exclusions" section, the policy stated:

We will not pay for:

1. **bodily injury** or **property damage** caused by intentional acts committed by or carried out at the direction of **you** or any other **covered person**. The expected or unexpected results of these acts or directions are not covered;

. . . .

13. **bodily injury** or **property damage** while **you** or anyone using **your auto**, with **your** permission, is involved in the commission of a felony; or while any such person is seeking to elude lawful apprehension or arrest by any law enforcement official . . . .

On March 8, 2003, while appellant's son, aged fifteen years, was at his father's house, he learned that his girlfriend was pregnant. Distraught, he took an overdose of his medicine for attention-deficit disorder, his stepmother's antidepressants, and some nonprescription medicine; took the keys to his father's pickup truck; slashed the tires on the family's other vehicle; drove in his father's truck to a family member's house, where he stole some guns; led the police on a high-speed chase; and crossed the median and drove into the opposite lane of traffic on Interstate 30, causing an accident involving Sonia Rogers and James Rogers (now deceased).

Mrs. Rogers, individually, and as Administratrix of the Estate of James Rogers, filed a lawsuit against Mr. Brown and Mrs. Ison, individually and as their son's parents, in the Saline County Circuit Court for damages caused by the accident. Allstate Insurance Company, Mr. Brown's insurer, refused to defend Mrs. Ison, who had signed as the responsible party for the son's driver's permit. With a reservation of rights, appellees agreed to provide her with a limited defense in that lawsuit.

Appellees filed this action against Mrs. Ison and Mr. Brown, individually and as their son's parents, and Mrs. Rogers, individually and as administratrix of the Estate of James Rogers, on May 19,

2004, seeking a declaratory judgment stating that they had no duty to defend or to provide coverage for the accident on the grounds that appellant's son was not a permissive driver; that there was no coverage for accidents involving an auto driven without permission or that was stolen; that damages caused by intentional acts were excluded from coverage; and that damages incurred while the insured or anyone using the automobile with permission was involved in the commission of a felony or seeking to elude lawful apprehension or arrest by any law enforcement official were also excluded. Mrs. Ison, individually and as her son's mother, filed a counterclaim against appellees requesting a declaration that they were contractually bound to provide her with a defense to Mrs. Rogers's action and to provide coverage for any damages awarded. In his answer, Mr. Brown admitted that his son took his vehicle without permission.

Appellees moved for summary judgment, arguing that the policy conditioned coverage on the permissive use of a vehicle and unambiguously excluded coverage for intentional acts and for accidents occurring during flight from law enforcement officers. In support of their motion, appellees filed a certified copy of the insurance policy in effect at the time of the accident and a copy of Mrs. Rogers's complaint in the Saline County Circuit Court. In their brief, appellees argued that the insurance policy's initial statement of coverage did not apply because Mrs. Ison's automobile was not involved in the accident; that the coverage extension, which gave the same coverage to a dependent relative living in the insured's household while using another private passenger automobile, did not apply because appellant's son was not living in her household when the accident occurred and was not using the other automobile with permission; that the coverage extension did not apply to accidents involving stolen vehicles; that the policy excluded from coverage bodily injury or property damage caused by intentional acts; that the policy also excluded bodily injuries occurring "while you or anyone using your auto, with your permission, is involved in the commission of a felony . . . or while any such person is seeking to elude apprehension or arrest by any law enforcement official"; that, after the accident, appellant's son was charged with felony fleeing, criminal mischief, reckless driving, possession of a firearm, and the unauthorized use of a vehicle and was found guilty of fleeing; and that appellees had not agreed to protect Mrs. Ison from liability she assumed by signing her son's

application for a driver's permit. In opposition to appellees' motion for summary judgment, Mr. Brown filed a copy of his deposition.

Mrs. Ison moved for partial summary judgment on October 20, 2004, requesting a determination that appellees owed her a defense with independent counsel of her choosing. She filed copies of Mrs. Rogers's first amended complaint and appellees' responses to her interrogatories and requests for production of documents, including copies of her March 16, 2004 statement to appellees' investigator, Jason Grady, and appellees' March 22, 2004 letter to her denying coverage but agreeing to provide her with a limited defense (its reservation of rights).

At the conclusion of the hearing on the motions, the circuit judge stated:

> From my reading of everything before me, I do not see how a jury could conclude that there was permission to drive the vehicle under these facts. I guess to state it more clearly, I do not know that there is sufficient evidence from which a jury could conclude that there was permission.
>
> If I get to that point, I do not know whether a ruling on other issues is necessary or not. I do not believe what I will call the "you" argument for lack of a better means to articulate it. I do not believe that argument applies. I think there is language in here that says that whatever coverage goes to the primary person is given is extended to the other one and the policy . . . exclusions. The other person does not have less exclusions. The other person has the same exclusions of whoever the primary person was.
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> I guess I am confusing one affirmative motion for summary judgment with reasons to deny the other. I am going to find as a matter of law that there was not permissive use of this vehicle. Unless asked to, I am not going to make a finding on the intentional act. I do not believe that is necessary. I do not know whether I have sufficient information before me one way or the other.

The circuit judge entered an order granting appellees' motion for summary judgment and denying Mrs. Ison's motion on January 20, 2005, stating that appellees had no duty to defend Mrs. Ison or to pay benefits as a result of the accident. Mrs. Ison has appealed from that order.

We approve the granting of a motion for summary judgment only when the state of the evidence portrayed by the pleadings,

affidavits, discovery responses, and admissions on file is such that the nonmoving party is not entitled to a day in court, *i.e.*, there is no genuine issue of material fact remaining, and the moving party is entitled to judgment as a matter of law. *Cumming v. Putnam Realty, Inc.*, 80 Ark. App. 153, 92 S.W.3d 698 (2002). Also, we normally view the evidence in the light most favorable to the party resisting the motion and resolve any doubts and inferences against the moving party. *Cranfill v. Union Planters Bank, N.A.*, 86 Ark. App. 1, 158 S.W.3d 703 (2004). However, when parties file cross-motions for summary judgment, they essentially agree that there are no material facts remaining, and summary judgment may be an appropriate means of resolving the case. *Id.* The filing of cross-motions for summary judgment, however, does not necessarily mean that there are no material issues of fact in dispute. In some cases, a party may concede that there is no issue if his legal theory is accepted and yet maintain that there is a genuine dispute as to material facts if his opponent's theory is adopted. *Id.* Appellant takes this approach.

Appellant's first point states that the circuit judge erred in "denying" summary judgment, so it appears that she is attacking the denial of her motion for partial summary judgment as well as the award of summary judgment to appellees.[1] She asserts that the policy covered her and her son under the following coverage extension:

> When **your** policy insures a **private passenger auto** for Bodily Injury and Property Damage Liability coverage, **we** will provide those same coverages for the use of certain other **private passenger autos.**
>
> 1. Use of Other **Private Passenger Autos.**
>
> Coverage applies to **you** or dependent relatives living in **your** household while using another **private passenger auto**. However, the **private passenger auto** cannot be:
>
> a. owned by **you** or dependent relatives of **your** household; or

[1] Usually, the denial of a motion for summary judgment, which is an interlocutory order, may not be appealed. However, it can be considered in conjunction with an appeal from a grant of summary judgment. *Smith v. Farm Bureau Mut. Ins. Co. of Ark., Inc.*, 88 Ark. App. 22, 194 S.W.3d 212 (2004).

b. furnished or available for regular use by **you** or dependent relatives of **your** household.

Mrs. Ison argues that, because this provision is silent on the issue of permissive use and she is a named insured and comes within the meaning of "you," she is entitled to a defense and to coverage. She also asserts that, because her son is a "dependent relative" living in her household, he is also covered by the policy and entitled to a defense, even though the accident occurred on a night that he was staying with his father, who shared custody of him. Under this point, Mrs. Ison contends that the circuit judge's finding that her son's use of the vehicle was not permissive was not a sufficient basis for summary judgment because the policy's provisions related to permissive use do not apply to her son. She argues that Coverage Extension No. 1 clearly extends coverage to a named insured or dependent family member for liability arising out of a named insured's or family member's "use" of another auto. Mrs. Ison also contends that the following provision did not apply to her son, because he did not meet the definition of "you" within the policy: "These coverage extensions do not apply to accidents: 1. that involve any **auto you** are driving without permission that is stolen or is reasonably suspected to be stolen. . . ." The policy defines "you" and "your" as "the policyholder first named in the current policy declaration. Unless specifically stated otherwise in the policy, **you** and **your** includes the policyholder's spouse if a resident of the same household." Mrs. Ison points out that her son is not the policyholder's spouse, and that other sections of the policy differentiate between "you" and "dependent relatives living in your household."

It is, therefore, necessary to construe the insurance policy. The general rule is that the pleadings against the insured determine the insurer's duty to defend. *Anderson Gas & Propane, Inc. v. Westport Ins. Corp.*, 84 Ark. App. 310, 140 S.W.3d 504 (2004). The duty to defend is broader than the duty to pay damages, and the duty to defend arises where there is a possibility that the injury or damage may fall within the policy coverage. *Id.* The insurer must defend the case if there is any possibility that the injury or damage may fall within the policy coverage. *Id.*

In reviewing an insurance policy, the appellate court follows the principle that, when the terms of the policy are clear, the language in the policy controls. *Anderson Gas & Propane, Inc. v. Westport Ins. Corp., supra.* The language in an insurance policy is to be construed in its plain, ordinary, popular sense. *Id.* If a policy

provision is unambiguous, and only one reasonable interpretation is possible, the court will give effect to the plain language of the policy without resorting to rules of construction. *Id.* Language is ambiguous if there is doubt or uncertainty as to its meaning and it is fairly susceptible to more than one equally reasonable interpretation. *Id.* If the policy language is ambiguous, the policy will be construed liberally in favor of the insured and strictly against the insurer. *Id.* Whether the language of a policy is ambiguous is a question of law to be resolved by the court. *Id.* If ambiguity exists, parol evidence is admissible and the meaning of the ambiguous term becomes a question for the fact-finder. *Id.*

Because the circuit judge based his decision on his determination that, as a matter of law, appellant's son's use of the vehicle was without permission, he obviously viewed the insurance contract as unambiguous. Contracts of insurance should receive a practical, reasonable, and fair interpretation consonant with the apparent object and intent of the parties in light of their general object and purpose. *Sweeden v. Farmers Ins. Group*, 71 Ark. App. 381, 30 S.W.3d 783 (2000). Further, different clauses in a contract must be read together and construed so that all of its parts harmonize, if that is at all possible. *Id.* It is error to give effect to one clause over another on the same subject if the two clauses are reconcilable. *Travelers Indem. Co. v. Olive's Sporting Goods, Inc.*, 297 Ark. 516, 764 S.W.2d 596 (1989).

In our view, appellant's hyper-technical interpretation of the policy is patently unreasonable. Essentially, she interprets it as extending greater coverage to dependent relatives living in her household, whose coverage is derivative of hers, while using another private passenger auto, than it does to her and her spouse. Reading the policy as a whole, as we must, it is clear that the interpretation given by the circuit judge was the only reasonable view possible. The obvious intent of the policy was to extend coverage for non-listed autos and for individuals that were not named insureds, spouses, or drivers, under very limited circumstances, and to require that all "dependent relatives living in [the Isons'] household" have permission to use the "other private passenger auto." Accordingly, we affirm on this point.

Mrs. Ison further argues that, even if permission was required, (1) the court should have held that, as a matter of law, her son had permission to take the vehicle, or (2) a material issue of fact — whether her son had permission — remains to be tried. She

correctly states that the permission from a named insured to another to drive a vehicle necessary to provide coverage under a liability policy may be express or implied. *See M.F.A. Mut. Ins. Co. v. Mullin*, 156 F. Supp. 445 (W.D. Ark. 1957). Mrs. Ison admits that express permission was not given to her son but argues that, at the least, an issue of fact exists as to whether he had implied permission. She reminds this court that Arkansas courts follow the "Hell or High Water" rule, under which implied permission will be found, short of theft or conversion. In *Commercial Union Ins. Co. v. Johnson*, 294 Ark. 444, 745 S.W.2d 589 (1988), the supreme court adopted the "initial permission" or "Hell or High Water" rule, which provides that, if the vehicle was originally entrusted by the named insured, or by one having proper authority to give permission, to the person operating it at the time of an accident, such operation is considered to be within the scope of the permission granted, regardless of how grossly the terms of the original bailment may have been violated. The court explained that an important policy behind the rule is to assure that all persons wrongfully injured have financially responsible persons to look to for damages and that a liability insurance policy is for the benefit of the public as well as for the benefit of the named insured. *Id.* That case holds that a deviation from the permitted use is absolutely immaterial; the only essential thing is that permission be given for use of the vehicle. *Id.* The court cautioned, however, that the rule that initial permission will suffice applies only when that permission was actually granted to the user sought to be brought within the coverage of the policy and concluded:

> The cases adopting the "initial permission" rule usually provide that it governs "short of theft or conversion," *see Milbank Mutual Insurance Co. v. United States Fidelity and Guaranty Co., supra*, 332 N.W.2d at 167, or "short of an unlawful taking," *see Odolecki v. Hartford Accident & Indemnity Co., supra*, 264 A.2d at 40. Although the question is not before us now, we agree that an insurer should not be liable to a thief or a person who has no permission to use a vehicle and who converts it to his or her own use. With respect to the situation in which one who has permission of the named insured grants permission to another person to use the named insured's vehicle, we make no decision. In this case the car belonged to Brett Davis. Teresa Davis, Brett's wife, had permission to use the car, and she gave permission to Self. However, no issue has been raised as to Self being the second permittee. As we noted at the outset, Commercial Union conceded that if Teresa had give Self permission,

> Self's use of the car was covered under the policy. Some of the policy reasons for adopting the "initial permission" rule probably apply in the "second permittee" case to the same extent that they apply no matter how greatly the person having permission of the named insured may deviate from the permitted route or use, but we leave that question open.
>
> Our holding is that the "initial permission" rule applies in Arkansas, and that the trial judge was correct in holding that the extent of route deviation by Self in the driving of the Davis vehicle is thus immaterial.

294 Ark. at 454, 745 S.W.2d at 594-95.

Mrs. Ison compares this situation to *Farmers Insurance Exchange v. Janzer*, 215 Mont. 260, 697 P.2d 460 (1985), where a fourteen-year-old boy caused an accident while running away from home in his parents' auto. The *Janzer* boy's father started teaching the boy to drive an automobile when he was ten years old; since the age of thirteen, the boy had frequently driven the auto on the highway and in the city when his parents were present; and, for several months before the accident, he drove the auto by himself to his job one mile away on a county road, with his parents' knowledge and express permission. The court understandably found that the boy's permission to use the auto "did not stop at the corral gate" and held that the issue of implied permission remained to be tried.

Mrs. Ison argues that the following considerations raised an issue of fact as to whether her son had implied permission to use the vehicle: (1) there was no evidence that her son had been expressly prohibited from using his father's vehicle; (2) he had driven the vehicle, while alone, in the past; (3) he had a driver's permit; (4) he had access to the keys; (5) he lived in the house of the vehicle's owner, his father.[2]

We disagree and find that the facts of this case are significantly different from those in *Janzer*. First, there was no "initial permission" actually given to appellant's son, and there-

[2] Additionally, Mrs. Ison contends that her son's intent to commit theft or conversion is a disputed issue of material fact, in light of his taking of prescription and non-prescription drugs and slashing his wrists in his suicide attempt during what was described as a "major depressive episode," which cast doubt on whether he was mentally capable of forming an intent. She notes that many courts have adopted the view that an insured suffering from a lack of mental capacity at the time of committing tortious conduct does not fall within an

fore, the "Hell or High Water" rule does not apply. Second, the evidence concerning the son's prior use of his father's vehicle was utterly insufficient to raise an issue of fact as to whether he had implied permission to take it on the date in question. In his deposition, Mr. Brown testified that his son had driven his father's truck by himself "probably twice" in the past; both times were "around the church parking lot" for the purpose of "either loading Boy Scout stuff up or something like that. . . ." Because appellant failed to demonstrate any issue of fact as to whether her son had implied permission to take the truck, we also affirm on this point.

Affirmed.

GRIFFEN and CRABTREE, JJ., agree.

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intentional injury exclusion. The exclusions, however, were not ruled on by the circuit judge and, therefore, are not properly before us. *See Jones v. Double "D" Props., Inc.*, 357 Ark. 148, 161 S.W.3d 839 (2004).

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