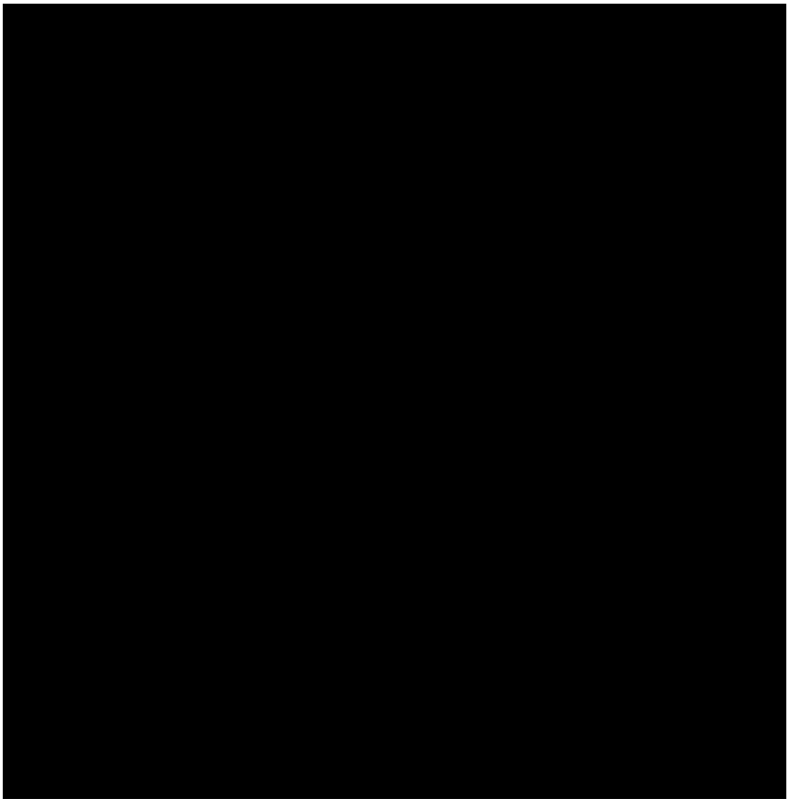

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Jerald WILSON *v.* CORNERSTONE MASONRY,
Firstcomp Insurance Company

CA 05-966 233 S.W.3d 161

Court of Appeals of Arkansas
Opinion delivered March 22, 2006

[Rehearing denied April 26, 2006.]

Walker, Shock, Cox & Harp, PLLC, by: *Eddie H. Walker, Jr.*, for appellant.

Kenneth A. Olsen, for appellee Cornerstone Masonry.

JOSEPHINE LINKER HART, Judge. Appellant, Jerald Wilson, appeals from the decision of the Arkansas Workers' Compensation Commission denying his claim for benefits. On appeal, he argues that substantial evidence does not support the Commission's conclusion that he failed to prove a compensable injury to his cervical spine. We reverse and remand.

Our workers' compensation statutes define a "compensable injury" as an "accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment. . . ." Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2005). When the Commission denies a claim for benefits because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if the Commission's decision displays a substantial basis for the denial of relief. *Cooper v. Hiland Dairy*, 69 Ark. App. 200, 11 S.W.3d 5 (2000). Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion. *Id.*

According to the Commission's opinion reversing the administrative law judge's (ALJ's) award of benefits, appellant was

involved in a motor-vehicle accident on July 23, 2003, while in the course and scope of his employment. Appellant was taken to the emergency room, where an x-ray of his cervical spine was found to be normal. The next day, however, appellant returned to the emergency room, where according to the medical records, he complained in part of neck pain at about the C7-T1 level. Following additional x-rays, he was assessed as having cervical strain, with a possible osteophyte fracture at about the C5 level.

Also as noted by the Commission, appellant returned to work on July 28, 2003, where he worked an average of eight to nine hours a day, with his duties including heavy lifting, bending, stooping, climbing, and stacking. In September 2003, appellant began suffering a recurrent burning sensation in his neck that by November 2003 became more frequent and intense. On November 4, 2003, he sought treatment from Dr. Robert Thompson. An MRI taken November 7, 2003, revealed a broad posterior disc protrusion at C6-7. Dr. Thompson opined that the herniated disc was "directly causally related to the accident." On December 11, 2003, Dr. Gregory Ricca examined appellant and recommended surgery at C6-7. Dr. Ricca opined that, within a reasonable degree of medical certainty, appellant's accident was the major cause of his ruptured disc and consequent need for surgery.

Appellant sought workers' compensation benefits. On appeal from the ALJ's award of benefits, the Commission found that appellant failed to prove that he sustained a compensable injury. In making its decision, the Commission found that appellant's testimony should be afforded little weight. The Commission wrote that "Dr. Ricca confirmed during his deposition . . . that his office would not continue to treat the claimant due to the claimant having requested that they make misrepresentations concerning his injury in order for state insurance to cover his pending surgery." The Commission stated that appellant's "willingness to make false representations to a state agency, and his attempt to persuade his doctor's office to participate in said fraud, weighs heavily against the claimant's overall credibility." The Commission concluded that, because of appellant's alleged willingness to commit fraud, appellant's testimony was not credible, and Dr. Ricca's medical opinion, which was based on a history given by appellant, should be given little weight.

On appeal, appellant argues that there is no substantial evidence to support the Commission's determination that he failed to prove he sustained a compensable injury to his cervical spine.

He argues in part that the Commission's determination that he attempted to defraud Medicaid and was therefore not credible was not supported by substantial evidence. We agree.

In regard to this issue, Dr. Ricca testified that his practice administrator, Dr. Sauthier, "had direct conversations with this patient and then discussed with me. There's some questions about the patient wanting us to charge Medicaid when we were unable to do so. I think Dr. Sauthier thought it was unethical. . . ." When asked if Dr. Ricca thought there was a problem with obtaining coverage through Medicaid when the coverage should be through workers' compensation, Dr. Ricca said,

> There can be. I think what I — and you might want to talk to Dr. Sauthier. She can give you the exact or more accurate information about her conversations. But what I had the impression from my conversations with Dr. Sauthier was that the patient was requesting us to misrepresent some of the information to help him get insurance coverage. I may be incorrect. . . . I may be incorrect in telling you that, but that was my impression from my conversation with Dr. Sauthier. . . . . I would suspect that's what it is, is that we had the impression it was job-related and could not get his company to pay for it. So he says, "Well, then say it's not job-related and get Medicaid to pay for it."

The Commission's conclusion that appellant committed fraud does not provide a substantial basis for the denial of benefits. Dr. Ricca's deposition testimony relied upon by the Commission is equivocal; Dr. Ricca repeatedly acknowledged that he may be incorrect about what occurred between appellant and Dr. Sauthier, who did not testify. Moreover, there is no evidence in the record indicating that it is in fact fraudulent to seek medical care through Medicaid when the employer refuses coverage. Furthermore, appellant testified that he was attempting to have the surgery paid through Medicaid. We defer to the Commission on issues involving the weight of the evidence and the credibility of witnesses, but while the Commission's findings on these matters may be insulated to a certain degree, its decisions are not so insulated as to render appellate review meaningless. *Id.*; *Lloyd v. United Parcel Serv.*, 69 Ark. App. 92, 9 S.W.3d 564 (2000). In sum, there was no evidence of fraud that would support the Commission's denial of benefits based on a finding that appellant was not credible.

Also, in denying benefits, the Commission stated that the weight of the "objective medical evidence" failed to establish that appellant suffered a herniated disc as a result of his accident. The Commission noted that appellant's initial x-rays and MRI showed normal results, that it was not until November that an MRI showed a herniated disc, and that it was "very unlikely that the claimant could have continued to engage in the type of strenuous activities that he did for months after his accident had he sustained a herniated disc at the time of his accident," noting further that appellant did not seek medical attention during the time following his accident, despite his worsening symptoms. These conclusions are not supported by any medical evidence and also do not constitute a substantial basis for the denial of benefits. We note that the medical records do not indicate that an MRI was taken of appellant's spine prior to November 2003. Further, when questioned about appellant's working for two months following the accident, Dr. Ricca testified,

> One can rupture a disc and get pressure on the spinal cord and have no symptoms for some time period. And the reason why is this spinal cord might be able to accommodate the pressure, and then over time the spinal cord starts to decompensate and then becomes symptomatic. So it is very reasonable that he sustained a significant injury to his neck, disc rupture, pressure on the spinal cord that was not identified or did not present itself till September as burning pain.

Moreover, we note that appellant testified that he did not visit the doctor until November because "I didn't feel that I was really severe or anything until I started losing feeling in my arm. I thought it was just a pain and I really wasn't concerned until I started losing feeling in my arm and hand." He stated that the burning sensation in his neck "would come and go and it didn't last for long periods of time, but when I started losing the feeling in my hand and arm, that was when I really became concerned." In sum, given this evidence, and the lack of evidence to the contrary, the Commission's conclusions are not supported by substantial evidence.

Thus, we conclude that the Commission's opinion does not display a substantial basis for the denial of relief. Reasonable minds could not reach the Commission's decision to deny benefits where the Commission reached its rationale based solely on conclusions not supported by the evidence and where there is no testimony or

other evidence in the record that supports the denial of benefits. Accordingly, we remand for an award of benefits.

Reversed and remanded.

VAUGHT and ROAF, JJ., agree.

Ricky Glenn STEWARD *v.* STATE of Arkansas

CA CR 05-221 233 S.W.3d 180

Court of Appeals of Arkansas
Opinion delivered March 22, 2006

[Rehearing denied April 26, 2006.*]

* ROBBINS and GRIFFEN, JJ., would grant rehearing.

Ronald L. Davis, Jr., Law Firm, PLLC, by: *Ronald L. Davis, Jr.*, for appellant.

Mike Beebe, Att'y Gen., by: *Nicana Corinne Sherman*, Ass't Att'y Gen., for appellee.

ROBERT J. GLADWIN, Judge. Appellant Ricky Glenn Steward was charged with four counts of attempted capital murder and one count of attempted first-degree murder, stemming from events that occurred on June 1, 2003, involving five police officers from the Jackson County Sheriff's Department. A Jackson County jury found appellant guilty of one count of attempted second-degree murder and three counts of aggravated assault and found him not guilty of all charges related to one particular officer. Following the jury's verdict, the trial court sentenced him to serve twenty-five years at the Arkansas Department of Correction. Appellant raises two points on appeal: (1) the trial court erred in granting the State's motion to restrain him in the presence of the jury during trial; and (2) the trial court erred in denying his motion to suspend the proceedings to determine whether he was competent to stand trial. We affirm.

On June 20, 2003, the Jackson County Circuit Court ordered that appellant undergo a mental-health evaluation upon defense counsel's motion. Dr. William Cochran, a psychologist at the North Arkansas Human Services System in Kensett, interviewed appellant. In appellant's history, it was noted that Dr. Cochran had previously evaluated him on April 16, 2002, and had opined at that time that he was competent to stand trial on charges unrelated to the current charges and was able to appreciate the criminality of his actions and to conform his behavior to the requirements of the law. Based on appellant's most recent examination, Dr. Cochran determined that appellant demonstrated a fully-developed, persecutory-type delusion, and Dr. Cochran opined that appellant was not currently competent to stand trial. On September 12, 2003, the trial court entered a not-fit-to-proceed commitment order. The trial court found that, pursuant to Ark. Code Ann. § 5-2-310, the proceedings would be suspended and that appellant would be committed to the custody of the Director of the Department of Human Services for detention, care, and treatment until restoration of fitness to proceed. The Department was ordered to report back within ten months.

On September 23, 2003, appellant was admitted to the Arkansas State Hospital (ASH) for treatment, and a forensic report was filed on February 17, 2004. In an initial interview, Dr. Charles H. Mallory, a staff psychologist, found him "unresponsive and preoccupied with military protocol and an apparent active delusion in which he perceived the ASH staff as involved in his military detention . . . ." Over the course of his treatment, appellant told the staff that in the early 1990s he began to understand that the county judge and the Newport police were corrupt and that it was his duty to correct the situation. On October 17, 2003, appellant was "discovered crawling on his belly in front of the nurses' station, and had a razor in his hand, saying that his mission was to 'take out everybody' on Gunny's orders." Appellant had been taking Haldol and Zyprexa for approximately four months at the time of examination on January 23, 2004. In the forensic report, Dr. Mallory and Dr. Kenneth Dowless, a forensic staff psychiatrist, noted that appellant had improved from his previously diagnosed condition. The doctors reported that, at the time of the examination, appellant had mental disease but not mental defect and that he had the capacity to understand the proceedings against him and the capacity to assist effectively in his own defense. They concluded, "It is unlikely that his mental condition will deteriorate due to the stress of awaiting trial or the stress of trial itself, *as long as he can be*

maintained on his current regimen of medications." (Emphasis in original.) The doctors also opined that, at the time of the alleged offenses, appellant did not lack the capacity to appreciate the criminality of his conduct but that, due to mental disease, he lacked the capacity to conform his conduct to the requirements of the law.

A competency hearing was held on June 21, 2004, at the conclusion of which, the trial court stated that "the defendant does not fit under the McNaughton rule at the time of the event, that it is a fact question, will be a fact question for the jury." Appellant does not challenge any aspect of that proceeding.

Appellant's trial was scheduled for August 2, 2004. On July 22, 2004, the State filed a motion to require that appellant be restrained during the proceedings. A hearing on the State's motion to restrain was held on August 2, 2004, and the trial court heard testimony regarding charges that arose from events that occurred in 1997 and in 2001 and testimony relating to the current charges stemming from events that occurred on June 1, 2003.

Events on November 27, 1997

The evidence showed that on November 27, 1997, Newport Police Officer Wade Honey was standing at the back door of the police department when he saw a white car going the wrong way on Second Street, which runs between the sheriff's office and the police department. The car's headlights were not on, and it was traveling at approximately eighty miles per hour. Honey began the pursuit, and Creston Hutton with the Arkansas State Police was called to assist. Hutton attempted to block the road using his police vehicle. Instead of stopping, appellant rammed his vehicle into the rear of Hutton's car. In continuing the pursuit, appellant narrowly avoided a head-on collision with Sheriff Jim Bishop's car. At another point during the pursuit, Honey pulled in front of appellant's stopped car, and Hutton attempted to block it by pulling in behind him. Appellant backed up his car and rammed it into the front of Hutton's car, and then drove forward, hitting Honey's car, before he fled again. Honey fired one round into the rear bumper of appellant's car. At the Waldenburg city limits, appellant slammed on his brakes and then backed up and almost hit Lieutenant Michael Scudder's car. Honey forced appellant's vehicle into a ditch, where it became stuck in the mud. According to Honey, appellant "held the accelerator wide open till the engine blew up."

Officers then attempted to get appellant out of the vehicle. Appellant put his arms up through the steering wheel and refused to let go. Honey climbed into the front seat while another officer struggled from the other side to force appellant's arms back through the steering wheel. Finally, they got him loose, and the other officer dragged appellant out through the car's window. Scudder recalled that appellant spit on an officer. Appellant was pepper sprayed, and it took several officers to get him out of his car and handcuffed.

Scudder testified that he had not seen appellant cause any trouble inside a courtroom but that he recalled a disruption getting appellant to go inside the courthouse after leaving the jail. Scudder also recalled that, when appellant was being taken back to the jail, the deputy he was following had to pull over because appellant had kicked the door so hard that it bowed. The officers put a different restraint on him so that he could no longer kick the door.

Events on July 11, 2001

Patrolman Michael Calendar with the Newport Police Department testified that on July 11, 2001, he saw a suspicious van in a residential neighborhood. He said that the van pulled over and let him pass every time he attempted to run the tags on it. He said he noticed the van following him. He turned around to return to the neighborhood, and the van turned around as well. Calendar finally got an opportunity to run the tags, and he learned that the van belonged to appellant out of North Carolina. Calendar was instructed by another officer to stop the vehicle in order to find out whether the driver was lost. Calendar activated his lights, but appellant continued to drive. Patrolman Mike Wilson joined the pursuit, and Calendar activated his siren. Lieutenant David Ervin also joined the pursuit. Two officers from the Diaz Police Department, who had been called to assist, attempted to block appellant's van. As Diaz Sergeant Charles Moss was exiting his car, the van slowed, then accelerated suddenly, and hit the Diaz patrol car, disabling both cars. Diaz Officer Dale Jackson testified that appellant exited his vehicle and began ranting that the officers had hit his van. Appellant kept coming toward the officers, even though they had instructed him to get on the ground, and Jackson even drew his weapon at one point. When the other units arrived, appellant fled on foot.

Scudder encountered appellant running in his direction. Scudder attempted to block appellant's path with his car. Appellant went over the hood, fell to the ground, and then got up and

continued to run. Eventually, the officers decided to stop pursuing appellant, and so they returned to the scene of the accident. Appellant returned to the scene as well and yelled and cursed at the officers. When the officers attempted to chase him, he fled again. According to Scudder, appellant called 911 from every payphone between the scene of the accident and the police department. Scudder said that appellant was sitting in front of the police department the following morning but would not let the officers get close.

Events on June 1, 2003

Sergeant James Brock with the Jackson County Sheriff's Department testified regarding the incident that occurred on June 1, 2003, that led to appellant's current charges. Brock and Deputy Toni Moss were dispatched to appellant's residence in reference to "unknown trouble." A child opened the door to the residence, and Brock saw appellant sitting in a chair across the room. Appellant appeared to be calm and assured the officers that everything was all right. The officers left the residence, but within five or ten minutes, they were summoned back to the residence. Brock, Moss, Tammy Selvidge, a reserve deputy in training, Deputy Chuck Benish, and Sergeant Mike Miller responded. As they arrived at his residence, appellant fired several shots at them, and one of the bullets hit Moss in the leg. Appellant then fled the scene and remained at large for three days.

Following the hearing on the State's motion to restrain appellant during the proceedings, appellant gave the trial judge his word as a United States Marine that he would not disrupt the proceedings. The trial court did not specifically rule on the State's motion at that point in time.

Before the trial proceedings began on the following day, defense counsel requested a bench conference. Defense counsel informed the trial court that appellant said he was hearing voices and suggested that the court allow appellant to speak to one of the doctors present at the proceedings. The trial judge responded, "Well, I've done that once."

The trial proceedings resumed, and some time later, defense counsel asked for another bench conference. Defense counsel again advised the trial court that appellant said he was hearing voices. Specifically, appellant was having conversations with "Gunny" who informed him that he had a right to be tried in military court. At that point, the trial judge ruled that appellant

would be restrained during the trial, but he gave the jury a limiting instruction. In his ruling, the trial judge stated:

> All right, the Court will make a record that he is not shackled but he has leg chains on and the reason is that the prior actions of the defendant, how strong he is, and unresponsive he is, I'm afraid to get him around the jury but I have kept his leg chains on. With the strength of the defendant and his prior actions with the police officers indicate to me that he should be in chains and the fact that he has run before from police. I'll give them a limiting instruction at the correct time. I think I'm required to as a matter of fact. I'll tell them that now.

At a third bench conference, defense counsel told the court that appellant was still communicating with his gunnery sergeant and that his competency to stand trial was being called into question again. The trial court refused to order an additional mental evaluation.

Toward the end of appellant's case in chief, defense counsel informed the trial court that appellant wished to testify against counsel's advice. The following colloquy occurred between the trial court and appellant:

> APPELLANT: Sir, as a United States Marine, my staff non-commissioned officer, Gunny Sergeant Williams, has authorized me to testify before you at this time, Sir.
>
> THE COURT: Well, what does that mean, Mr. Steward?
>
> APPELLANT: It means my Gunny told me to get up there and tell the truth.
>
> THE COURT: Do you wish to testify?
>
> APPELLANT: Yes, sir.
>
> THE COURT: Do you understand you have the right not to testify?
>
> APPELLANT: As it stands right now, my Gunny told me to testify, I will testify, Sir.
>
> THE COURT: And you understand that your Gunny Sergeant is not your lawyer and he is not skilled like your lawyer is.
>
> APPELLANT: I've been in the marines fourteen years, he hadn't steered me wrong yet, Sir.

THE COURT: Well, step around here and get on the stand.

Appellant testified that the police had been harassing him since 1997. He stated that he believed the officers who arrived at his residence on June 1, 2003, were there to kill him. In fact, he heard one of the officers say, "Let's kill him this time." Appellant stated that he was under orders from "Gunny" to fire at the officers so that they would leave him alone. He insisted, however, that he was not trying to kill the officers. He said he was an expert with the M-16 A2 service rifle and could have shot and killed the officers if he had wanted to do so. Appellant testified that "Gunny" was real and that the Marine Corps had sent "Gunny" to assist him in his secret mission to liberate Newport. Appellant stated that at the state hospital, which he referred to as an interrogation camp, doctors had diagnosed mental disease or defect. He insisted, however, that he did not have a problem. Concerning his secret mission, appellant testified that he had collected information about key officials in Newport and was sending the information to the Department of Justice in Washington, D.C.

On cross-examination by the prosecutor, appellant stated, "Sir, it is my duty to let you know that I am a prisoner of war. Under the Prisoner of War Act of the Geneva Commission (sic), the only thing I can be allowed to give you is my name, rank, and serial number. I cannot be interrogated." The prosecutor responded, "You can't even acknowledge if you know who I am?" Appellant answered, "Steward, Staff Sergeant, 43143704."

Following deliberations, the jury convicted appellant of attempted second-degree murder against Moss and three counts of aggravated assault against Selvidge, Brock, and Miller. The jury found appellant not guilty of all charges that pertained to Benish. Because the jury was unable to arrive at a decision on appellant's sentence for the offenses, the trial court sentenced him to serve twenty-five years at the Arkansas Department of Correction.

On appeal to this court, appellant first argues that the trial court erred in granting the State's motion to require him to be restrained during the proceedings. Arkansas Rule of Criminal Procedure 33.4 provides the following:

> Defendants and witnesses shall not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order. If the trial judge orders such restraint, he shall enter into the record of the case the reasons

> therefor. Whenever physical restraint of a defendant or witness occurs in the presence of jurors trying the case, the judge shall upon request of the defendant or his attorney instruct the jury that such restraint is not to be considered in assessing the proof and determining guilt.

It is not prejudicial per se when the defendant is brought into a courtroom handcuffed or leg-cuffed. *Townsend v. State*, 308 Ark. 266, 824 S.W.2d 821 (1992). Almost without exception, our prior decisions that have upheld the use of restraints have involved defendants charged with violent offenses or who have engaged in disruptive behavior, or attempted escape. *Id.* The trial court has discretion to use physical restraints on a defendant for security purposes and to maintain order in the courtroom. *Woods v. State*, 40 Ark. App. 204, 846 S.W.2d 186 (1993). Moreover, the trial judge is in a better position to evaluate the potential security risks involved. *Id.* We will not presume prejudice when there is nothing in the record to indicate what impression may have been made on the jurors and when appellant has offered no proof of prejudice. *Hill v. State*, 285 Ark. 77, 685 S.W.2d 495 (1985).

■ Appellant argues that the record does not support the trial court's reasons for restraining him. He further argues that the State's witnesses conceded that he had never been disruptive in a courtroom before and that he was quiet during the proceedings. The record does indeed support the reasons stated by the trial court. Appellant was charged with having committed violent offenses and was clearly prone to fleeing from authorities. Scudder testified that it took several officers to remove appellant from his vehicle and get him handcuffed and that it was not easy to subdue appellant even with the use of mace. Scudder also testified that appellant kicked a patrol car's door so hard that it bowed. Under these circumstances, we cannot say that the trial court abused its discretion in ordering that appellant be restrained during the proceedings. Moreover, the trial court properly instructed the jury to disregard the fact that appellant had on leg chains and to give that fact no consideration during its deliberations as to appellant's guilt or innocence. Furthermore, appellant cannot show that prejudice resulted from the trial court's use of restraints because the jury convicted him of lesser-included offenses, found him not guilty of any offense related to one officer, and could not agree on what sentence he should receive.

Next, appellant argues that the trial court erred in refusing to suspend the proceedings to ascertain whether he was competent to stand trial. Arkansas Code Annotated section 5-2-302 provides that no person who, as a result of mental disease or defect, lacks capacity to understand the proceedings against him or her or to assist effectively in his or her own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures. If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended. Ark. Code Ann. § 5-2-310(a). If the court, pursuant to the report of the Director of the Department of Human Services, or as a result of a hearing on the report, determines that the defendant is fit to proceed, prosecution in ordinary course may commence. Ark. Code Ann. § 5-2-310(b)(2)(B).

When an accused raises the defense of mental disease or defect or places his or her competency in issue, the trial court must follow the procedures for evaluation set out in Ark. Code Ann. § 5-2-305. An evaluation performed under that section does not ordinarily require a second opinion, and further evaluation is discretionary with the trial court. *Dyer v. State*, 343 Ark. 422, 36 S.W.3d 724 (2001).

The law is well settled that a criminal defendant is presumed to be mentally competent to stand trial, and the burden of proving incompetence is on that defendant. *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996). The test for determining an accused's competency to stand trial is whether he is aware of the nature of the proceedings against him and is capable of cooperating effectively with his attorney in the preparation of his defense. *Id.* On appellate review of a finding of fitness to stand trial, we affirm if there is substantial evidence to support the trial court's finding. *Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996).

Appellant argues that two psychologists and a psychiatrist diagnosed mental disease and defect and that Dr. Mallory and Dr. Dowless determined that he was unable to conform his conduct to the requirements of the law relative to incidents that occurred in 1997 and 2001. Appellant concedes that the trial court conducted a hearing on his competency but asserts that, "however, unlike a determination of ones (sic) capacity to conform his conduct with the requirements of the law at a particular time, the issue of whether the appellant was fit to proceed should always be considered, irrespective of any prior considerations of the same." He argues that, because his counsel made the trial court aware that he

(appellant) was hearing voices during the course of the trial, there was clearly sufficient reason to doubt his fitness to proceed pursuant to Ark. Code Ann. § 5-2-305(D).

According to Dr. Mallory and Dr. Dowless, appellant did not lack the capacity to understand the proceedings against him and to assist effectively in his own defense, which is the linchpin of Ark. Code Ann. § 5-2-302(a). The trial court properly suspended the proceedings and ordered that appellant undergo a mental-health evaluation upon defense counsel's motion in accordance with Ark. Code Ann. § 5-2-305. Once his fitness to proceed was restored, the prosecution commenced in accordance with Ark. Code Ann. § 5-2-310. Here, the trial court followed the dictates of the statutes to the letter, and any further mental-health evaluations were purely discretionary with the trial court. There was no evidence, and appellant has not so much as suggested, that he was not receiving the regimen of medications prescribed to treat his mental condition. The trial court was in a better position to judge whether an additional mental-health evaluation was warranted based on appellant's alleged hearing of voices. Under these circumstances, we cannot say that the trial court abused its discretion.

Affirmed.

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

ROBBINS and GRIFFEN, JJ., dissent.

JOHN B. ROBBINS, Judge, dissenting. It should be an extraordinary circumstance to require a defendant to be shackled with leg chains throughout a trial and in full view of his jury. However, I agree with the majority that such a situation existed during Steward's trial. The trial court was of the opinion that Steward posed a serious risk to the safety of the jury and court personnel, and there was ample evidence to support such an opinion. Steward had been diagnosed by Dr. Charles H. Mallory and Dr. Kenneth Dowless, forensic staff psychologists with the Arkansas State Hospital, as suffering schizophrenia, paranoid type, continuous, and the majority opinion summarizes some of the bizarre behavior of Steward within recent years. Consequently, on this issue I concur with the majority's decision to affirm.

It is with the second issue that I disagree with today's decision. Steward contends that the court erred in refusing to

suspend the trial proceeding to ascertain whether he was competent to stand trial. For the following reasons I agree with Steward's contention.

Steward's jury trial was conducted on August 2, 2004. At this time other charges were pending against him. More than one year earlier, on June 17, 2003, the trial court ordered a mental evaluation prior to trial on one of these other charges. Dr. William Cochran, a licensed psychologist with the North Arkansas Human Services System, conducted an evaluation in which he found that Steward was delusional with paranoid ideation and concluded with an opinion that Steward was not competent to stand trial. Consequently, all criminal prosecutions against Steward were suspended and he was committed to the custody of the Director of the Department of Human Services for inpatient detention, care and treatment until restoration of fitness to proceed.

On February 17, 2004, a report pertaining to Steward was filed with the trial court from Dr. Charles Mallory and Dr. Kenneth Dowless. The report was based upon Steward's court, police and psychological history, and interviews with Steward held on September 23, 2003, and January 23, 2004. Two significant points relevant to this appeal were presented in this report. First, Dr. Mallory expressed his opinion that at the time of the alleged criminal offenses, due to mental disease, Steward lacked the capacity to conform his conduct to the requirements of the law. Secondly, Dr. Mallory opined that Steward was now competent to proceed to trial and "it is unlikely that his mental condition will deteriorate due to the stress of awaiting trial or the stress of trial itself, *as long as he can be maintained on his current regimen of medications.*"

Following receipt of this report, which was also signed by Dr. Kenneth Dowless, a hearing was held on June 21, 2004. The hearing is significant, not so much as to what was decided, but what was not. At the conclusion of the hearing the trial court stated:

> [T]he Court rules that the defendant does not fit under the McNaughton rule at the time of the event, that it is a fact question, will be a fact question for the jury.

Clearly, because of the court's reference to the McNaughton rule, the issue was whether Steward lacked the capacity to conform his conduct

to the requirements of the law at the time of the alleged criminal conduct. The court did not address Steward's competency to proceed to trial.

Although no ruling had been made regarding Steward's fitness to proceed since summer of 2003 when the court found him not competent to proceed to trial, a jury trial was held on August 2, 2004. Three times during the trial Steward's attorney brought to the attention of the trial judge that Steward indicated that he was having continuing conversations with "Gunny," Steward's gunnery sergeant, apparently from when Steward was serving in active duty with the United States Marines. These three colloquies include the following statements:

First colloquy —

> DEFENSE COUNSEL: Judge, my client tells me, I just talked to him, he's hearing voices and I bring that to the Court's attention because I think I'm duty bound to do it. I'm not sure what I'm asking other than to advise the Court.
>
> . . . .
>
> But because we had this issue, I think the law requires me to advise the Court and the Court makes a determination that he needs some clarification that he talk to one of the doctors, one of them is here.
>
> THE COURT: Well, I've done that once.

Second colloquy —

> DEFENSE COUNSEL: Judge, again for purposes of the record, on each session when we break or anything, I always try to talk to Mr. Steward and I did in this instance talk to Mr. Steward to see if I'm confident about his mental state, and just to bring to the Court's attention again that he continues to say that he's having conversations with Gunny and in particular last night about him having the right to be tried in a military Court.
>
> THE COURT: All right, the Court will make a record that he is not shackled but he has leg chains on and the

> reason is that the prior actions of the defendant, how strong he is, and unresponsive he is, I'm afraid to get him around the jury but I have kept his leg chains on.

Third colloquy —

> DEFENSE COUNSEL: I make my record again that as I indicated to the Court on several occasions during the course of this trial, Mr. Steward has indicated and without giving privileged information that he is still communicating with his gunnery sergeant, and I think thus calls into question his competency to stand trial in this matter; that, I think the rule of law is clear that at any point in time that the court becomes aware or that the competency of the defendant to proceed to trial is brought into question that the court has an obligation to make a finding with regards to whether or not there needs to be any additional evaluation on the subject.
>
> . . . .
>
> THE COURT: The objection is overruled.

It is not clear as to when "that once" occurred, which the trial court mentioned during the first colloquy. At this point, Steward had been examined and reports had been made twice. The first was in June 2003 and resulted in the trial court finding Steward not competent to proceed to trial. The second examination and report was the one dated February 17, 2004, which was the subject of the June 2004 hearing and concluded with the trial court holding that Steward's mental capacity at the time of the alleged offense would be a factual issue for the jury. No ruling was pronounced at that hearing pertaining to Steward's competence or fitness to proceed to trial.

Arkansas Code Annotated section 5-2-305(a)(1) (Repl. 2005) provides in pertinent part:

> [T]he court shall immediately suspend any further proceedings in a prosecution if:
>
> . . . .
>
> (D) There is reason to doubt the defendant's fitness to proceed.

The supreme court has defined the test of competency to stand trial as "whether a defendant has sufficient *present* ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual, understanding of the proceedings against him." (emphasis added) *Haynes v. State,* 346 Ark. 388, 392, 58 S.W.3d 336, 339 (2001); and *see Thessing v. State,* 365 Ark. 384, 230 S.W.3d 526 (2006). Granted, here the trial court had complied with this mandate more than a year before Steward was eventually tried. That suspension resulted in a determination that Steward was not competent to proceed to trial. Steward was committed to the state hospital for treatment. He was placed on a regimen of medication and by January 2004 he had improved to a level that staff psychologists opined that he was competent to be tried, provided he continued to "*be maintained on his current regimen of medications.*"

As noted by the majority, an evaluation once performed pursuant to Ark. Code Ann. § 5-2-305 does not ordinarily require a second opinion, and our supreme court has held that further evaluation is discretionary with the trial court. *See Dyer v. State,* 343 Ark. 422, 36 S.W.3d 724 (2001); *Dirickson v. State,* 329 Ark. 572, 953 S.W.2d 55 (1997). While an evaluation based upon interviews with a defendant within the past few days or perhaps few weeks might shed light on whether the defendant has sufficient *present* ability to assist his counsel in his defense, it is indefensible to consider an evaluation based on interviews more than six months earlier as relevant for this purpose under the circumstances of this case. I submit that the trial court should have suspended the trial, at least until Steward could be examined, when it was brought to the court's attention that Steward was hearing voices, especially when Steward stated that he would testify because Gunny was telling him to do so.[1] Clearly, Steward's delusion of hearing instructions from "Gunny" directing him to act contrary to his attorney's recommendations interfered with his ability to consult with his lawyer.

The six-month lapse of time since Steward was last evaluated by a psychologist, the fact that the opinion of the psychologists

[1] The prosecution attempted to cross-examine Steward following his direct examination. Steward would only respond by stating his name, military rank and serial number. The fact that the State did not object and/or seek contempt sanctions at this juncture is some indication of the State's opinion of Steward's competency.

who performed that evaluation conditioned Steward's competency on maintenance of his medicinal regimen, and the delusions of Gunny's directions during trial should have triggered application of Ark. Code Ann. § 5-2-305 and its requirement for an evaluation. This is not an instance of doctor shopping that the supreme court discouraged in *Dirickson, supra,* or a case where there was no history of mental illness as in *Dyer, supra.* The trial was so far removed from the previous evaluation that the issue of competency to proceed and a mental evaluation should not be considered discretionary, but rather mandatory pursuant to section 5-2-305. However, even if discretionary, the trial court either failed to exercise his discretion, or if exercised, abused that discretion by failing to have Steward evaluated.

I would reverse and remand for further proceedings, including a current competency evaluation before a new trial.

CONCRETE WALLSYSTEMS of ARKANSAS, INC. *v.* MASTER PAINT INDUSTRIAL COATING CORPORATION

CA 05-1046 233 S.W.3d 157

Court of Appeals of Arkansas
Opinion delivered March 22, 2006

Appeal from Garland Circuit Court; *Vicki Cook*, Judge; reversed and remanded.

Montgomery, Adams & Wyatt, PLC, by: *James W. Wyatt*, for appellant.

ROBERT J. GLADWIN, Judge. In this one-brief case, appellant, Concrete Wallsystems of Arkansas, Inc. (Concrete), appeals from the trial court's refusal to strike the answer of appellee, Master Paint Industrial Coating Corporation (Master Paint), and from

the trial court's dismissal of Concrete's complaint for lack of jurisdiction over Master Paint. We reverse and remand on both points.

There is no material dispute as to the relevant facts. Concrete is an Arkansas corporation, and Master Paint is a Kansas corporation with no offices, agents, or employees in Arkansas. On or about September 2, 2003, Concrete agreed to purchase a stucco-like product from Master Paint. At various points, Concrete's representatives went to Kansas, where they wrote a post-dated $13,400 check to pay for their purchase, received training on the application of the product, and made arrangements to pick up materials and equipment. A Master Paint representative made one trip to Arkansas to instruct Concrete on the application of the product.

Concrete used the product to build a wall around a subdivision in Garland County. However, according to Concrete, the product did not perform as represented and Master Paint failed to correct the problem, despite promises to do so. As a result, Concrete stopped payment on the $13,400 check. When that occurred, Master Paint filed a materialman's lien in Garland County on the realty where the product was used. Attached to the filing was an invoice showing that Concrete owed Master Paint $13,400.50.

Thereafter, Concrete filed a complaint against Master Paint in Garland County Circuit Court, alleging that Master Paint's sale of a defective product and subsequent filing of a lien caused Concrete to suffer damages in excess of $17,000. Master Paint was served on June 25, 2004, and filed a timely answer questioning Arkansas's jurisdiction over it. However, the answer was filed on Master Paint's behalf by its president, Forouhar Vahdat, who is not an attorney. As a result, Concrete moved on January 6, 2005, to strike the answer. Master Paint then hired an Arkansas attorney, who filed an amended answer on February 11, 2005, urging that the complaint be dismissed for lack of personal jurisdiction.

Following a hearing, the trial court imposed a $500 sanction on Master Paint rather than grant what it called the "extreme relief" of striking the answer.[1] The court then granted Master Paint's motion to dismiss for lack of personal jurisdiction, noting that Master Paint owned no real property in Arkansas; had no

[1] The court stated that the $500 was to be paid as an attorney fee to Concrete. This was apparently an exercise of the court's contempt power. *See* Ark. Code Ann. § 16-22-209

employees, subsidiaries, representatives, or satellite offices in Arkansas; and had made only one brief visit to Arkansas for training purposes. The court also ruled that Master Paint's lien filing in Arkansas did not create a basis for personal jurisdiction. Concrete now appeals from the denial of its motion to strike and from the trial court's dismissal of its complaint for lack of personal jurisdiction.

We first address Concrete's argument that the trial court should have stricken Master Paint's initial answer, which was filed by its president, Forouhar Vahdat. We agree that the answer should have been stricken. Under Arkansas law, a corporation must be represented by a licensed attorney; it cannot be represented by a corporate officer who is not a licensed attorney. *See, e.g., All City Glass & Mirror, Inc. v. McGraw Hill Info. Sys. Co.*, 295 Ark. 520, 750 S.W.2d 395 (1988); *Roma Leathers, Inc. v. Ramey*, 68 Ark. App. 1, 2 S.W.3d 82 (1999). Further, our supreme court has held that a pleading filed by one who is not licensed to practice law in Arkansas is a nullity and that the unauthorized filing is not an "amendable defect." *Preston v. Univ. of Ark.*, 354 Ark. 666, 677-78, 128 S.W.3d 430, 436-37 (2003) (citing *Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002)). Thus, while we understand the trial court's concern about imposing an extreme measure on Master Paint, the above authorities require that Master Paint's initial answer be stricken. It was filed by a person who was not authorized to practice law and was consequently a nullity, and this infirmity was not cured by the subsequent filing of an answer by retained counsel. We therefore conclude that the trial court erred on this point.

The practical application of our ruling is that Master Paint now has no initial responsive pleading of record other than its amended answer, which was filed more than seven months after Master Paint was served with process, making it untimely. *See* Ark. R. Civ. P. 12(a)(1) (2005) (allowing a non-resident thirty days from the time of service in which to file an answer or other initial responsive pleading). Nevertheless, Master Paint's defense of lack of personal jurisdiction remains viable and must be addressed in this appeal. Even an untimely answer may be adequate to preserve the defense of lack of personal jurisdiction, where, as here, it raises

(Repl. 1999), which provides that every person who shall attempt to practice law without being licensed shall be deemed guilty of contempt and punished accordingly.

that defense. *See Dunklin v. First Magnus Fin. Corp.*, 79 Ark. App. 246, 86 S.W.3d 22 (2002); *J&V Rest. Supply & Refrig., Inc. v. Supreme Fixture Co.*, 76 Ark. App. 505, 69 S.W.3d 881 (2002).

Under Arkansas's long-arm statute, our courts have jurisdiction of all persons and causes of action to the maximum extent permitted by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Ark. Code Ann. § 16-4-101(B) (Repl. 1999). We determine whether jurisdiction can be exercised over a nonresident defendant by ascertaining whether the defendant has established sufficient minimum contacts with the State of Arkansas, such that the assumption of jurisdiction does not offend traditional notions of fair play and substantial justice. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Davis v. St. Johns Health Sys., Inc.*, 348 Ark. 17, 71 S.W.3d 55 (2002). Additionally, attention must be paid to the quality and nature of those contacts and to whether the nonresident, through those contacts, has enjoyed the benefits and protections of Arkansas laws. *See Davis, supra.*

We also take into account whether the nonresident's conduct and connection with Arkansas are such that he can "reasonably anticipate being haled into court" here, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), and whether he has purposefully directed his activities toward Arkansas residents or availed himself of the privilege of conducting activities in Arkansas. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *John Norrell Arms, Inc. v. Higgins*, 332 Ark. 24, 962 S.W.2d 801 (1998). Finally, our supreme court has recognized that personal jurisdiction may be exercised over a nonresident even though he has had only one contact with the forum state. *John Norrell Arms, Inc., supra* (citing *Burger King Corp., supra*).

After considering the foregoing principles, we conclude that the trial court erred in dismissing Concrete's complaint for lack of personal jurisdiction. Although Master Paint had few, if any, ordinary business contacts with Arkansas, it had one contact that was sufficient to subject it to the jurisdiction of our courts — it filed a lien in the Garland County Circuit Court on real property located in Arkansas. In doing so, Master Paint invoked the jurisdiction of the State of Arkansas for its own benefit and sought the assistance and protection of our courts and laws in resolving its controversy with Concrete, an Arkansas company. The lien filing also shows that Master Paint purposefully directed its activities at the State of Arkansas and availed itself of the privilege of conduct-

ing activities here. *See Burger King Corp., supra*; *Davis, supra.* Further, because a lien filing is often a prelude to further litigation, *see, e.g.*, Ark. Code Ann. § 18-44-127 (Repl. 2003) (providing that a court shall ascertain by fair trial the amount of indebtedness for which the lien is prosecuted and may render judgment), Master Paint could reasonably anticipate being "haled into court" in Arkansas. *World-Wide Volkswagen Corp., supra.* Under these circumstances, the Garland County Circuit Court's exercise of jurisdiction over Master Paint would not offend traditional notions of fair play and substantial justice, as required by the Due Process Clause of the Fourteenth Amendment. *See Int'l Shoe Co., supra.*

Before leaving this issue, however, we believe it is necessary to distinguish the case of *John Norrell Arms, Inc., supra.* There, an Oklahoma resident, Higgins, obtained an Oklahoma judgment against an Arkansas resident, Seslar, and registered the judgment in Carroll County, Arkansas. Thereafter, Higgins was sued in Pulaski County by a third party, Norrell Arms, who asserted ownership of some of the goods that were the subject of the Oklahoma judgment. Higgins successfully challenged the Pulaski County court's jurisdiction over him, and our supreme court affirmed, ruling that Higgins's registration of the Oklahoma judgment in Arkansas was but a "brief encounter" that would not merit the exercise of jurisdiction over Higgins. *John Norrell Arms, Inc.*, 332 Ark. at 29, 962 S.W.2d at 804.

Despite the similarity between *John Norrell Arms* and the present case, there are significant differences between the two. First, we observe that the present case involves a lien on real property that is irrevocably situated in the State of Arkansas. The subject of the court filing in *John Norrell Arms* was moveable, personal property that, according to the Pulaski County court, might no longer have been in Arkansas. More importantly, there is no indication that, when the nonresident in *John Norrell Arms* filed his foreign judgment in Arkansas, he could reasonably anticipate becoming embroiled in other litigation here. By contrast, Master Paint's lien filing in this case was directed at a party with whom it had an ongoing business dispute, and Master Paint invoked the jurisdiction of the Arkansas courts to resolve that dispute. Additionally, as we stated earlier, the filing of a lien often precedes further litigation. *See, e.g.*, Ark. Code Ann. § 18-44-127 (Repl. 2003). The filing of a foreign judgment, on the other hand, occurs

at the conclusion of litigation and is frequently a mere collection device employed after the issues have been resolved.

In light of the foregoing, we reverse the trial court's refusal to strike Master Paint's original answer, and we reverse its dismissal of Concrete's complaint for lack of personal jurisdiction. The case is remanded for further proceedings consistent with this opinion.

PITTMAN, C.J., and BAKER, J., agree.

SOUTHWEST ARKANSAS DEVELOPMENT COUNCIL, INC. and Employer Risk Management Resources *v.* Irene TIDWELL

CA 05-1198 233 S.W.3d 190

Court of Appeals of Arkansas
Opinion delivered March 22, 2006

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

Scott Allen Scholl, for appellant.

JOHN B. ROBBINS, Judge. Appellant Southwest Arkansas Development Council, Inc., and its insurance carrier, Risk Management Resources (collectively "Southwest") appeal the award of benefits to appellee Irene Tidwell in her claim for workers' compensation benefits. The sole issue at the Workers' Compensation Commission level, and to us on appeal, is whether appellee was performing employment services at the time of her injury. The Commission found that appellee was performing employment services at the time of her injury. Southwest contends that this finding is not supported by substantial evidence and is an erroneous interpretation of the law. We affirm.

This court reviews decisions of the Workers' Compensation Commission to determine whether there is substantial evidence to support it. *Rice v. Georgia-Pacific Corp.*, 72 Ark. App. 149, 35 S.W.3d 328 (2000). Substantial evidence is that relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if its findings are supported by substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). The issue is not whether we might have reached a different decision or whether the evidence would have supported a contrary finding; instead, we affirm if reasonable minds could have reached the conclusion rendered by the Commission. *Sharp County Sheriff's Dep't v. Ozark Acres Improvement Dist.*, 75 Ark. App. 250, 57 S.W.3d 764 (2001).

We do not review the decision of the administrative law judge but rather we determine whether the Commission's decision upon its de novo review is supported by substantial evidence. *See, e.g., Jones v. Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981). A majority of the Commission is required to reach a decision. *See* Ark. Code Ann. § 11-9-204(b)(1) (Repl. 1996); *see also S & S Constr., Inc. v. Coplin*, 65 Ark. App. 251, 986 S.W.2d 132 (1999). Two-to-one decisions are frequently issued by the Commission, and those are majority decisions. *S & S Constr., Inc. v. Coplin, supra.* In this appeal, it is the majority opinion issued by the Commission that we review.

There is no dispute about the relevant facts. Appellee worked as an in-home client service assistant, providing assisted-living services for home-bound persons in southern Arkansas. On January 9, 2002, she had provided services to one client and was driving toward another client's home. En route, appellee pulled off the highway into a convenience store parking lot to buy a soft drink because she was thirsty. She returned to her vehicle, and as she drove out of the parking lot and back onto the highway, her vehicle was hit by a truck. She filed a claim for the injuries she sustained in the accident. Southwest resisted the claim on the basis that appellee was not performing employment services at the time of her injury because she had deviated from her job duties. Appellee contended that she did not deviate from her duties because this personal need was no different than any other such need in a fixed workplace. Appellee also contended that even if she had "deviated" from her work momentarily, at the time of her injury she was traveling toward the next work site and had resumed her work activities.

The administrative law judge denied benefits. Appellee appealed to the Commission, which reviewed the relevant case authority and found on de novo review that appellee's claim was compensable. It found that the cases of *Collins v. Excel Specialty Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002); *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002); and *Wallace v. West Fraser South*, 90 Ark. App. 38, 203 S.W.3d 646 (2005), required this result. The Commission's decision stated in pertinent part that:

> The claimant's act in stopping for a soft drink was something permitted by her employer and one that did not detract or conflict with her purpose of traveling to the employer's client to perform

> employment services. As noted by the Supreme Court in *Collins*, an act which the employer contemplates and permits is part of an employee's employment services. Further, even if it were true that obtaining a soft drink was a deviation from the claimant's employment so as to remove her from the realm of employment service, under the holding of *Wallace*, the claimant had returned to her employment duties in attempting to pull back onto the roadway. At that point, her break had ended and she was once again attempting to carry out the employer's purpose in traveling to provide services to their client.
>
> The holdings of the Arkansas Supreme Court and the Arkansas Court of Appeals compel us to find that the claimant was engaged in employment services at the time of her injury. The criteria set out by those appellate courts clearly bring claimant's conduct into the realm of employment services and their holdings are binding upon this Commission.

The dissenting Commissioner expressed disagreement, viewing the cases cited above to be distinguishable because in those cases, the claimant was actually on the employer's premises. The dissenter also noted that the *Wallace* case was under review by the Arkansas Supreme Court. Southwest has now appealed to our court seeking reversal of the prevailing majority opinion issued by the Commission.

Appellant Southwest's arguments on appeal echo the points articulated by the dissenting Commissioner. In our consideration of this appeal, we first note that the *Wallace* case on review has been decided by our supreme court in *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 225 S.W.3d 361 (2006). In that case, the critical issue was whether Wallace was performing employment services at the time he fell and injured himself. He had taken a break from driving a fork lift on the employer's work site. As Wallace was "coming off break" walking back toward the fork lift, he fell. The supreme court recognized that it had to construe the Workers' Compensation Act strictly and define the phrase "employment services" within the parameters of Act 796 of 1993. It examined the appellate case law in Arkansas giving meaning to "employment services" including *Collins*, *supra*. The supreme court found instructive the cases in which a claimant was awarded benefits when he or she was returning to work after a break. *See Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002); *Matlock v.*

Arkansas Blue Cross & Blue Shield, 74 Ark. App. 322, 49 S.W.3d 126 (2001). The supreme court declined to adopt a bright-line rule that any employee on a break is per se performing employment services. Instead, it held that Wallace was performing employment services because he was returning to his work after a permissible break period, and that nothing in the record showed that Wallace's actions were inconsistent with his employer's interests in advancing the work.

We can find no meaningful distinction to be drawn between Mr. Wallace returning from his break to his work and the present appellee's returning from a permissible stop to resume her work travel. They were both "coming off a break," and thus, the deviation from work was completed. As construed by our appellate courts, appellee was performing employment services at the time of her injury. The Commission did not err in so finding.

With regard to the contention that appellee was not on company property at the time of her injury, we disagree that this is a bar to her recovery of benefits. In *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997), the supreme court recognized that an employee is generally said not to be acting within the course of employment when he or she is traveling to and from the workplace. This "going and coming" rule ordinarily precludes recovery for an injury sustained while the employee is going to or returning from his place of employment. *Lepard v. West Memphis Mach. & Welding*, 51 Ark. App. 53, 908 S.W.2d 666 (1995). There are, however, exceptions to this rule. *Olsten, supra.* In the *Olsten* case, the claimant was an in-home nursing assistant who had to drive to each client's home to provide care. Ms. Olsten was injured in a vehicular accident en route to a client's home, and her claim was approved because she was deemed to have been providing employment services at the time she was injured. The supreme court noted that Ms. Olsten "was required by the very nature of her job description to submit herself to the hazards of day-to-day travel in her own vehicle, back and forth to the homes of her patients," which meant she was acting within the course of her employment when she was injured. *Id.*, 328 Ark. at 386. Likewise, appellee in the instant case was traveling between clients' homes when she took a short break to buy a drink for herself, and had resumed the travel necessary to offer in-home

services to Southwest's clients. The Commission correctly determined that she was acting within the scope of her employment and providing employment services when she was injured en route to her next job site.

Because the Commission's decision is supported by substantial evidence and demonstrates no error in the application of relevant law, we affirm.

Affirmed.

GRIFFEN and NEAL, JJ., agree.

Kelley MOISER and Jennifer Moiser *v.*
ARKANSAS DEPARTMENT of HEALTH
& HUMAN SERVICES

CA 05-366 233 S.W.3d 172

Court of Appeals of Arkansas
Opinion delivered March 22, 2006

Lee Wisdom Harrod, for appellant

Gray Allen Turner, for appellee.

LARRY D. VAUGHT, Judge. Appellant Kelly Moiser[1] argues on appeal that the Cleburne County Circuit Court clearly erred in finding that his son, A.M., was a dependent-neglected child. We agree and reverse.

On October 23, 2004, Kelly was arrested and incarcerated. At the time of his arrest, Kelly was accompanied by A.M. and a friend, Jessica Blankenstaff. Kelly asked Blankenstaff to take A.M. to Antoinette Moiser, Kelly's aunt. Antoinette, in turn, took the child next door to Kelly's father, Louis Moiser, who Kelly and A.M. had been living with prior to the arrest.

On October 27, 2004, the trial court held a Family in Need of Services hearing and found that there was not an appropriate care giver in the home. The court ordered the child into the custody of the Arkansas Department of Human Services (DHS) on a seventy-two-hour hold. On October 29, 2004, the State filed a Petition for Emergency Custody alleging that A.M. was dependent-neglected pursuant to Ark. Code Ann. § 9-27-303(17) (Supp. 2005), specifically asserting that the child was "neglected" as defined in § 9-27-303(36) (Supp. 2005).

On November 4, 2004, the court held a hearing and determined that there was probable cause to continue the emergency order. An adjudication hearing was held on November 11, 2004. The mother of the child, Jennifer Moiser, was not present.

At the time of the hearing, Kelly was incarcerated, and it was uncertain when he would be released. Kelly testified that A.M.'s mother was aware that A.M. had been taken into DHS custody. He stated that she signed custody of A.M. over to him after the divorce. Kelly told the court that he asked Blankenstaff to take A.M. to his aunt and then to his father's house. He acknowledged that he could not take immediate custody of A.M. because of his incarceration. Kelly admitted that at the time of his arrest, his sister, Christine Halton, was also living in his father's home. Christine had since been arrested and incarcerated. Kelly testified that he had served time in prison previously and that his father had taken care of A.M. during that time. Kelly told the court that he wanted A.M. to live with his aunt and uncle, Antoinette and Clifford Moiser.

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[1] Although legal documents in this case refer to appellant as "Kelley Moiser," the record reflects appellant signed his name "Kelly Moiser."

Antoinette Moiser testified that she was willing to take temporary custody of the child. She stated that neither she nor her husband had ever used drugs or been convicted of a crime. She stated that she lived next door to Louis Moiser and would allow A.M. plenty of visitation with his grandfather.

Louis Moiser testified that he had taken care of A.M. after his son's arrest and before DHS had taken custody of the child. He explained that he worked a shift that started at three in the morning but that he could probably go in around six or seven. He stated that before DHS took custody of A.M., he (Louis) had been working on finding a babysitter for A.M. Louis stated that he would not object to the court putting the child in Antoinette's custody and would actually prefer that. Louis testified that Kelly's sister, Christine, had substance-abuse problems and that he had cared for her three kids.

At the conclusion of the evidence, Kelly made a motion for directed verdict and argued that the State had failed to prove that the allegations in the petition were substantiated by evidence that the child had been neglected. The court denied the motion. Kelly then presented testimony from two witnesses, Nicole Chaberson, a family-service worker from DHS, and Jennie Moiser, Antoinette's daughter. Chaberson told the court that she had investigated Antoinette and performed a home study. Chaberson opined that it would be an appropriate home for A.M. She explained that no information she had gathered about Antoinette or Clifford gave her concerns. She added that she had been to Louis's home and noted nothing that would concern her about it. Jennie testified that she lived with her mother and father and would help out with A.M. She stated that she had never been arrested and felt like her home was appropriate for A.M.

Kelly renewed his motion for directed verdict and argued that A.M. was not neglected pursuant to § 9-27-303(36) and not dependent pursuant to § 9-27-303(17)(B). DHS maintained that a finding of dependency was required so that "whoever has custody of this child, there ought to be an Order giving them custody." The court denied the motion and found the child dependent but not neglected. The court ordered the child into the custody of Antoinette and Clifford Moiser and asked DHS to continue a protective-services case with regard to the child.

In equity matters, such as dependency-neglect cases, the standard of review on appeal is de novo, but we do not reverse the judge's findings unless they are clearly erroneous or clearly against

the preponderance of the evidence. *Wade v. Ark. Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.* However, a trial court's conclusion on a question of law is given no deference on appeal. *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000).

Arkansas Code Annotated § 9-27-325(h)(2)(B) (Supp. 2005) requires proof by a preponderance of the evidence in dependency-neglect situations. Under Ark. Code Ann. § 9-27-313 (Supp. 2005), a child can be taken into immediate custody by the State when that child is in immediate danger. Promptly following that taking, a probable cause hearing must be held and then an adjudication hearing. During the adjudication hearing, the State is required to prove by a preponderance of the evidence that the allegations in the petition for emergency custody were substantiated. Ark. Code Ann. § 9-27-327 (Supp. 2005). Under Ark. Code Ann. § 9-27-303(17)(B) a "dependent juvenile" is a "child whose parent . . . is incarcerated and . . . no appropriate relative or friend [is] willing or able to provide care for the child." The statute goes on to describe a "dependent-neglected juvenile" as one who "is at substantial risk of serious harm as a result of" abandonment, abuse, neglect, or parental unfitness. Ark. Code Ann. § 9-27-303(18). The statute includes "dependent juveniles" as "dependent-neglected juveniles." *Id.* The statute also describes "neglect" as:

> (i) Failure or refusal to prevent the abuse of the juvenile when the person knows or has reasonable cause to know the juvenile is or has been abused;
>
> (ii) Failure or refusal to provide the necessary food, clothing, shelter, and education required by law . . . .
>
> (iii) Failure to take reasonable action to protect the juvenile from abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness when the existence of this condition was known or should have been known;
>
> (iv) Failure or irremediable inability to provide for the essential and necessary physical, mental, or emotional needs of the juvenile.
>
> . . .
>
> (v) Failure to provide for the juvenile's care and maintenance, proper or necessary support, or medical, surgical, or other necessary responsibility; or

(vi) Failure, although able, to assume responsibility for the care and custody of the juvenile or to participate in a plan to assume the responsibility; or

(vii) Failure to appropriately supervise the juvenile that results in the juvenile's being left alone at an inappropriate age or in inappropriate circumstances, creating a dangerous situation or a situation that puts the juvenile at risk of harm.

See Ark. Code Ann. § 9-27-303(36).

Kelly contends that the trial court erred in not dismissing the petition for emergency custody at the adjudication hearing because the State was unable to substantiate the allegations in the petition as required by Ark. Code Ann. § 9-27-327. He also maintains that even if we find the trial court did not err in not dismissing the petition, it clearly erred in finding that the State had established the child was dependent-neglected under Ark. Code Ann. § 9-27-303(16).

In this case, the court specifically declined to find the child had been neglected and instead based its decision on a finding of dependency. The court's conclusion that there was no proof presented at the adjudication hearing to substantiate a finding of neglect under § 9-27-303(36) was correct; however, the court clearly erred in adjudicating the child dependent-neglected based on a finding of dependency. Arkansas Code Annotated § 9-27-303(17)(B) clearly states that a child is considered "dependent" when the parent is incarcerated and there is no appropriate relative or friend that is willing and able to care for the child. There was substantial evidence in this case that relatives were willing to take the child — both the grandfather and the aunt and uncle had volunteered. Additionally, there was evidence presented that DHS had reviewed their respective homes and found them appropriate. There was no evidence presented at the adjudication hearing that these family members were inappropriate care givers. Therefore, we hold that it was clear error for the court to find dependency in this situation.

Reversed and dismissed.

HART and ROAF, JJ., agree.

KEN'S DISCOUNT BUILDING MATERIALS, INC. *v.* Steven MEEKS

CA 05-208 233 S.W.3d 176

Court of Appeals of Arkansas
Opinion delivered March 22, 2006

[Rehearing denied April 26, 2006.]

Barber, McCaskill, Jones & Hale, P.A., by: *R. Kenny McCulloch*, for appellant.

Robert L. Depper, Jr., for appellee.

TERRY CRABTREE, Judge. Appellant Ken's Discount Building Materials (KDBM) brings this appeal from a jury verdict in a premises-liability case. The jury awarded appellee Steven Meeks judgment against KDBM for $10,000. KDBM raises four points on appeal. We agree with KDBM's first two points and reverse and dismiss without discussing its third and fourth points.

In May 1999, while still a minor, Meeks was riding his bicycle on a sidewalk in El Dorado when he struck the horizontal crossbar of a sign in front of KDBM's business, sustaining injuries to his face, mouth, and jaw. Meeks filed suit, alleging that KDBM was negligent in maintaining a dangerous condition on its property

and in failing to warn the public of that danger. KDBM denied the material allegations of the complaint. KDBM also asserted defenses of comparative fault and that the sign's crossbar was an open and obvious danger. Meeks subsequently filed an amendment to his complaint, alleging that KDBM's conduct in maintaining the sign was willful and wanton.

Kenneth Blackmon, the owner of KDBM, was called as an adverse witness by Meeks and testified that his business was located across the street from a football stadium and a boys and girls club. He stated that he was not aware that Meeks was on the property and did not witness the accident. He described the crossbar as being five or six feet high between the two legs of the sign. He also stated that, after the accident, he noticed blood on the south side of the sign's crossbar. According to Blackmon, there was a four-to-six-inch ledge abutment, as well as the remnants of an old sign base, blocking access to the south side of the sign at issue. The ledge abutment and sign bases were on KDBM's property at the time of the accident, he said. He stated that the sign's legs were approximately five feet apart with the eastern leg of the sign base approximately five inches off KDBM property and seven feet from the street. Blackmon asserted that the sidewalk was wide enough for two people to ride bicycles side-by-side without striking the sign pole. He also stated that, at the time of the accident, he had the ability to remove the abutment and old sign base from his property. He further stated that he could have put reflective tape across the crossbar if he thought it necessary.

Blackmon testified that it was not uncommon for him to see children riding bicycles on the sidewalk in front of his store, adding that he would tell bicyclists to stay on the sidewalk instead of his parking lot. He also stated that he did not go to the boys and girls club across the street to ask that children not ride their bicycles on the premises. Blackmon stated that he never thought a person would ride a bicycle between the sign's legs. He stated that there had not been a similar accident at his property and that he did not consider the sign dangerous to pedestrians or bicycle riders. He also denied doing anything to intentionally or willfully injure anyone.

Appellee Steven Meeks testified that he was injured while riding his bicycle with his friend William Boyer. He stated that they were traveling in a northerly direction on the sidewalk when he hit the sign's crossbar at KDBM's property. He could not remember why he was traveling between the legs of the sign. Meeks stated that he was aware of the sign from previous passings

but never saw the crossbar or the support posts. He also did not recall racing with Boyer and stated that Boyer had gone to the left (or western) side of the sign's legs. Meeks also stated that he and Boyer were not going to do any business at KDBM and that, to his knowledge, no one at KDBM knew he or Boyer were on the property until the accident occurred.

William Boyer testified that, at the time of the accident, he and Meeks were riding down the sidewalk with himself in the lead. He realized that Meeks was somewhat behind him and turned around and saw that an accident happened. He stated that he was familiar with the KDBM sign. He stated that he rode to the left of the sign and did not travel to the right of the sign on the sidewalk because he did not want to take a chance of coming close to a car. He stated that, when he went around the sign, he was on KDBM property. Boyer stated that he could not recall whether he and Meeks had been racing that day or not but admitted that it was possible that they had been racing. He could not recall whether Meeks told him sometime after the accident that he (Meeks) was trying to jump a ramp or something between the sign. He also stated that he did not think that it was a very smart thing to try to ride or ramp between the two poles.

At the close of Meeks's case and again at the close of all of the evidence, KDBM made motions for directed verdicts, which were denied. The bases for the motions were that Meeks was a trespasser and there was no proof of willful or wanton conduct on KDBM's part. KDBM further argued that the crossbar was open and obvious and, therefore, there was no duty to warn. In denying the motion, the trial court noted that, although there was no evidence that KDBM acted intentionally, it was a close question of whether KDBM acted with conscious disregard for the safety of others because there was evidence that KDBM knew that children were sometimes present on the property.

Nine members of the jury agreed on a verdict in favor of Meeks and awarded him $10,000. The verdict was reduced to judgment. This appeal timely followed.

KDBM raises four points on appeal: that there was no substantial evidence to support the jury's verdict; that the trial court erred in failing to grant its motion for a directed verdict; that the trial court erred in instructing the jury; and that the trial court erred in allowing certain photographs to be admitted into evidence. We find the first two points to be dispositive and pretermit discussion of KDBM's third and fourth points.

A directed-verdict motion is a challenge to the sufficiency of the evidence, and when reviewing the denial of a motion for a directed verdict, this court determines whether the jury's verdict is supported by substantial evidence. *Superior Fed. Bank v. Mackey*, 84 Ark. App. 1, 129 S.W.3d 324 (2003). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without having to resort to speculation or conjecture. *Id.* When determining the sufficiency of the evidence, this court reviews the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *Id.* A motion for a directed verdict should be denied when there is a conflict in the evidence or when the evidence is such that fair-minded people might reach different conclusions. *Fayetteville Diagnostic Clinic, Ltd. v. Turner*, 344 Ark. 490, 42 S.W.3d 420 (2001). Under those circumstances, a jury question is presented and a directed verdict is inappropriate. *Id.* It is not this court's province to try issues of fact; we simply examine the record to determine if there is substantial evidence to support the jury verdict. *Id.* With these standards in mind, we discuss KDBM's first and second points together because both points assert that there is no substantial evidence to support the verdict.

The law of negligence requires as essential elements that the plaintiff show that a duty was owed and that the duty was breached. *Young v. Paxton*, 316 Ark. 655, 873 S.W.2d 546 (1994); *Earnest v. Joe Works Chevrolet, Inc.*, 295 Ark. 90, 746 S.W.2d 554 (1988); W. Page Keeton, et al., *Prosser & Keaton on the Law of Torts* § 30 at 164 (5th ed. 1984). KDBM devotes much of its argument to the assertion that Meeks was a trespasser while Meeks argues that he was a licensee. Irrespective of Meeks's status as trespasser or licensee, there is nothing in the proof submitted to indicate that KDBM breached a duty of care owed to Meeks. A property owner owes both a trespasser and a licensee the duty to refrain from causing him injury by willful or wanton conduct. *Aluminum Co. of Am. v. Guthrie*, 303 Ark. 177, 793 S.W.2d 785 (1990). To constitute willful or wanton conduct, there must be a course of action that shows a deliberate intention to harm or that shows utter indifference to, or conscious disregard of, the safety of others. *Moses v. Bridgeman*, 355 Ark. 460, 139 S.W.3d 503 (2003); *Lively v. Libbey Mem'l Physical Med. Ctr., Inc.*, 311 Ark. 41, 841 S.W.2d 609 (1992); *Maneth v. Tucker*, 72 Ark. App. 141, 34 S.W.3d 755 (2000). A person acts willfully and wantonly when he knows or should know in the light of surrounding circumstances that his conduct

will naturally and probably result in bodily harm and continues such conduct in reckless disregard of the consequences. *Croom v. Younts*, 323 Ark. 95, 913 S.W.2d 283 (1996). Further, KDBM owed no duty to warn of obvious or patent dangers. *Maneth, supra.* There is no dispute that the crossbar was an obvious danger.

We cannot find any meaningful way to distinguish *Guthrie* from the present case. There is no evidence that KDBM acted willfully or wantonly to cause Meeks's injury. There was no evidence presented that KDBM knew that people were regularly going between the sign posts. Kenneth Blackmon testified that he did not know of anyone riding between the legs of the sign prior to the accident. Although there was evidence that children would periodically go onto the KDBM parking lot, Blackmon testified that he would ask children to ride on the sidewalk and not on his parking lot. The fact that KDBM did not put reflective tape on the sign or take other steps does not aid Meeks because KDBM owed no duty to Meeks as either a licensee or a trespasser to inspect the premises to be certain they are safe. *See Webb v. Pearson*, 244 Ark. 109, 424 S.W.2d 145 (1968).

There is no evidence that KDBM breached any duty owed to Meeks. Therefore, we must reverse and dismiss.

Reversed and dismissed.

BIRD and GLOVER, JJ., agree.

Kenneth CONNALLY *v.* Catherine CONNALLY

CA 05-897 233 S.W.3d 168

Court of Appeals of Arkansas
Opinion delivered March 22, 2006

[redacted]

[redacted]

[redacted]

Williams & Anderson, LLP, by: *Peter G. Kumpe* and *Debra L. Williams*, for appellant.

Davidson Law Firm, Ltd., by: *Matthew D. Wells* and *Charles Darwin "Skip" Davidson*, for appellee.

KAREN R. BAKER, Judge. This appeal is brought from the dismissal of a post-decree motion filed by appellant Kenneth Connally against his former wife, appellee Catherine Connally. The trial court ruled that Kenneth did not properly serve the motion on Catherine. Kenneth now appeals that ruling and argues that service was proper. We disagree and affirm.

The parties were divorced in 1997. Prior to entry of the divorce decree, they executed an agreement wherein Catherine would retain two particular business entities and would pay Kenneth forty-nine percent of the net sale proceeds if she sold them within five years. The agreement was "incorporated [into the divorce decree] but not merged" with it.

On June 11, 2004, Kenneth filed a motion to enforce the agreement using the caption and docket number of the 1997 divorce case. He alleged that Catherine had sold the aforementioned businesses and owed him at least $178,000, and he asked that she be ordered to account for the sale proceeds and pay all sums due him.

The certificate of service accompanying Kenneth's motion indicated that he mailed it to the attorney who had represented Catherine in the 1997 divorce. The attorney filed a response

asking that the motion be dismissed because Catherine was now a resident of Canada and did not consent to service in Arkansas or service upon her attorney. Thereafter, Kenneth attempted service by the three means that are the subject of this appeal: 1) by mail; 2) by commercial courier; 3) by personal service.

Service by mail was attempted on July 8, 2004, when Kenneth mailed the motion and accompanying papers to Catherine at her address in Toronto, Canada, via "Registered Mail Return Receipt Requested." Canadian Postal Service tracking information indicates that the mail was "successfully delivered" to the subject address on July 23, 2004; however, no postal receipt was available to show who signed for the package. The trial court rejected this attempt at service, after which Kenneth sent a renewed motion to Catherine's Toronto address by Federal Express. A tracking document shows that this package was delivered and signed for by someone named Juan.

Finally, Kenneth employed a Canadian process server to personally serve the renewed motion on Catherine. The server's affidavit recites that he attempted to serve Catherine between December 16, 2004, and January 7, 2005. According to him, he first went to Catherine's home address, which was a secured condominium. The guard telephoned Catherine's residence but received no reply; the server left his business card with the guard "requesting that [Catherine] contact me to arrange for delivery of legal documents." Next, the server telephoned Catherine at work and spoke with her personally. According to him, he identified himself and asked to "set up an appointment with herself such that I may effect service of the attached documents," and Catherine said that she would call him back, but she did not. Thereafter, the server went to Catherine's condominium complex on two more occasions and left his card requesting that she contact him for delivery of legal documents. Finally, he attempted to serve her at a work address that had been provided to him by Kenneth's attorney but, upon arriving, was advised that Catherine no longer worked there. The server concluded his affidavit by stating that he believed that Catherine was evading service.

On February 24, 2005, Catherine moved to dismiss Kenneth's renewed motion on the basis that it still had not been properly served on her. Following a hearing to resolve the issue, the trial court dismissed Kenneth's renewed motion due to insufficiency of service. Kenneth now appeals from that order.

Kenneth contends that his attempts at service by mail, commercial courier, and personal delivery complied with Rule 5 of the Arkansas Rules of Civil Procedure. Rule 5 governs service of papers filed subsequent to the complaint. Ark. R. Civ. P. 5(a) (2005). Generally, papers filed subsequent to the complaint are served on a party's attorney. Ark. R. Civ. P. 5(b)(1). However, if the action is one in which final judgment has been entered and the court has continuing jurisdiction, service shall be upon the party. *Id.* Rule 5(b)(3) sets out special requirements where, in a post-decree, continuing-jurisdiction case, service is made on a party by mail or commercial delivery:

> If a final judgment or decree has been entered and the court has continuing jurisdiction, service upon a party by mail or commercial delivery company shall comply with the requirements of Rule 4(d)(8)(A) and (C), respectively.

Although Rules 4(d)(8)(A) and (C) of the Arkansas Rules of Civil Procedure govern service of summonses and complaints, Rule 5(b)(3) does not require service by summons and complaint; rather, it requires service in the same manner or method as a summons and complaint. *Dickson v. Fletcher*, 361 Ark. 244, 206 S.W.3d 229 (2005).

For the purposes of our discussion, we will assume, as Kenneth does, that this was a case in which the trial court had continuing jurisdiction. Therefore, the question before us is whether he accomplished service on Catherine as required by Rule 5. We do not believe that he did.

■ Service on a party by mail under Rule 5(b)(3) must comport with Ark. R. Civ. P. 4(d)(8)(A) (2005), which permits service by any form of mail, addressed to the person to be served, with a return-receipt requested and delivery restricted to the addressee or his agent.[1] However, the record before us does not indicate that Kenneth mailed his motion to Catherine using restricted delivery, and, during oral argument, his counsel could not direct us to any evidence of such. Compliance with the service requirements of the Rules of Civil Procedure must be exact. *Wilburn v. Keenan Cos.*, 298 Ark. 461, 768 S.W.2d 531 (1989). If

[1] This rule governs service inside the state; however, Rule 4(e), which authorizes service outside the state, provides for service by mail as set forth in subsection (d)(8).

service by mail under Rule 4 is required to be made by restricted delivery, the failure to do so renders service invalid. *See Wilburn, supra*; *see also CMS Jonesboro Rehab., Inc. v. Lamb*, 306 Ark. 216, 812 S.W.2d 472 (1991) (holding that, even though restricted-delivery box was not checked on the mail card, service was valid where the mail was delivered just as if the box had been checked). In the case at bar, the restricted-delivery box was not checked, and there is no proof of *de facto* restricted delivery. Therefore, Kenneth's attempted service by mail did not comply with Rule 4(d)(8)(A), and, consequently, did not comply with Rule 5(b)(3). We therefore agree with the trial court that Kenneth did not properly serve Catherine by mail.[2]

Kenneth maintains, however, that, under Ark. R. Civ. P. 5(b)(2), service was "presumptively complete upon mailing." It is true that this language appears in Rule 5(b)(2). However, subsection (b)(2), which provides for service by regular mail, states that its provisions apply "except as provided in paragraph (3)." Thus, by its own terms, the presumption in Rule 5(b)(2) does not apply to the service requirements of Rule 5(b)(3).[3]

We turn now to Kenneth's contention that Catherine was served when Federal Express delivered the motion to a person named Juan. He again relies on language in Rule 5(b)(2) that service by a commercial delivery company is presumptively complete upon depositing the papers with the company. However, as we previously stated, that language does not apply when service is made pursuant to Rule 5(b)(3). Further, Kenneth's service did not comply with Ark. R. Civ. P. 4(d)(8)(C), as mandated by Rule 5(b)(3). Rule 4(d)(8)(C) provides that a commercial delivery package must be delivered to the addressee or her authorized agent and that "the signature of the defendant or agent must be obtained." We see no evidence in the record that Catherine signed for the package or that the person named Juan was Catherine's authorized agent, and, during oral argument, Kenneth's counsel

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[2] Even though this reasoning was not used by the trial court, we may affirm the trial court if it is correct for any reason. *Fritzinger v. Beene*, 80 Ark. App. 416, 97 S.W.3d 440 (2003).

[3] We observe that the 1999 amendment to Rule 5, which added subsection (b)(3), apparently superseded the holding in *Office of Child Support Enforcement v. Ragland*, 330 Ark. 280, 954 S.W.2d 218 (1997), that a service of post-judgment motion is presumptively complete upon mailing. *See Finney v. Cook*, 351 Ark. 367, 94 S.W.3d 333 (2002); Ark. R. Civ. P. 5 Reporter's Notes, 1999 Amendment (2005).

could not direct us to any such evidence. We therefore agree with the trial court that Catherine was not served by commercial delivery.

Next, we address Kenneth's argument that Catherine was personally served by a process server. His argument actually centers on his claim that Catherine refused service from the process server.

Kenneth acknowledges that, when the process server attempted to serve Catherine at home and at work, he was unable to deliver the documents because Catherine was not present at the times of attempted delivery. This distinguishes the present case from *Riggin v. Dierdorff*, 302 Ark. 517, 790 S.W.2d 897 (1990), where, according to the supreme court, the defendant in fact refused to accept service, and *Valley v. Bogard*, 342 Ark. 336, 28 S.W.3d 269 (2000), where the process server saw the defendant through a window, made eye contact with him, announced that he had papers for him, and saw the defendant fall to his knees and crawl to the back of the house. Moreover, in both of those cases, following the refusal of service, the process server left the suit papers behind on the defendant's property. Here, the process server left only his business card.

Kenneth also claims that appellee's failure to make an appointment with the process server following the server's phone call constitutes a refusal of service. We first observe that Kenneth cites no authority for his claim that a refusal to make an appointment to meet someone claiming to be a process server constitutes a refusal of service. In any event, we are hesitant to hold that a refusal has occurred where the process server has never personally encountered the defendant, other than by telephone, or left any documents for her. Under the particular circumstances of this case, we cannot say that the trial court erred in determining that Catherine did not refuse personal service.

Finally, Kenneth contends that Catherine had actual notice of his filing the motion, as evidenced by her attorney's appearances contesting jurisdiction. We believe that the supreme court, by incorporating the service requirements of Rule 4 into Rule 5(b)(3), intended to adopt the spirit of Rule 4, in which actual knowledge does not validate defective service of process. *See Carruth v. Design Interiors*, 324 Ark. 373, 921 S.W.2d 944 (1996). We therefore conclude that, just as actual notice does not satisfy due process under Rule 4, it does not satisfy due process under Rule 5(b)(3).

For the foregoing reasons, we affirm the trial court's dismissal of Kenneth's motion due to improper service. Our holding makes it unnecessary to reach Catherine's argument that Kenneth was required to file a separate breach-of-contract action and serve it by means of a summons and complaint.

Affirmed.

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

Cynthia HARDY *v.*
UNITED SERVICES AUTOMOBILE ASSOCIATION;
Chloe J. Miers, and James Miers

CA 05-918 233 S.W.3d 165

Court of Appeals of Arkansas
Opinion delivered March 22, 2006

[Rehearing denied April 26, 2006.]

Wm. C. Plouffe, Jr., for appellant.

Kilpatrick, Williams, & Meeks, L.L.P., by: *Richard A. Smith*, for appellees.

ANDREE LAYTON ROAF, Judge. Appellant Cynthia Hardy appeals the decision of the Union County Circuit Court dismissing her declaratory action against appellees Miears[1] and United Services Automobile Association (USAA). Hardy raises two points on appeal: (1) that the trial court erred in dismissing her action because a justiciable controversy does exist and (2) that Arkansas case law allows third-party standing in a declaratory judgment suit in the context of an insurance dispute. We find no error and affirm.

On November 23, 2003, while negligently operating an automobile, appellee Chloe Miears struck and killed Catrice Johnson, Hardy's disabled minor daughter. Hardy's minor son witnessed the death of his sister and as a consequence suffered substantial mental and emotional difficulties.

Miears had an insurance policy with appellee USAA; the policy limits were $500,000 per claim and $1,000,000 per accident. Hardy, as special administratrix, settled a wrongful-death claim against Miears and USAA on behalf of her daughter's estate and the statutory beneficiaries for $500,000. This claim did not resolve the issue of any separate claim that Hardy's minor son could possibly bring.

Hardy subsequently brought a Petition for Declaratory Judgment on the issue of whether her son had a separate and independent tort claim so as to trigger the additional $500,000 of coverage. USAA filed a Motion to Dismiss, asserting that this issue was not proper for a declaratory judgment suit and that Hardy did not have standing to bring such an action. The trial court granted the motion to dismiss, finding that there was no justiciable controversy between Hardy and USAA because Hardy has no legal interest in the relationship between Miears and USAA.

When reviewing questions of law, the appellate courts employ a de novo standard of review. *Arkansas Dep't of Human Servs. v. Welborn*, 66 Ark. App. 122, 987 S.W.2d 768 (1999). In reviewing the trial court's decision on a motion to dismiss pursuant

[1] The filings and briefs indicate that appellee's last name is spelled "Miers"; however, in his brief, appellees' counsel asserts that the proper spelling is "Miears." We will refer to appellee as "Miears."

to Ark. R. Civ. P. 12(b)(6), this court treats the facts alleged in the complaint as true and views those facts in a light most favorable to the complaining party. *Martin v. Equitable Life Assurance Soc'y of the U.S.*, 344 Ark. 177, 40 S.W.3d 733 (2001).

The Declaratory Judgment Act, Ark. Code Ann. § 16-111-101 *et. seq.* (1997) is remedial, and its purpose is to afford relief from uncertainty and insecurity by declaring "rights, status, and other legal relationships whether or not further relief is or could be claimed." Ark. Code Ann. §§ 16-111-102 and 103. The act is to be liberally construed and administered. Ark Code Ann. § 16-111-102(c). In addition, when declaratory relief is sought, "all persons shall be made parties who have or claim any interest that would be affected by the declaration." Ark. Code Ann. § 16-111-106(a).

A declaratory judgment proceeding is intended to supplement rather than supersede ordinary causes of action, and is not a proper means of trying a case. *Martin, supra.* A declaratory judgment action does not substitute for an ordinary cause of action, but rather is dependent on and unavailable in the absence of a justiciable controversy. *Id.* Declaratory judgment suits are typically used to determine the obligations of the insurer under the insurance policy. *Id.*

Hardy's first point on appeal is simply that her request for declaratory relief was proper in this case. USAA argues that seeking a declaration of whether Hardy's son has an independent tort claim against Miears is not an appropriate use of declaratory judgment relief because the relationship between USAA and Miears has no bearing on the existence or nonexistence of a tort claim. We agree.

Declaratory relief may be maintained when its purpose of liquidating uncertainties and interpretations that might result in future litigation is served. *Traveler's Indem. Co. v. Olive's Sporting Goods, Inc.*, 297 Ark. 516, 764 S.W.2d 596 (1989). The requisite precedent facts that must be established before declaratory relief can be obtained include the following: (1) there must be a justiciable controversy (a controversy in which a claim or right is asserted against one who has an interest in contesting it); (2) the controversy must be between parties with adverse interests; (3) the party seeking declaratory relief must have a legally protectable interest in the controversy; and (4) the issue must be ripe for judicial determination. *Id.* (Citations omitted.) In essence, before the trial court can use its discretion in favor of a declaratory judgment, the court must conclude that the judgment will termi-

nate the uncertainty or controversy giving rise to the proceeding and that the judgment will be useful in stabilizing legal relations. *Equity Gen. Agents, Inc. v. O'Neal*, 15 Ark. App. 302, 692 S.W.2d 789 (1985). Moreover, the court may not deny a declaration merely because another remedy is available or because of the pendency of another suit in which the rights of the parties would not necessarily be determined. *Id.*

In this case, Hardy's petition for declaratory judgment presents no justiciable controversy. Declaratory judgment relief is not appropriate simply to determine whether a cause of action exists. *See, e.g., Bankers & Shippers Ins. Co. of N.Y. v. Kildow*, 9 Ark. App. 86, 654 S.W.2d 600 (1983) (stating that the Declaratory Judgment Act was not designed to force the parties to have a "dress rehearsal" of important issues to be tried in the subsequent tort suit).

It is true, as USAA states, that Arkansas does not recognize the tort claim of negligent infliction of emotional distress, *see Mechanics Lumber Co. v. Smith*, 296 Ark. 285, 752 S.W.2d 763 (1988); however, Hardy framed her complaint in terms of a claim for either the tort of outrage or intentional infliction of emotional distress. Still, whether a cause of action exists is an important issue that can only be resolved if Hardy actually files suit. Either Hardy's son has a recognized cause of action or he does not, and the resolution of this matter does not depend upon whether Miears's insurance policy with USAA will cover any subsequent judgments in Hardy's son's favor.

Hardy's son has only a potential claim against Miears; he does not have a judgment that might be subject to collection from the insurance proceeds. We find that dismissal of Hardy's declaratory action is proper because there is no justiciable issue. As such, we decline to address Hardy's second contention that she had standing.

Affirmed.

HART and VAUGHT, JJ., agree.

James Darren MARTIN *v.*
Kaci Weeks Martin SCHARBOR

CA 05-1016 233 S.W.3d 689

Court of Appeals of Arkansas
Opinion delivered April 12, 2006

[redacted]

James Law Firm, by: *Patricia A. James*, for appellant.

Eugene D. Bramblett, for appellee.

ROBERT J. GLADWIN, Judge. This is an appeal from an order in which the Ouachita County Circuit Court increased appellant's child-support payments and modified appellant's visitation with the parties' minor children but declined to modify other aspects of the parties' property-settlement and child-custody agreement ("Agreement").[1] Appellant raises several points on appeal, alleging that the trial court erred: (1) by denying his request to modify the divorce decree when the incorporated Agreement was not intended to be an independent contract; (2) by denying his request to modify certain expenses that were clearly "in the nature of" child support; (3) by modifying appellant's child-support payments in accordance with appellee's oral amendment to her petition to modify; (4) by modifying appellant's visitation schedule. We affirm.

The parties were divorced on November 2, 1999. Two children were born of the marriage, a daughter, R.B.M., and a son, H.L.M., who were nine years old and eight years old, respectively, at the time of the hearing on the parties' petitions to modify the

[1] The "other aspects" specifically deal with paragraph seven of the Agreement whereby appellant agreed to provide for medical and dental insurance, as well as pay for all such expenses not covered by insurance, and to provide school clothes and pay for other school-related expenses until the children reach the age of eighteen.

Agreement. The original Agreement was approved by the trial court and incorporated by reference into the divorce decree, and it was modified, by agreement of the parties, on August 8, 2000, and on May 20, 2002. On October 14, 2004, appellant filed a petition to modify the Agreement, requesting specifically a decrease in his child-support payments, the termination of his responsibility to pay all medical and health expenses not covered by health insurance and any other items for the children beyond the required child-support payments, an increase in the amount of visitation he received with the children, and the modification of certain visitation-related logistical terms. On November 2, 2004, appellee filed a response and a counter-petition for contempt and modification of visitation. After a hearing, the trial court entered an order on May 31, 2005, stating that the general terms of the Agreement could not be modified because it was an independent agreement. The order did, however, increase appellant's child-support obligation from $127 per week to $585 per month, modify appellant's visitation outside the guidelines to accommodate the children's swim schedule, and award attorney's fees to appellee. Appellant filed a timely notice of appeal on June 27, 2005.

We review child-support awards de novo on the record. *McKinney v. McKinney*, 94 Ark. App. 100, 226 S.W.3d 37 (2006). In de novo review cases, we will not reverse a finding of fact by the trial judge unless it is clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.* Because the question of whether the trial court's findings are clearly erroneous turns largely on the credibility of witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the children's best interest. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002). There are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carry as great a weight as those involving minor children. *See Vo v. Vo*, 78 Ark. App. 134, 79 S.W.3d 388 (2002).

Our supreme court has stated that it is axiomatic that a change in circumstances must be shown before a court can modify an order for child support. *See Evans v. Tillery*, 361 Ark. 63, 204 S.W.3d 547 (2005). In addition, the party seeking modification has the burden of showing a change in circumstances. *See id.* In determining whether there has been a change in circumstances

warranting adjustment in support, the court should consider remarriage of the parties, a minor reaching majority, change in the income and financial conditions of the parties, relocation, change in custody, debts of the parties, financial conditions of the parties and families, ability to meet current and future obligations, and the child-support chart. *See id.* It is the ultimate task of the trial judge to determine the expendable income of a child-support payor. *Brown v. Brown*, 76 Ark. App. 494, 68 S.W.3d 316 (2002). A trial court's determination regarding whether there are sufficient changed circumstances to warrant a modification in child support is a question of fact that will not be reversed unless it is clearly erroneous. *Woodson v. Johnson*, 63 Ark. App. 192, 975 S.W.2d 880 (1998).

Additionally, 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. *Meins v. Meins*, 93 Ark. App. 292, 218 S.W.3d 366 (2005). While visitation is always modifiable, 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. *Id.* 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 interest of the children is the main consideration. *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 children; (3) problems of transportation and prior conduct in abusing visitation; (4) the work schedule or stability of the parties; (5) the relationship with siblings or other relatives. *Id.*

I. Whether the Agreement is an Independent Contract

Appellant argues that the Agreement amounted to nothing more than "an agreement as to what the [c]ourt should put in its decree to avoid the taking of proof." He contends that paragraph eleven of the Agreement and paragraph five of the divorce decree make clear the intention of the parties by incorporating the Agreement into the divorce decree in order to give it the full force and effect of a decree of the trial court. He asserts that the parties intended for the Agreement to be merged with the divorce decree,

thereby giving the trial court full ability to modify its terms. *See Law v. Law*, 248 Ark. 894, 455 S.W.2d 854 (1970) (whereby an agreement becomes merged in the decree and loses its independent contractual nature). Finally, he claims that appellee offered no testimony at the hearing that would satisfy her burden of proving that the Agreement was an independent contract giving rise to a separate cause of action. *Id.*

Appellee counters that the trial court was correct in determining that it was without authority to grant appellant's requested relief with regard to paragraph seven of the Agreement, as modified by the parties on May 12, 2002.[2] She contends that both the language of the Agreement and the actions of the parties at the time of their divorce clearly indicate that they intended the Agreement to be an independent contract. Paragraph ten of the Agreement specifically states: "It is the purpose of the parties to this Agreement that it fully and finally settle, resolve, and terminate any and all claims, demands, and rights of whatever kind or nature between the parties." Both parties signed the Agreement and acknowledged that they had been represented by counsel prior to executing the Agreement. Appellee points out that this court previously found a settlement agreement that contained substantially similar language to be an independent contract. *See Kennedy v. Kennedy*, 53 Ark. App. 22, 918 S.W.2d 197 (1996). We agree that the Agreement was intended to be an independent contract and find that the trial court was not clearly erroneous on this point; accordingly, we affirm with respect to this issue.

II. Whether Expenses Were "In The Nature Of" Child Support and Therefore Modifiable

Appellant maintains that, even if this court determines that the Agreement is an independent contract, his obligation to pay for school clothes, school-related expenses, and medical and dental bills not covered by insurance, clearly falls within the definition of child support and is therefore modifiable. Child support is defined as "only those support obligations which are contained in a decree

[2] The only modification on this date was that appellee, rather than appellant, would be responsible for maintaining health insurance coverage on the children and that the parties would equally divide any expenses related to cosmetic dental work, including braces. Appellant remained responsible for all other medical and dental expenses not covered by insurance.

or order of the circuit court which provides for the payment of money for the support and care of any child or children." *See* Ark. Code Ann. § 11-9-110(g) (Repl. 2002). Appellant correctly points out that a trial court always retains jurisdiction over child support as a matter of public policy, and no matter what an independent contract states, either party has the right to request modification of a child-support award. *McKinney, supra.*

The recent case of *Hyden v. Hyden*, 85 Ark. App. 132, 148 S.W.3d 748 (2004), is cited by appellant to support his proposition that educational expenses are "in the nature of support" and therefore modifiable. He contends that the expenses he sought to modify in this case were consistent with those expenses at issue in *Hyden*, and as such, the trial court had the authority to modify them. Additionally, he claims that modification was warranted because there was a change in circumstances. At the time the parties divorced, appellant started his own business, which was apparently successful for a time. Subsequently, however, circumstances required him to file bankruptcy and close his business. He also relocated to Rogers, Arkansas, where he lives with his current wife and son, who was four years old at the time of the hearing. Appellant maintains that he had to accept employment that paid considerably less than he was previously earning and that he now makes approximately $14,000 to $15,000 per year. Appellant references the definition of "change in income" that constitutes a change in circumstances sufficient to warrant the modification of child support:

> A change in gross income of the payor in an amount equal to or more than twenty percent (20%) or more than one hundred dollars ($100) per month shall constitute a material change of circumstances sufficient to petition the court for review and adjustment of the child support obligated amount according to the family support chart after appropriate deductions.

Ark. Code Ann. § 9-14-107(a) (Supp. 2005). He contends that his income "decreased drastically" after he filed bankruptcy, by more than twenty percent, which entitles him to a modification of child support.

Appellee contends that *Hyden, supra,* does not support appellant's position, and we agree that this case is distinguishable. In *Hyden*, the amount of child support was tied to where the child attended school and dealt with a private boarding school in

Virginia. So, although the expenses in question were related to the child's education, they also covered expenses related to room, board, etc., that would normally be covered under typical child-support payments for a child living with the custodial parent. *Hyden, supra.* Appellee maintains that appellant's agreed-upon obligation to pay for school clothes and related expenses and the uninsured medical and dental expenses were "in addition to," and not tied to, his scheduled child-support payments. She argues that one did not depend upon the other, as expressly stated in paragraph seven of the Agreement.

There are examples of this court upholding and enforcing a provision made in a property-settlement agreement to pay for the needs of children over and above child support and finding that such provisions are not subject to modification by the trial court. *See Rogers v. Rogers*, 83 Ark. App. 206, 121 S.W.3d 510 (2003); *Harris v. Harris*, 82 Ark. App. 321, 107 S.W.3d 897 (2003). Appellant points out that both of these cases dealt with agreements to pay college expenses for children who had reached the age of majority, which differs from the situation where the expenses are related to the support of minor children. Those "child-support" expenses are subject to either party's request for modification regardless of what the Agreement says. *See Alfano v. Alfano*, 77 Ark. App. 62, 72 S.W.3d 104 (2002). These cases are also distinguishable from the current situation, but the bottom line is that appellant has failed to show that (1) the expenses he sought to modify were not "in addition to" and independent of his child support obligation, or (2) there in fact has been a sufficient change in circumstances due to the fact that he abandoned his request to decrease child support and failed to provide the required financial documentation to support his claims of a decreased income level. *See Weir v. Phillips*, 75 Ark. App. 208, 55 S.W.3d 804 (2001) (holding that the burden of proof is on the party seeking modification to show a sufficient change of circumstances). Additionally, appellant failed to object to the trial court's imputation of his income at $25,500 per year and the related increase in his child-support obligation. We affirm on this point as well.

III. Whether the Trial Court Erred in Allowing Appellee to Orally Amend Her Petition

Appellant objected to the trial court's allowing appellee to amend her petition to modify the Agreement for increased child

support because he had not been given notice or an opportunity to respond at the hearing. He cites Ark. R. Civ. P. 15 (2005) in support of his argument, which states:

> A party may amend his/her pleadings at any time without leave of the Court. Where, however, upon motion of an opposing party, the Court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment, the Court may strike such amended pleading or grant a continuance of the proceeding.

Appellant argues that he was prejudiced by the trial court's granting appellee's oral motion to amend because he was not allowed to properly respond, and further, because the amendment would not have occurred absent prompting by the trial court.

In response, appellee reminds us that it was appellant who initiated the original petition for modification of the Agreement, based in part on a request to reduce his child-support obligation. Appellee served appellant with interrogatories and requests for production of documents to determine whether he had, in fact, experienced a significant decrease in income. Appellant failed to provide any meaningful information about his current income level and then proceeded to withdraw his request to reduce his child-support obligation at the beginning of the hearing. As appellee points out, it is difficult to believe that appellant would claim a lack of notice that child support was at issue when he initiated the current action to reduce his child-support obligation. Additionally, appellant has failed to present any proof of the claimed "prejudice" to which he was subjected. Because we will not reverse unless error and prejudice have been shown, *Lucas v. Grant*, 61 Ark. App. 29, 962 S.W.2d 388 (1998), we reject this argument and affirm on this point.

IV. Modification of Visitation

Under the Agreement, appellant's visitation with his children was "subject to reasonable and seasonable visitation rights." He cites *Jones v. Jones*, 26 Ark. App. 1, 759 S.W.2d 42 (1988), for the proposition that, as a general rule, parties to a divorce action may enter into an independent agreement to settle property rights which, if approved by the trial court and incorporated into the divorce decree, may not be subsequently modified by the trial

court. Appellant asserts that, because the trial court determined that the Agreement was just such an agreement, it follows that the modification of visitation should have been subjected to the same restrictions as the other provisions in the Agreement. He further contends that if this court agrees with the trial court that the Agreement is an independent contract that cannot be modified with respect to paragraph seven, then the visitation terms covered therein are not modifiable for the same reason.

Alternatively, if this court finds that visitation is modifiable under the Agreement, appellant claims that the trial court erred because the terms of the modification were not in the best interest of the children. *See Hass v. Hass*, 80 Ark. App. 408, 97 S.W.3d 424 (2003) (finding that the party seeking a change in visitation has the burden to show a material change in circumstances and that the primary consideration is what is in the best interest of the children). As previously stated, in determining reasonable visitation, the court considers the following factors: (1) the wishes of the children; (2) the capacity of the party desiring visitation to supervise and care for the children; (3) problems related to transportation and prior conduct in abusing visitation; (4) the work schedule or stability of the parties; (5) the relationship with siblings and other relatives. *See id.*

Appellant contends that there was a material change of circumstances warranting the modification of his visitation with the children. Because of his relocation from the Camden area to Rogers, Arkansas, he was unable to spend alternating weekends with the children, so he requested visitation on all the long weekends during the school year and for six weeks during the summer break according to the visitation guideline. The trial court granted visitation of one long weekend per month, to coincide with long weekends in the children's school calendar; appellant was also granted visitation according to the visitation guidelines regarding spring break, Thanksgiving, and Christmas, unless the parties could agree in writing to another visitation plan. Finally, and most contentious, was the grant of visitation during summer break in the amount of four weeks instead of the requested six. Appellant was awarded visitation during the first full week in June, the first full week in July, and two consecutive weeks following the children's final swim meet of the summer.

The primary issue that was raised with regard to the summer visitation schedule dealt with the children's participation in the South Arkansas Swim Association ("SASA"). It is undisputed that

the children practice every morning, Monday through Friday, beginning on the sixth day of June and continuing through their final weekend-swim meet on the twenty-third day of July. As of the time of the hearing, the children had participated in the SASA program during the previous four summers and had distinguished themselves as good swimmers. Appellant concedes that the swim schedule caused him some concern and hardships; however, he claims that there was no indication at the hearing that he would fail to make every effort to see that the children were at the scheduled swim meets. He argues that no consideration was given to his desire to spend quality time with the children without interruption. He recognizes the importance of their participation in the activity but alleges that it is in their best interest to spend as much time with him as possible.

It is well settled that a trial court maintains continuing jurisdiction over visitation and may modify or vacate such orders at any time on a change of circumstances or for knowledge not known at the time of the initial order. *See Meins, supra*; *Stellpflug v. Stellpflug*, 70 Ark. App. 88, 14 S.W.3d 536 (2000). Appellee points out that both she and appellant requested that the trial court modify visitation because of his relocation to a town some 350 miles away. Appellee agrees that appellant's relocation indeed constituted a material change of circumstances that justified a modification of the visitation schedule. She contends that the trial court fashioned the modification taking into account concerns raised by both parties, as well as looking at what was best for the children.

In short, based upon our de novo review of the record in this case, we are simply not left with a definite and firm conviction that a mistake has been made with respect to this issue, and we are not willing to substitute our judgment for that of the trial court, particularly in light of the fact that we are dealing with a change in visitation, not a change in custody. In *Harris v. Tarvin*, 246 Ark. 690, 439 S.W.2d 653 (1969), our supreme court rejected an argument that visitation cannot be modified unless there is a sufficient change in circumstances to warrant a change of custody. The supreme court explained that visitation rights may be modified upon a proper showing that it is a change to which the petitioning parent is reasonably entitled because of changed circumstances pertinent to visitation and also that the welfare and best interest of the child dictate a change. We find no clear error in the trial court's finding that appellee had shown there had been a

material change in circumstances pertinent to visitation and also that the children's best interest dictated a change in visitation.

V. Award of Attorney's Fees

For his final point, appellant claims that the trial court erred in awarding appellee a portion of her attorney's fees in this matter to be paid by him. Under Ark. Code Ann. § 9-12-309(a)(2) (Repl. 2002), attorney's fees are allowed in the final decree of an action for absolute divorce, and the trial court may award the wife or husband costs of court, a reasonable attorney's fee, and expert witness fees. Additionally, subsection (b) states that the trial court may allow either party additional attorney's fees for the enforcement of alimony, maintenance, and support provided for in the decree. Ark. Code Ann. § 9-12-309(b) (Repl. 2002). Appellant contends that neither subsection applies in this case. There were no attorney's fees awarded in the initial divorce decree, and appellant argues that the instant case was not an action to enforce alimony, maintenance, or support provided for in the decree. He asserts that it was merely an action to modify his obligations under the decree, and as such, he contends that the trial court erred in making the award to appellee.

Appellee points out that in Arkansas, attorney's fees are allowed by the courts when such fees are authorized by contract or by statute. *See Riddick v. Streett*, 313 Ark. 706, 858 S.W.2d 62 (1993). In the instant case, the parties' liability for attorney's fees is set by contract, specifically in paragraph twelve of the Agreement, which states: "Any wrongful and groundless refusal by one party to comply with the provisions of this agreement necessitating legal expenses by the other party shall result in the party wrongfully refusing compliance being responsible for said legal expenses." The trial court found appellant in contempt of court for making child-support payments payable to the minor children rather than to appellee, for failing to make child-support payments in a timely fashion, for failing to pay drug and dental expenses incurred on behalf of the minor children that were not covered by insurance, and for failing to furnish appellee with the required copies of his W2 and 1099 tax forms. These were all obligations to which appellant agreed under the Agreement. The trial court also denied appellant's request to modify his obligation to pay for the expenses contained in paragraph seven of the Agreement. As the trial judge noted, "[Appellant] initiated this round of pleadings resulting in

the hearing held on May 10, 2005[,] and he came up short on all issues." Courts have recognized the inherent power of a court of equity to award attorney's fees in domestic relations proceedings and found that whether there should be an award for fees, and if so how much, are matters within the discretion of the trial court. *See Rogers, supra.* Under the circumstances of this case, the trial court did not abuse its discretion in awarding appellee an attorney's fee of $1,000. We affirm on this point as well.

Affirmed.

VAUGHT and CRABTREE, JJ., agree.

Terrell Jamaal TRAVIS *v.* STATE of Arkansas

CA CR 05-999 233 S.W.3d 705

Court of Appeals of Arkansas
Opinion delivered April 12, 2006

Gant & Barlow LLP, by: *R. Derek Barlow,* for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Terrell Jamaal Travis was convicted by a jury of possession of cocaine with intent to deliver, possession of marijuana with intent to deliver, and possession of drug paraphernalia. He was sentenced to fifty-five years in prison. On appeal, Mr. Travis argues that the trial court erred in denying his motion to suppress the incriminating evidence because the evidence was discovered as the result of an illegal search of the vehicle he was driving. We affirm.

Officer Olen Craig testified for the State at the suppression hearing. Officer Craig stated that he was patrolling the eastbound lanes of Interstate 40 in Crawford County in the early morning hours of May 12, 2004. He was driving behind a 2004 Ford Taurus with California tags when he observed the Taurus cross the center line twice. As a result, Officer Craig decided to make a traffic stop, which was initiated at 2:05 a.m.

Upon stopping the vehicle, Officer Craig found that Mr. Travis was the driver and a man named Meldanado Hankins was in the front passenger seat. Officer Craig stated that when he approached, Mr. Travis was holding a cell phone in his lap and would not look at him. When Officer Craig asked for license and registration, Mr. Travis gave him his driver's license and a rental agreement. Officer Craig returned to his patrol car and called for background checks, which revealed that Mr. Travis had a prior arrest involving possession of a firearm, and that Mr. Hankins had been arrested for an unspecified sexual offense.

The rental agreement listed the lessee as Makala Racobs, and did not pertain to the 2004 Taurus. When Officer Craig returned to the vehicle and informed Mr. Travis that he presented the wrong rental agreement, Mr. Travis produced another rental agreement. This contract did pertain to the 2004 Taurus, and listed Makala Racobs as the lessee with no other authorized drivers.

Officer Craig went back to his patrol unit at about 2:13 a.m. and called Officer Michael Bowman for backup assistance, explaining that he had a "quirky feeling." Officer Craig then proceeded back to the Taurus, where he instructed Mr. Travis to exit the vehicle and join him in the patrol car. During their conversation, Mr. Travis stated that he was traveling to Jacksonville, North Carolina, and that his sister-in-law had rented the car for him for insurance purposes because he was under twenty-five years of age. Officer Craig asked Mr. Travis if he had ever been arrested before, and Mr. Travis acknowledged a prior misde-

meanor arrest. Officer Craig asked if he could search the car, and after giving evasive answers Mr. Travis ultimately said "no."

Officer Bowman arrived with a drug-detection canine at about 2:18 a.m. Mr. Hankins was removed from the car, and when asked about their destination he stated that they were headed to Jacksonville, North Carolina. Officer Bowman walked the dog around the car, and the canine sniff was concluded at approximately 2:21 a.m. During the procedure, the dog alerted on the trunk of the car. As a result, the officers searched the trunk and found 2.2 pounds of cocaine and 3.9 pounds of marijuana.

Officer Craig testified that during the stop he suspected that Mr. Travis was hauling drugs due to his extreme nervousness and evasive answers as to whether he would consent to a search. Officer Craig further found it suspicious that there were two rental agreements, and that the valid agreement did not authorize Mr. Travis as a driver and indicated that the car was due back in California on the following day. Officer Craig stated that he did not issue a citation for crossing the center line because of his suspicion of more serious criminal activity. Officer Craig acknowledged that he did not have any information that the car had been stolen, and the fact that the occupants of the car had prior arrests did not factor in his decision to detain them.

In denying Mr. Travis's motion to suppress, the trial court stated:

> The stop was 15 minutes by my calculations. The court finds that there was no violation of 3.1 or 3.2 as far as the rules are concerned. The appellate courts have gone and have sanctioned 20 minutes as being totally unreasonable [sic]. I find it to be well within that time. The court finds that the stop was lawful because the vehicle was across the center line twice, I believe. The court also finds that the officer testified that the driver was nervous, that the rental agreement was of a third party, the third party was not present in the car, and the defendants were not authorized users of the car. The officer also testified that there were two rental agreements, that the driver would not look up and was evasive in answering the questions. The contract was due back on the 13th and this was early morning on the 12th and the car was going in the other direction. The officer later testified that it caused him problems that the driver was on the cell phone when he walked up. I believed this has been identified in other cases, as far as in drug situations, that other vehicles are driving in tandem and in commu-

> nication by cell phones. . . . The State is on very solid ground here based on them not being authorized drivers under the contract to this vehicle. They had a right to confiscate the car and hold it until it was determined that someone had a right to drive the vehicle any further. . . . The nervousness, the refusal to look up, evasive answers, the contract being due the next day, two rentals in the car, and the renter not being present in the car. Your motion to suppress will be denied for those reasons.

For reversal, Mr. Travis argues that the contraband should have been suppressed because the search violated his Fourth Amendment right against unreasonable searches and seizures and Rule 3.1 of the Arkansas Rules of Criminal Procedure. Rule 3.1 provides:

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

In *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001), our supreme court recognized that as part of a valid traffic stop, a police officer may detain a traffic offender while he completes certain routine tasks, but that such detention is unrelated to a Rule 3.1 detention. Mr. Travis argues in this case that the routine tasks associated with the traffic violation were completed long before the canine alerted to the presence of drugs, and thus that the continued detention would only be justified if there was reasonable suspicion under Rule 3.1. He further contends that there was no such reasonable suspicion under the facts of this case.

While there was evidence that Mr. Travis exhibited nervousness during the stop, he cites *Lilley v. State*, 362 Ark. 436, 208 S.W.3d 785 (2005), where the supreme court held that nervous-

ness alone does not constitute reasonable suspicion of criminal activity and grounds for detention. Mr. Travis also cites *U.S. v. Beck*, 140 F.3d 1129 (8th Cir. 1998), where the Eighth Circuit Court of Appeals stated that there was nothing inherently suspicious about Mr. Beck's use of a rental vehicle, even though rented by a third person, to travel. The circumstances of this case showed that Mr. Travis was nervous and was traveling in a rental car that had been rented by a third person and was due back in California the next day. Mr. Travis submits that these factors did not give rise to reasonable suspicion of any drug-related activity. In *United States v. Boyce*, 351 F.2d 1102 (11th Cir. 2003), the appeals court stated that in deciding whether certain factors give rise to reasonable suspicion of criminal activity, the factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied. Mr. Travis argues that the factors in this case were consistent with innocent travel, that Officer Craig's decision to detain him was merely based on a hunch, and that the trial court erred in denying his motion to suppress.

The State first contends that we should affirm without reaching the merits of Mr. Travis's argument because he failed in his burden of establishing that he had any standing to contest the search. We agree.

In *Ramage v. State*, 61 Ark. App. 174, 966 S.W.2d 267 (1998), this court set out the following guidelines for determining standing to contest a Fourth Amendment search:

> Fourth Amendment rights against unreasonable searches and seizures are personal in nature. *McCoy v. State*, 325 Ark. 155, 925 S.W.2d 391 (1996). Thus, a defendant must have standing before he can challenge a search on Fourth Amendment grounds. *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997). The pertinent inquiry regarding standing to challenge a search is whether the defendant manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable. *McCoy v. State*, *supra*; *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). It is well settled that the defendant, as the proponent of a motion to suppress, bears the burden of establishing that his Fourth Amendment rights have been violated. *McCoy v. State*, *supra*; *Rockett v. State*, 319 Ark. 335, 891 S.W.2d 366 (1995). A person's Fourth Amendment rights are not violated by the introduction of damaging evidence secured by the search of a third person's premises or property. *Davasher v. State*, 308 Ark. 154, 823

> S.W.2d 863 (1992); *Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997). A defendant has no standing to question the search of a vehicle unless he can show that he owns the vehicle or that he gained possession of it from the owner or someone else who had authority to grant possession. *McCoy v. State, supra*; *Littlepage v. State, supra*; *State v. Barter*, 310 Ark. 94, 833 S.W.2d 372 (1992).

Id. at 176–77, 966 S.W.2d at 268–69.

In holding that Mr. Travis lacked standing in the present case, we are guided by our supreme court's decision in *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). In that case the appellant was driving a rental car that had been rented to a third person who was the only authorized driver in the rental agreement. The vehicle was stopped and searched and the police seized illegal drugs and other contraband. Mr. Littlepage argued on appeal that the trial court erred in denying his motion to suppress, but the supreme court declined to reach the merits of his argument based on the following analysis:

> In this matter, Littlepage bore the burden of proving not only that the search of the car he drove was illegal, but also that he had a legitimate expectation of privacy in that car. The proof revealed that the car Littlepage was driving was rented to Rebecca Jones, who was not present at the time of the arrest. Ms. Jones was the only authorized driver in the rental agreement. Littlepage claimed that Ms. Jones had rented the car for him in Dallas for his use when his own car had broken down, but there was no showing that this assertion had any validity. Besides, the rental agreement authorizing Ms. Jones to drive the car had expired two days prior to Littlepage's traffic stop and arrest. Clearly, Littlepage failed to establish his expectation of privacy in the searched automobile. Accordingly, we conclude that Littlepage had no standing to challenge the officer's search as unconstitutional. Because Littlepage had no expectation of privacy in the car, the issue of whether or not this was a pretextual search is of no moment.

Littlepage v. State, 314 Ark. at 369, 863 S.W.2d at 280 (citations omitted).

[redacted] The circumstances in the case at bar are not materially distinguishable from those in *Littlepage v. State, supra*. As in that case, Mr. Travis was driving a car rented to a third party who was not present, and he was not listed as an authorized driver. And

other than the officer's testimony as to Mr. Travis's explanation of how he came into possession of the car, Mr. Travis offered no proof on the issue at the suppression hearing. While the rental agreement in *Littlepage* had expired and the one in the present case was valid for one more day, we read *Littlepage* to say that the driver lacked standing whether or not the rental contract had expired. Because Mr. Travis failed to prove that he had an expectation of privacy in the vehicle he was driving, we conclude that he failed in his burden to establish standing to challenge the search. Therefore, we do not reach the merits of his argument on appeal.

Affirmed.

HART and GLOVER, JJ., agree.

Davey LEE *v.* Patricia LEE
and Office of Child Support Enforcement

CA 05-1141 233 S.W.3d 698

Court of Appeals of Arkansas
Opinion delivered April 12, 2006

Wm. C. Plouffe, Jr., for appellant/cross-appellee.

Joanie M. Ozment, for appellees/cross-appellant.

SAM BIRD, Judge. Appellant Davey Lee appeals from the judgment of the Union County Circuit Court holding him in contempt for nonpayment of child support, granting the Office of Child Support Enforcement (OCSE) judgment for $7,132 in unpaid child support, and setting his support obligation at $40 per week. The $40-per-week sum represented a downward deviation from the $72-per-week sum provided by application of the child-support chart. Appellant raises five points for reversal. OCSE cross-appeals from the trial court's decision to deviate downward from the child-support chart. We affirm on both direct appeal and cross-appeal.

Appellant and appellee Patricia Lee were divorced by decree of the Union County Chancery Court entered on July 25, 2000. The decree awarded Patricia custody of the parties' two minor children and ordered appellant to pay child support of $58 per week.

In October 2001, the Lees' minor children were injured in an explosion at Patricia's home. The Lees filed a suit seeking damages for the children in the Union County Circuit Court. The case was settled, and a special-needs trust was created for the children with Liberty Bank of Arkansas serving as trustee.

OCSE intervened in the divorce case and filed a motion seeking to modify appellant's support obligation and to hold appellant in contempt for nonpayment of support. Appellant denied the material allegation of the petition. Prior to trial, appellant issued a subpoena to the bank seeking "financial account and/or trust records for the last three years concerning Patricia A. Lee. . . ." The bank filed a motion to quash the subpoena, alleging that the records had been ordered sealed in the earlier tort case. Appellant asserted that the motion to quash should be denied because the order sealing the records did not extend to the records sought.

After a hearing, the trial court granted the motion to quash by order entered on February 9, 2005. The trial court found that the purpose of the subpoena was to determine the assets and income available to the minor children and whether the bank had provided appellant with a complete list of all income or payments received by Patricia or the minor children. The court concluded that appellant had received all information necessary for the court to make a determination as to whether there should be a deviation from the child-support chart.

Appellant filed a "Motion for Reconsideration/New Trial and Motion for Findings of Fact and Conclusions of Law" on February 22, 2005. The motion sought findings of fact and conclusions of law regarding the following: the reasons that the records were sealed; whether the sealing of the records applied to records subsequently created by the bank for purposes of administering the special-needs trust; why the release of subsequently created documents would violate the order sealing the records; how the bank met its burden of showing good cause to quash the subpoena; how the records were not relevant to a requested deviation from the child-support chart; and how the release of the records would harm the special-needs trust. On March 16, 2005, the trial court denied the motion as being without merit and as untimely filed under Ark. R. Civ. P. 59(b).

At trial, appellant admitted that he had an arrearage of $12,132 but stated that he and Patricia had an agreement whereby he would not have to pay child support. He said that she told him that he "would not have to worry about child support anymore." He identified a document, signed by Patricia, requesting that the child-support case with OCSE be closed. Appellant stated that he was working, earning $7 per hour for a forty-hour week. He stated that he had a wife and two children, ages two and four, living at home with him. He also admitted receiving $250,000 as his share of the settlement from the accident involving his older children but stated that he did not put that money in the bank. He added that $150,000 in cash from that settlement, a vehicle, and a motorcycle were stolen from his home.

According to appellant, he paid $5,000 for food and clothing for the children. He asserted that the children were removed from Patricia's custody in 2002 due to her inability to care for them after the explosion. Appellant also claimed that he should not have to pay support for the period the children were not in Patricia's custody. He said that, in addition to the $5,000 previously mentioned, he paid more than $2,000 during the fifteen-month period the children were in foster care. However, he did not have receipts for these payments. He said that the children received $1,500 per month in disability from social security and $6,000 per month from the special-needs trust. According to appellant, the trust was worth approximately $1 million and paid for all of the household expenses. He added that the children's total estate was valued between $15 to $17 million. He stated that he did not think it was

fair for him and his new family to suffer by his paying child support when the children's needs were met by the trust.

After the hearing, the trial court announced its findings from the bench and found that appellant was previously ordered to pay child support of $58 per week and that appellant admitted an arrearage of $12,132. The court gave appellant credit for $5,000 in previous payments. This resulted in a net judgment of $7,132. The trial court found that appellant was not entitled to credit for payments from the special-needs trust because it was not created with funds provided by appellant. The trial court found, based on the child-support chart, that appellant should pay $72 per week in current support. Because the children were receiving $1,500 per month from social security and $6,000 per month from the special-needs trust, the court concluded that a deviation from the child support was warranted and that such a deviation would not adversely affect the children. In deciding to deviate from the chart, the court also noted that appellant had two other biological children residing with him. The court then set child support at $40 per week, plus $8 per week on the arrearage. An order based on the trial court's oral findings was entered on July 1, 2005. Appellant filed a timely notice of appeal, and OCSE filed a timely notice of cross-appeal.

Appellant raises five points on appeal: (1) that the trial court erred when it held that the income from the special-needs trust would not be credited against appellant's support obligation; (2) that the trial court erred in not considering Patricia Lee's request to close her child-support case and that she did not have custody of the minor children for an extended period of time, and that appellant detrimentally relied on Patricia Lee's request in stopping child support; (3) that the trial court erred in setting appellant's support obligation at $40 per week; (4) that the trial court erred in quashing a subpoena for the records of the trust from the bank; and (5) that the trial court erred when it denied as untimely appellant's motion seeking findings of fact as to the trial court's decision to grant the bank's motion to quash. On cross-appeal, OCSE argues that the trial court erred in deviating downward from the child-support chart.

Child-support cases are reviewed de novo on the record. *Paschal v. Paschal*, 82 Ark. App. 455, 117 S.W.3d 650 (2003). It is the ultimate task of the trial judge to determine the expendable income of a child-support payor. *Cole v. Cole*, 82 Ark. App. 47, 110 S.W.3d 310 (2003). This income may differ from income for tax

purposes. *See Brown v. Brown*, 76 Ark. App. 494, 68 S.W.3d 316 (2002). As a rule, when the amount of child support is at issue, the appellate court will not reverse the trial judge absent an abuse of discretion. *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001); *Paschal, supra.*

In setting the amount of child support that a noncustodial parent must pay, reference to the most recent child-support chart is mandatory. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). The family-support chart is more accurately identified as Section VII of Supreme Court Administrative Order 10, *In Re: Administrative Order No. 10: Arkansas Child Support Guidelines*, 347 Ark. Appx. 1064 (2002). Administrative Order Number 10 sets out the definition of income for child-support purposes and the manner of calculation of support. It also lists factors that the court should consider when determining support at variance to the chart. Although the court must consider the chart, it does not have to use the chart amount if the circumstances of the parties indicate that another amount would be more appropriate. *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000); *Stewart v. Winfrey*, 308 Ark. 277, 824 S.W.2d 373 (1992); *see also* Ark. Code Ann. § 9-14-106 (2002).

Appellant first argues that the trial court erred in not crediting the amount that the children receive from the special-needs trust against his support obligation. In *Hinton v. Hinton*, 211 Ark. 159, 199 S.W.2d 591 (1947), the supreme court held that military allotments assigned to a child could be credited toward the father's child-support obligation. In *Cash v. Cash*, 234 Ark. 603, 353 S.W.2d 348 (1962), the court held that a father was entitled to credit social security retirement benefits received by the child against the father's child-support payments. In so holding, the court observed that such benefits were not gratuitous but earned, and the court was persuaded that the equities tipped in favor of allowing credit to the father under the circumstances of the case.[1] However, in *Thompson v. Thompson*, 254 Ark. 881, 496 S.W.2d 425 (1973), the supreme court held that college educational benefits for a disabled veteran's children represented a specialty item to be used only under specified circumstances and could not be credited toward the veteran's child-support payments. Other

[1] *See also, e.g., Office of Child Support Enforcement v. Harris*, 87 Ark. App. 59, 185 S.W.3d 120 (2004); *Davis v. Davis*, 79 Ark. App. 178, 84 S.W.3d 447 (2002); *Cantrell v. Cantrell*, 10 Ark. App. 357, 664 S.W.2d 493 (1984).

courts have held that a child's receipt of social security benefits would not be considered in determining the basic child-support obligation because they are not income to the obligor; however, the trial court may consider such benefits in deciding whether to deviate from the guidelines. *See Ouellette v. Ouellette*, 687 A.2d 242 (Me. 1996); *Drummond v. State ex rel. Drummond*, 350 Md. 502, 714 A.2d 163 (1998).

Here, appellant essentially is asking that the children be ordered to support themselves from their own funds instead of his being required to do so. The funds were not earned by appellant and are not a substitute for his earnings because of a disability. They are the result of an award of damages for the benefit of the children, who were involved in an unfortunate accident. These funds will be needed to support the children throughout the rest of their lives. We do not know from the evidence presented the nature and extent of the children's injuries and what future needs they might have. A parent has a legal and moral duty to support and educate his child and to provide the necessities of life even though the child has sufficient property to do so. *See Alcorn v. Alcorn*, 183 Ark. 342, 35 S.W.2d 1027 (1931). Additionally, in the present case, the testimony clearly shows that appellant is able to work. Therefore, appellant has a duty to support his children. We affirm on this point.

In his second point, appellant argues that the trial court erred in not considering his agreement with Patricia that he did not have to pay support or his assertion that the children were not in her custody the entire period of time for which the arrearages were sought. We disagree.

Appellant relies on the closure form signed by Patricia as evidence that he and she had an agreement for him not to pay child support. First, the form does not, by itself, indicate an agreement. It was simply a request by Patricia that OCSE close her case. Appellant was not involved in that request. However, it does tend to corroborate appellant's testimony because it indicates that Patricia no longer wanted OCSE to collect child support for her. Second, it has long been the law in Arkansas that the interests of a minor, such as in receiving support, cannot be compromised by a guardian without approval by the court. *Davis v. Office of Child Support Enforcement*, 322 Ark. 352, 908 S.W.2d 649 (1995). Our supreme court has further provided that:

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

Id. at 355-56, 908 S.W.2d at 651-52. Here, there is no proof that the "agreement" was ever presented to or approved by the trial court. Therefore, we cannot say that the trial court erred in failing to consider any agreement that appellant not pay child support.

As for appellant's contention that he should not have to pay support for the period that the children were in foster care, the trial court did give appellant credit for $5,000 in payments even though he did not show any receipts. This sum exceeds the total amount of support due for the period the children were in foster care. Therefore, appellant received the relief he is now requesting. We affirm on this point.

Because appellant's third point and OCSE's cross-appeal both concern the ultimate amount of appellant's support obligation, we discuss them together. Both points assert that the trial court erred in setting appellant's support obligation at $40 per week. Appellant argues that he should not have to pay any support because the children were receiving $1,500 per month from social security and $6,000 from the trust, and OCSE argues that the trial court erred in considering the children's social security benefits and the distribution from the trust in deviating from the child-support chart.

Section V of Arkansas Supreme Court Administrative Order No. 10 sets forth the following factors to be considered when deviating from the amount set by the chart: food, shelter and utilities, clothing, medical expenses, educational expenses, dental expenses, child care (including day care or other expenses for supervision of children necessary for the custodial parent to work), accustomed standard of living, recreation, insurance, transportation expenses, and other income or assets available to support the child from whatever source. Section V then lists what are called additional factors and include the procurement and maintenance of life insurance, health insurance, dental insurance for the children's benefit; the provision or payment of necessary medical, dental, optical, psychological or counseling expenses of the children; the creation or maintenance of a trust fund for the children;

the provision or payment of special-education needs or expenses of the child; the provision or payment of day care for a child; the extraordinary time spent with the noncustodial parent, or shared or joint custody arrangements; the support required and given by a payor for dependent children, even in the absence of a court order; and where the amount of child support indicated by the chart is less than the normal costs of child care.

Our supreme court has held that state courts are prohibited by federal law from ordering child-support payments from SSI benefits. *Davie v. Office of Child Support Enforcement*, 349 Ark. 187, 76 S.W.3d 873 (2002); *Davis v. Office of Child Support Enforcement*, 341 Ark. 349, 20 S.W.3d 273 (2000). However, while the supreme court has held that child support cannot be ordered *paid* from SSI benefits, the supreme court has not held that a trial court cannot consider those benefits in determining whether to *deviate* from the child-support chart. The guidelines specifically allow consideration of "other income or assets available to support the child from whatever source" and the creation of a trust for the children as factors in deciding to deviate from the child-support chart. *See* Section V, *supra*.

On this point, appellant repeats much of his argument that he is entitled to credit for the full amount the children receive from social security. This court has rejected the argument that a noncustodial parent is entitled to a downward deviation from the child-support amount provided by the child-support chart on the ground that the amount exceeds a child's actual needs. *Ceola v. Burnham*, 84 Ark. App. 269, 139 S.W.3d 150 (2003). The amount of child support lies within the discretion of the court and the court's findings will not be disturbed on appeal, absent a showing of an abuse of discretion. *Id.* We cannot say that the trial court abused its discretion in setting appellant's support obligation at $40 per week.

Appellant contends as his fourth point that the trial court erred in quashing a subpoena for the trust records from the bank. It is well established law that a trial court has broad discretion in matters pertaining to discovery, and the exercise of that discretion will not be reversed by this court absent an abuse of discretion that is prejudicial to the appealing party. *Ballard v. Martin*, 349 Ark. 564, 79 S.W.3d 838 (2002). Much of appellant's argument is devoted to the proposition that the order sealing the settlement records does not extend to records created after the settlement for

the purpose of administering the trust. Even if appellant is correct in this assertion, he does not explain how he was prejudiced by the inability to obtain the subpoenaed financial information. The issue before the trial court to which the requested information was relevant was a deviation in the amount of child support to be paid. The trial court granted the requested deviation, based in part on appellant's testimony that the children received $6,000 per month from the special-needs trust. Appellant cannot show how the result would have been different had he received the requested information. We will not reverse without a showing of prejudice. *Carton v. Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993).

In his fifth point, appellant argues that the trial court erred when it denied as untimely his motion seeking findings of fact as to the motion to quash the subpoena to the bank. The order granting the motion to quash was filed on February 9, 2005, and appellant filed his "Motion for Reconsideration/New Trial and Motion for Findings of Fact and Conclusions of Law" on February 22, 2005. On March 16, 2005, the trial court denied the motion as being both without merit and untimely filed under Ark. R. Civ. P. 59(b). Citing Ark. R. Civ. P. 6(a), appellant argues that the motion was timely. A short answer to this point is that, by the plain terms of Ark. R. Civ. P. 52(a), findings of fact and conclusions of law are unnecessary on decisions of motions under the rules. Subpoenas are governed by Ark. R. Civ. P. 45. That rule, in subsection (b)(1), provides that the court, upon motion made prior to the time specified in the subpoena for compliance, may quash or modify the subpoena if it is unreasonable or oppressive. Therefore, the motion to quash was a "motion under these rules" within the meaning of Rule 52(a), and findings of fact and conclusions of law are not required.

Affirmed.

NEAL and BAKER, JJ., agree.

Carol WILLIAMS *v.* Mickey NESBITT

CA 05-864 234 S.W.3d 343

Court of Appeals of Arkansas
Opinion delivered April 19, 2006

Martin and O'Bryan, by: *Joe O'Bryan*, for appellant.

Flynn Law Firm, by: *John Alexander Flynn*, for appellee.

JOSEPHINE LINKER HART, Judge. Carol Williams appeals from an order of the Lonoke County Circuit Court denying her motion for an increase in child support and for enforcement of a

prior order requiring the parties to split the cost of unreimbursed medical expenses incurred on behalf of their minor child. We affirm in part and reverse in part and remand.

In an order establishing paternity that was filed for record on December 10, 2002, Mickey Nesbitt was found to have a weekly net income of $1086.00. On December 29, 2003, Williams filed a motion to modify her child support. Ultimately, this motion was heard on January 12, 2005. Williams introduced into evidence a 2002 W-2 form that showed that Nesbitt had gross earnings of $53,060.19 from Ron Campbell Ford, Inc., and a 2002 1099-R that indicated that he had $25,068.00 in retirement pay from the United States Navy. Williams also introduced a 2003 1099-R that indicated that Nesbitt's retirement earnings had risen to $25,416, and documentation from Campbell Ford that stated Nesbitt's gross earnings for 2004 were $55,202.45. The latter document also stated that Nesbitt had elected to have withheld from his pay $15,950.12 for federal taxes.

Nesbitt acknowledged that he had more money withheld from his earnings at Campbell Ford than was required by the withholding tables promulgated by the Internal Revenue Service because in 2002 and 2003, he had to pay substantial amounts of additional taxes to the IRS, due in part to the Navy's failure to withhold a portion of his retirement pay for taxes.

In the same proceeding, Williams also sought reimbursement for half of the unreimbursed medical expenses that she incurred on behalf of the minor child. However, when she attempted to introduce her handwritten records of her expenditures, Nesbitt objected and the records were subsequently excluded from evidence. Williams did, however, note that she had received some money from Nesbitt toward these expenses, including an $89 check that Nesbitt had given her that morning.

The trial judge found that Williams did not prove a material change of circumstances and denied her motion to increase child support. He also denied Williams's motion for reimbursement for medical expenses, finding that she had not availed herself of "cost-free medical care" available at the Air Force base in Jacksonville and that she should be responsible for the expenses.

Williams first argues that the trial court erred in finding that there had not been a material change in Nesbitt's income because he "artificially" reduced his "disposable income" by withholding an excessive amount from his earnings at Campbell Ford. She notes

that the federal and state withholding tables indicate that Nesbitt should have had considerably less withheld from his pay, and therefore, he had more income with which to pay child support. We agree.

A trial court's ruling on child-support issues is reviewed de novo by this court, and the trial court's findings are not disturbed unless they are clearly erroneous. *Montgomery v. Bolton*, 349 Ark. 460, 79 S.W.3d 354 (2002). In reviewing a trial court's findings, we give due deference to the court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.* As a rule, when the amount of child support is at issue, we will not reverse absent an abuse of discretion. *Id.* However, a trial judge's conclusion of law is given no deference on appeal. *Id.*

For the purposes of calculating a child-support obligation, under Section II of Administrative Order Number 10, income is defined as:

> any form of payment, periodic or otherwise, due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers' compensation, disability, payments pursuant to a pension or retirement program, and interest less proper deductions for:
>
> 1. Federal and state income tax;
>
> 2. Withholding for Social Security (FICA), Medicare, and railroad retirement;
>
> 3. Medical insurance paid for dependent children; and
>
> 4. Presently paid support for other dependents by court order.

Accordingly, this case turns on what is meant by a "proper deduction." In *Montgomery v. Bolton, supra*, the supreme court stated that in deciding whether a deduction qualifies, the ultimate objective is to determine how much "expendable income" a payor has available to support the child. *See also McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001). It is reversible error to mechanically look at tax documents to determine support rather than the actual expendable income that a payor has available. *Stepp v. Gray*, 58 Ark. App. 229, 947 S.W.2d 798 (1997).

It is apparent from the record that Nesbitt had caused an excessive amount of his paycheck to be withheld, ostensibly for federal taxes. We believe that the trial court erred in ignoring the withholding tables and simply accepting Nesbitt's assertion that it was to avoid having to pay additional money in taxes. In doing so, he obscured the amount of actual expendable income that he had available for support. Although this court has the power to decide equity cases de novo on the record, we think it appropriate to remand this case to the trial court for further consideration of the federal-income-tax withholding issue. *See id.*

Williams next argues that "the trial court had no reason to refuse to enforce its previous order that [Nesbitt] should share in the costs of medical expenses for the child or to terminate [her] right to recover the child's medical expenses from [Nesbitt]." She asserts, and the record established, that during her testimony she explained that she had the records in the courtroom, but when the trial court excluded her written summary, the trial judge indicated that he did not want to see them. Without citation of authority, Williams asserts that this action on the part of the trial court was an abuse of discretion. We do not find merit in this argument.

We note that Williams does not actually challenge the trial court's decision to exclude her summary of the medical expenses that she claimed to have incurred on behalf of her minor child. Furthermore, she has failed to proffer either the summary or the actual bills that she had received for the minor child's medical care. It is axiomatic that to preserve a challenge to a ruling of the trial court excluding evidence, the appellant must proffer the excluded evidence so that the appellate court can review the trial court's decision, unless the substance of the evidence is apparent from the context. Ark. R. Evid. 103(a)(2); *Halford v. State*, 342 Ark. 80, 27 S.W.3d 346 (2000). Accordingly, we are left only with her testimony concerning the amount of expenditures that she made for the child's medical care, and the trial court was free to believe or disbelieve her testimony. When judging the trial court's findings in equity cases, we defer to the trial judge's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Hill v. Hill*, 84 Ark. App. 132, 134 S.W.3d 6 (2003). Accordingly, we decline to reverse on this point.

Affirmed in part; reversed in part and remanded.

ROBBINS and GLOVER, JJ., agree.

James Vincent VALETUTTI *v.*
Kathleen Susan VALETUTTI

CA 05-976 234 S.W.3d 338

Court of Appeals of Arkansas
Opinion delivered April 19, 2006

[Rehearing denied October 4, 2006.*]

Tim A. Womack, P.A., by: *Tim A. Womack*, for appellant.

Harrell & Lindsey & Carr, P.A., by: *Christina S. Carr*, for appellee.

ROBERT J. GLADWIN, Judge. Appellant James Vincent Valetutti appeals from the Ouachita County Circuit Court's order filed on June 2, 2005, in which it reduced his monthly alimony obligation to his ex-wife, appellee Kathleen Susan Valetutti. On appeal to this court, appellant argues that the trial court abused its discretion in ordering that alimony continue indefinitely at the reduced but still substantial rate despite proof that appellee no longer needs the alimony. We affirm.

Appellant and appellee were married in 1988, and their only child, a daughter, was born in 1991. Appellee has twin sons from a previous marriage who were minors at the time of the parties' divorce, and appellant has a grown son. In 1997, appellant ac-

* BIRD and CRABTREE, JJ., would grant rehearing; see dissenting opinion on denial of rehearing.

cepted a job that paid $98,000 per year, and so the parties moved from Maryland to Camden, Arkansas. Soon after they arrived in Arkansas, appellant had an affair with a coworker, and appellee sought a divorce, which was granted on August 4, 1998. Appellee was awarded custody of the parties' daughter, and they returned to Maryland with the court's permission. In the divorce decree, appellant was ordered to pay $1500 per month in alimony and $200 per week in child support. The decree specifically provided that "alimony shall continue until the death of the payee, payor, the remarriage of the payee, other statutory limitations or further orders of this court." In an opinion delivered on October 13, 1999, we affirmed the trial court's award of alimony and child support and its division of the parties' property. *Valetutti v. Valetutti*, CA99-21, slip op. at 1 (Ark. App. Oct. 13, 1999).

On December 9, 2004, appellant filed a petition for termination or modification of alimony. At the hearing on appellant's petition, appellee testified that she purchased her home in Elkton, Maryland, in January 2005 for $118,000 and that her monthly mortgage payment is $1300. She testified that her daughter and her twenty-year-old son currently live with her. She stated that David Miller is her boyfriend of two years but not her fiancé. According to appellee, she has no plans to marry Miller and further explained that "for now I am done with marriage." She testified that she is employed at ATK Alliant Techsystems, formerly Thiokol Corporation and Cordant Technologies. From 1999 to 2002, she was an administrative assistant/production secretary. She stated that her income for 1999, when she had her two sons as dependents, was $15,813; in 2000, still claiming her two sons as dependents, she earned $18,491; she earned $23,894 in 2001; and in 2002, she earned $25,230. Between 2003 and 2004, she became an accountant for the company after taking night classes at Cecil County Community College. Appellee stated that her company reimbursed her for the cost of the classes. In 2003, appellee earned $27,344, and in 2004, she made $34,290. She stated that her contributions to her 401K plan between 1999 and 2004 totaled approximately $10,000. In 2003, she borrowed approximately $12,000 to pay for home improvements and to pay off some of her credit-card debt. She identified appellant's exhibit listing eleven credit cards, but she stated that she no longer had or used seven of the cards. Appellee testified that, according to her affidavit of financial means, she had $32,000 in a 401K account, $2000 in an IRA account, $800 in a checking account, and $400 in a savings account. Also according to her affidavit of financial means, appel-

lee's expenses totaled $3989 per month. Appellee stated that before her twin boys turned eighteen years old, their biological father paid her $90 per week in child support plus a lump sum of $2000 to pay the arrearage. Appellee stated that, without appellant's alimony payments, she would be unable to pay all of her expenses listed on the affidavit. She stated that her lifestyle had not changed since the parties' divorce and that she was not living more extravagantly or spending more money. Appellee conceded that she currently has two fewer dependents and that her income has doubled since 1998.

Appellant testified that he lives in an apartment in Camden, Arkansas, and that, while he would like to live in a house, he is not currently "emotionally equipped" for that kind of acquisition. He stated that he is the director of contracts for Aerojet General Corporation. He stated that in December 2002 he married Jan Valetutti but had since divorced. Jan paid $80,000 as a down payment on the house they bought for $198,000. He stated that his monthly mortgage payment was $1100, which he paid for two and one-half years, but that he received none of the equity when it was sold following the divorce from Jan. Appellant owed $19,000 on a motorcycle he bought in 2003 and had paid $2200 for its enclosed trailer. He stated that his gun collection was worth $8000; his jewelry was worth $1000; and an ATV four wheeler was worth $2500. He stated that he had approximately $3000 in his checking account and $29,000 in a savings account, $15,000 of which came from a settlement following his involvement in a motor vehicle accident in 2004. Appellant earned $124,392.90 in 2001; $117,753.73 in 2002; $112,416 plus $21,336 in 2003 (he had two W-2 forms because Aerojet purchased Atlantic Research Corporation); and $139,431.46 in 2004 plus $1050 from teaching as an adjunct professor at SAU-Tech for one semester. He had contributed $90,000 to his 401K plan since his divorce from appellee, and it was currently valued at approximately $162,000. Appellant stated that after deductions his monthly income is $2536 and that his monthly expenses total $2070.76. Appellant stated that now that two of appellee's children are grown, appellee no longer has an excuse for not getting an education and that the parties' fourteen-year-old daughter could be left without supervision. Appellant also testified that there were online classes that appellee could take. He also pointed out that appellee has no health problems or disabilities.

In a modified decree entered on June 2, 2005, the Ouachita County Circuit Court reduced appellant's monthly alimony obligation to $950 and increased his weekly child-support obligation to $274. The trial court made the following findings:

> The evidence confirms that since the divorce of the parties, plaintiff and the minor child have moved to Cecil County, Maryland, and that plaintiff has remained with the same employer, ATK Elkton, LLC, and presently has an annual wage of approximately $32,000.00. At the time of the divorce, plaintiff was earning less than $20,000.00, and her future employment was in doubt. Plaintiff has purchased a comfortable home in Elkton, Maryland, and it would appear that her financial situation has improved considerably since the date of the divorce.
>
> The Court further finds that at the time of the divorce, plaintiff had custody of two minor children from a previous marriage who have both since become adults. As a result, there is no doubt but that the financial needs of the plaintiff have been significantly reduced.
>
> The Court further finds that defendant has continued to work for the same employer since the divorce and has experienced a considerable increase in wages, as has the plaintiff. The Court finds that the defendant continues to have the ability to pay alimony and his obligation should not be terminated.

A trial judge's decision whether to award alimony is a matter that lies within his or her sound discretion and will not be reversed on appeal absent an abuse of that discretion. *Davis v. Davis*, 79 Ark. App. 178, 84 S.W.3d 447 (2002). The purpose of alimony is to rectify economic imbalance in the earning power and the standard of living of the parties to a divorce in light of the particular facts of each case. *Harvey v. Harvey*, 295 Ark. 102, 747 S.W.2d 89 (1988). The primary factors that a court should consider in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. *Id.* The trial court should also consider the following secondary factors: (1) the financial circumstances of both parties; (2) the amount and nature of the income, both current and anticipated, of both parties; (3) the extent and nature of the resources and assets of each of the parties; (4) the earning ability and capacity of both parties. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998). The amount of alimony should not be reduced to a mathematical formula because the need for flexibility outweighs the need for relative certainty. *See Mitchell v. Mitchell*, 61 Ark. App. 88, 964 S.W.2d 411 (1998).

On appeal to this court, appellant specifically argues that:

> The judge abused its discretion when ordering alimony to continue *indefinitely* at a lower, but quite substantial rate — despite overwhelming evidence that after James Valetutti paying almost a quarter million dollars in spousal plus child support in the seven years since their ten-year marriage ended, Ms. Valetutti no longer requires alimony, because her needs are substantially decreased, while her prosperity continues to steadily increase, due to: 1) having only one minor child, instead of three, now at home; 2) more education; 3) higher pay from better employment; 4) greater employment benefits; 5) fruits of her fourth marriage's Divorce Decree; 6) greater personal income; 7) better earnings potential; with, 8) considerably less debt; and 9) better credit.

Appellant further argues that it is no longer reasonable or equitable for appellee to receive spousal support that she does not need. He argues that circumstances have changed significantly since their 1998 divorce and the 1999 appeal. Appellant argues that "Ms. Valetutti, with help, has laudably eclipsed her previous circumstances to defy the Arkansas Court of Appeals' 1999 prediction that '. . . her opportunities for advancement in education and income were limited.' " He lists the following "fruits" of the parties' divorce decree that went to appellee: (1) over $51,000 from his 401K; (2) 50% of his pension, with 100% retention of her pension; (3) over $4000 in her relocation expenses paid by him; (4) all the marital home's furniture and half its equity; (5) his former $7000 gun collection that she sold; (6) over $2000 in income tax refunds plus $2500 from cashed bonds; (7) debt-free end to her fourth marriage with all credit-card debts going to him; (8) medical and dental insurance he provides for their daughter; and (9) $1500 per month alimony (over $108,000 at filing), plus $800 per month child support. Appellant also argues that his "reliable and lucrative" alimony payments may have deterred appellee's remarriage since she has not remained unmarried for very many consecutive years. Appellant maintains that "equity in this case cries for a cessation of alimony." He argues that "[a]limony under these circumstances is practically enslavement, a form of involuntary servitude the Court forces Mr. Valetutti to perform on behalf of his former spouse." Finally, appellant contends that the alimony in this case has become almost penal in nature.

■ While we sympathize somewhat with appellant's position, upon de novo review, we simply cannot hold that the trial court abused its discretion. The trial court's findings suggest that it

looked to both appellee's improved financial condition and appellant's ability to pay. The fact that appellee's financial situation had "improved considerably" and that her financial needs had been "significantly reduced" caused the trial court to reduce appellee's alimony by more than thirty percent. Although we find no cases where alimony has been ordered indefinitely for such a relatively short-term marriage, it is not prohibited. Presumably, it has been thought that the need for flexibility outweighs the corresponding need for relative certainty. *See Russell v. Russell*, 275 Ark. 193, 628 S.W.2d 315 (1982); *Mitchell, supra*. Our supreme court has refused to set a bright-line limitation on alimony, and we will not either.

Affirmed.

VAUGHT and CRABTREE, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
OCTOBER 4, 2006

TERRY CRABTREE, Judge, dissenting. I would grant the Petition for Rehearing, and then terminate alimony as requested by the appellant. It is conceded that the appellant continues to have the ability to pay alimony, but in my opinion, the appellee no longer has the need for the alimony. *Harvey v. Harvey,* 295 Ark. 102, 747 S.W.2d 89 (1988).

The parties to this appeal were married in 1988 and divorced in 1998, a ten-year marriage and the fourth marriage of the appellee. The appellant appealed from the divorce decree entered in this case asserting, among other things, that the trial court erred in awarding the appellee permanent alimony. The divorce decree provides "In addition to the $650.00 per month, Plaintiff is awarded $1500.00 per month permanent alimony. Alimony shall continue until the death of the payee, payor, the remarriage of the payee, other statutory limitations or further orders of this court." Obviously, the trial court considered the alimony awarded as being permanent, even though it may be modified at any time upon showing of changed circumstances and the equities of the parties. *Herman v. Herman,* 335 Ark. 36, 977 S.W.2d 209 (1998). This court affirmed the trial court's award of alimony in the amount of $1500.00 per month.

On December 9, 2004, the appellant filed a petition to modify or terminate alimony. The trial court, finding changed circumstances, reduced appellant's alimony from $1500.00 per month to $950.00 per month, and increased his child support from $200.00 per month to $274.00 per month. The appellant appeals that decision to this court. This court affirmed the decision modifying alimony in *Valetutti v. Valetutti*, 95 Ark. App. 83, 234 S.W.3d 338 (2006). The appellant has filed a petition for rehearing which is before this court at this time. I would grant the petition.

The divorce decree awarded the appellee $200.00 per month child support; $1500.00 in alimony; all the furniture in her possession; one half the equity of a home in Maryland of which she was required to pay the first mortgage of $1,177.00, while the appellant was required to pay the second mortgage in the amount of $650.00 per month. The appellee was allowed to live in the house until it was sold. Further, the appellee was awarded one-half of the appellant's retirement account with Thiokol Corporation, approximately $51,000.00, and she received her entire retirement fund. She was awarded $2,500.00 representing one-half of a gift given to appellant's son. The appellee was awarded her costs in moving back to Maryland in the amount of $4,199.69, which had been paid out of the parties' tax refund. The balance of the tax refund was awarded to the appellee in the amount of $2,167.31. The appellant was required to pay the debt on the parties' credit cards, and any debt owed for medical expenses that remained outstanding. Further, the appellant was to pay all costs of transportation to visit with his daughter, pay for health insurance for the minor child of the parties, and pay for a life insurance policy for $150,000.00 on himself for appellee's benefit.

At the time of the divorce the appellee was earning less than $20,000.00 annually. At the time of the hearing on the petition to modify or terminate alimony, she was earning approximately $34,000.00 a year, and her two sons from a prior marriage no longer lived with her. The trial court stated, in its order resulting from the petition to modify or terminate, that the appellee "has purchased a comfortable home in Elkton, Maryland, and it would appear that her financial situation has improved considerably since the date of the divorce." The appellee managed to put at least $1,100.00 per year into a 401k account from the year following the divorce until the hearing.

In my opinion, the appellee's need for additional alimony has ended. After the divorce, the appellant moved back to Mary-

land basically debt free and with a substantial amount of money. She went to school and took accounting classes, and as a result, has obtained a higher salary. She could increase her salary again by going back to school for another two years. She certainly is not destitute, but enjoys a comfortable lifestyle. I would terminate the alimony now, or no later than 2010, which would give the appellee sufficient time to obtain the necessary education to increase her salary once again.

I would grant the petition for rehearing.

BIRD, J., agrees.

David WEEKS *v.* Kay WILSON

CA 05-978 234 S.W.3d 333

Court of Appeals of Arkansas
Opinion delivered April 19, 2006

Chisenhall, Nestrud & Julian, P.A., by: *Denise R. Hoggard*, for appellant.

Southern & Allen, by: *Byron S. Southern*, for appellee.

JOHN B. ROBBINS, Judge. Appellant David Weeks and appellee Kay Wilson were divorced on July 12, 2000, after a sixteen-year marriage. There were no children born of the marriage. The divorce decree divided the parties' assets and debts, and ordered Mr. Weeks to pay monthly alimony of $400.00 for a period of five years. On January 5, 2005, Ms. Wilson filed a motion seeking an extension and increase in alimony on the basis that there had been a material change in circumstances since the entry of the divorce decree. After a hearing, the trial court found that Ms. Wilson met her burden of proving a material change in circumstances, and on May 20, 2005, ordered Mr. Weeks to pay monthly alimony of $500.00 for an indefinite duration.

Mr. Weeks now appeals from the trial court's May 20, 2005, order that modified his alimony obligation. He argues that the trial court erred in denying his motion to dismiss because Ms. Wilson failed to prove a material change in circumstances to justify the modification. Mr. Weeks further argues that the trial court erred in failing to consider Ms. Wilson's failure to rehabilitate herself during the five-year period following the divorce. We affirm.

Modification of an award of alimony must be based on a change of circumstances of the parties. *Herman v. Herman*, 335 Ark. 36, 977 S.W.2d 209 (1998). The burden of showing a change in circumstances is always upon the party seeking the change in the amount of alimony. *Hass v. Hass*, 80 Ark. App. 408, 97 S.W.3d 424 (2003). The primary factors to be considered in making or changing alimony are the need of one spouse and the ability of the other spouse to pay. *Id.* We review domestic-relations cases de novo, but we will not reverse a finding of changed circumstances warranting a modification of alimony unless clearly erroneous. *See id.*

Ms. Wilson testified that she is fifty-six years old and is five years older than Mr. Weeks. She has lived in an apartment for the

past five years and pays $735.00 in rent, plus utilities. Ms. Wilson stated that she plans to move to another location because she can no longer cope with climbing the stairs to her apartment.

Ms. Wilson stated that at the time of the divorce she was working as a massage therapist, and that she also worked as a receptionist for a chiropractor. In December 2000, Ms. Wilson began working as a course coordinator for the University of Arkansas for Medical Sciences (UAMS), and has been employed there ever since.

Ms. Wilson testified that she was diagnosed with rheumatoid arthritis and osteoarthritis in November 2000. As a result, she experiences pain and swelling in her knees, hands, and wrists, for which she takes medication. Ms. Wilson stated that the pain and swelling keep her from being active, and that she never has a pain-free day.

Ms. Wilson had been earning $50.00 per hour as a massage therapist, and her rate of pay at UAMS is $11.18 per hour. She testified that she works about thirty hours per week and that due to the deterioration of her health, "I can't work anymore than I'm doing." Ms. Wilson stated that she has not considered seeking other or additional employment "because I have an excellent situation because my boss is so flexible and very understanding of my disease." Ms. Wilson reported $740.00 of income from doing massage therapy in 2000, but has since made no meaningful earnings from that occupation.

Ms. Wilson indicated that her current net pay is $325.00 per week and that she gets a two-percent raise each year. In her affidavit of financial means prepared during the pendency of the divorce, Ms. Wilson claimed weekly net pay of $386.44, which included an estimated $150.00 per week for massage therapy. Ms. Wilson testified that she was healthy at the time of the divorce, and that due to her current health problems and limitations she cannot make ends meet without alimony.

Dr. Columbus Brown, a rheumatologist, testified that he has examined Ms. Wilson on multiple occasions. He stated that Ms. Wilson has a severe form of rheumatoid arthritis, which if left untreated would result in deformities and debilitation. Dr. Brown testified that the disease can be controlled with medicine and that Ms. Wilson has done well on her current drug treatments. However, he gave the opinion that Ms. Wilson cannot engage in massage therapy because if she had to do manual work with her hands on a daily basis, she would suffer from frequent flare-ups

from her rheumatoid arthritis. Dr. Brown did not think Ms. Wilson could ever return to performing massage therapy, although he agreed that she is capable of performing her full-time employment at UAMS.

Dr. Ricardo Zuniga began treating Ms. Wilson on January 15, 2002, and he stated the following in a letter dated February 6, 2004:

> I am treating her for rheumatoid arthritis, a chronic inflammatory condition that affects especially her hands and knees. Currently, this patient has very active disease involving her hands, which produces severe pain and limitation in the range of motion in her joints, especially in her hands. This is a chronic condition that will persist, however I am offering her the treatment recommended for such cases, and her response has not been the best to those medications. I can not predict her future response, but up to now the medications used failed to control her condition.
>
> I understand that Ms. Wilson works or used to work part-time giving massages. To a reasonable medical certainty, I consider that due to the inflammatory condition involving the small joints in her hands, using her hands to give massages would be very difficult/painful to do, and in addition it would increase the stress in the already inflamed joints; for that reason I consider that she can not perform massage due to her active inflammatory process. At this time I can not predict her future response to medications, for that reason I can not say now if such inability will be permanent or not.

Mr. Weeks testified on his own behalf and stated that he has been employed as a conservationist for the federal government for the past twenty years. In his affidavit of financial means prepared in anticipation of the divorce, Mr. Weeks claimed a weekly net pay of $1076.88, and at the most recent hearing he stated that his annual gross income had increased by $20,000.00 since the time of the divorce. Mr. Weeks indicated that his raises were anticipated and were consistent with those he received prior to the divorce.

In the order modifying Mr. Weeks' alimony obligation, the trial court made the following findings:

> At the time of entry of the Decree of Divorce, the Court had hoped that Plaintiff's massage therapy business would substantially increase her income. The Court considered that since entry of the

> Decree, Plaintiff was diagnosed with rheumatoid arthritis which precluded her from performing massage therapy. The Court also considered other factors, including but not limited to, that Plaintiff felt she was unable to work beyond her full-time clerical job because of pain and fatigue, and the Defendant's increase in his income since the entry of the Decree.
>
> Plaintiff has met her burden of proving a material change in circumstances and as such warrants a continuation of alimony as well as an increase therein. Effective for entry of this Order, Defendant shall hereafter pay Plaintiff the sum of $500 per month as alimony, such alimony to continue indefinitely.

Mr. Weeks argues on appeal that the trial court erred in converting the alimony award from a specified term to an indefinite term and in increasing the amount. He contends that Ms. Wilson failed to establish a material change in circumstances to support such a modification.

Mr. Weeks does not dispute the fact that Ms. Wilson was diagnosed with rheumatoid arthritis and cannot return to massage therapy, but disputes that she was expected to earn more money as a massage therapist than she currently earns at her full-time job. Mr. Weeks notes that when Ms. Wilson was diagnosed in 2000, her total gross income from massage therapy was $740.00. Since then she has earned no reportable income from massage therapy. While Ms. Wilson charged $50.00 per hour for massage therapy, Mr. Weeks asserts that this did not take into account overhead expenses or taxes, and further submits that the availability of full-time work in that field was in question. Given the uncertainty related to Ms. Wilson's expectation of income from massage therapy, Mr. Weeks contends that her inability to perform that job does not amount to a change in circumstances.

Mr. Weeks also contests the severity of Ms. Wilson's condition. While Ms. Wilson subjectively reported pain and fatigue, Mr. Weeks notes that Dr. Brown testified that her disease is in remission. Dr. Brown stated that in January 2005 he found Ms. Wilson to be without fatigue or joint pain. Given her physical abilities and intellectual capacity, Mr. Weeks argues that Ms. Wilson had ample time to consider other employment and rehabilitate herself after the divorce, but failed to do so.

Finally, Mr. Weeks takes issue with the trial court's pronouncement at the conclusion of the hearing that Ms. Wilson's income is substantially less than it was five years ago. Mr. Weeks asserts that this finding is incorrect, noting that her 2000 tax return

showed income of $17,120, while her 2004 tax return showed income of $21,641. Mr. Weeks contends that any earnings Ms. Wilson realized from massage therapy at the time of divorce were nominal at best, and that her income has gradually increased since then. Mr. Weeks further argues that his gross annual salary increase of $20,000 cannot be considered a change in circumstances because such increase was anticipated at the time of the divorce.

Mr. Weeks compares this case to *Russell v. Russell*, 281 Ark. 473, 665 S.W.2d 271 (1984). In that case the appellant was awarded alimony for a definite term, and subsequently petitioned the trial court to modify its original decree by continuing the allowance of alimony. The trial court denied her petition based in part on the factors that appellant's financial circumstances were about as had been expected and the appellant had made no effort to rehabilitate herself and secure employment, and the supreme court affirmed. In the present case, Mr. Weeks contends that modification of alimony was not justified because Ms. Wilson's income was about what was anticipated at the time of divorce, and at any rate her financial condition resulted from her failure to pursue more profitable employment.

We hold that the trial court did not clearly err in finding a material change in circumstances, and in increasing the alimony to $500.00 per month for an indefinite period. We agree with Mr. Weeks that the evidence did not support the trial court's comment at trial that Ms. Wilson's income had substantially decreased. However, the trial court's written order does not include or rely on this finding. The order instead recites that Ms. Wilson was diagnosed with rheumatoid arthritis that precludes her from performing massage therapy, and that she cannot perform any additional work due to pain and fatigue. These findings are supported by the evidence and amount to a change in circumstances justifying a modification of alimony.

While Dr. Brown testified that Ms. Wilson's rheumatoid arthritis was in remission and she was responding to treatment, he also characterized her condition as "severe" and stated that she will never be able to return to massage therapy. Moreover, Ms. Wilson testified that her life is very limited due to the pain and swelling caused by her disease, and that she is physically unable to work more than her thirty-hour weekly shift at UAMS, where she is accommodated well by her boss due to his understanding of the disease. The trial court found Ms. Wilson to be a credible witness, and we defer to the trial court's superior position to determine the

credibility of the witnesses and the weight to be given their testimony. *See Akins v. Mofield*, 355 Ark. 215, 132 S.W.3d 760 (2003).

While it is uncertain how much income Ms. Wilson could have earned as a massage therapist, the trial court found that her arthritis not only prevented her from performing that job, but also limited her potential employment in other fields. In assessing alimony the trial court considers a variety of factors, including the health and medical needs of the parties, as well as their earning capacities. *See Boyles v. Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980). In this case there was evidence that due to Ms. Wilson's deteriorating health, her earning capacity was significantly less than anticipated at the time of the divorce, and that any failure of occupational rehabilitation was thus beyond her control. The trial court ruled that Ms. Wilson established the need for an increase in alimony, as well as Mr. Weeks' ability to pay, and we affirm the trial court's decision.

Affirmed.

HART and GLOVER, JJ., agree.

Phillip CLAIRDAY *v.* The LILLY COMPANY, Employer, Royal Alliance Insurance Company, Carrier

CA 05-696 234 S.W.3d 347

Court of Appeals of Arkansas
Opinion delivered April 19, 2006

[Rehearing denied May 24, 2006.*]

* GLADWIN, GRIFFEN, VAUGHT, and CRABTREE, JJ., would grant rehearing.

John Bartlett, for appellant.

Roberts Law Firm, P.A., by: *Jeremy Swearingen* and *Emily A. Neal*, for appellees.

OLLY NEAL, Judge. This is an appeal from the Arkansas Workers' Compensation Commission's (Commission) decision that appellant, Phillip Clairday, failed to prove by a preponderance of the evidence that he was entitled to temporary-total-disability compensation after April 24, 2003. For reversal, appellant argues that there is no substantial basis supporting the Commission's findings that the surgery he requested was not causally related to his April 30, 2002, work-related injury. We reverse and remand.

The facts are these. Appellant worked for appellee Lilly as a forklift technician, mechanic, and delivery driver. On April 30, 2002, while performing employment services, appellant was injured when he reached down to release a boom on a chain and it pulled him "straight back down," immediately causing him pain in his lower back. Appellant reported the incident and was seen by a doctor on May 1. The injury was accepted as compensable and medical benefits were awarded.

During his treatment, appellant saw numerous doctors. In reversing the administrative law judge and denying appellant's claim for additional temporary-total disability, the Commission stated that it gave greater weight to the opinions of Drs. Kornblum, Sorenson, Schnapp, Gera, and Moore, stating:

> The Full Commission recognizes that the claimant continued to receive some pain management after the end of the claimant's healing period on April 24, 2003. Nevertheless, the persistence of pain does not prevent a finding that the claimant's healing period is over. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The Full Commission also recognizes Dr. Eubanks' statement in February 2004, nearly two years after the compensable injury, that there may have been a "misdiagnosis" and that the claimant might need surgery. This speculative opinion by Dr. Eubanks was never confirmed in the record. The Full Commission attaches great weight in the present matter to the expert opinions of Dr. Kornblum, Dr. Sorenson, Dr. Schnapp, Dr. Gera, and Dr. Moore. None of these physicians opined that the claimant remained within his healing period or that there had been a misdiagnosis, and Dr. Schnapp expressly opined that the claimant had reached maximum medical improvement [MMI] as of April 24, 2003. The Full Commission reverses the administrative law judge's award of temporary total disability compensation after April 24, 2003.

This appeal followed. In reviewing decisions of the Commission, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms the decision if it is supported by substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Geo Specialty, supra.* It is the Commission's function to determine witness credibility and the weight to be afforded to any testimony; the Commission must weigh the medical evidence and, if such evidence is conflicting, its resolution is a question of fact for the Commission. *Searcy Indus. Laundry, Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003). The Commission's resolution of the medical evidence has the force and effect of a jury verdict. *Jim Walter Homes v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003).

Our supreme court has said that "temporary total disability" is that period within the "healing period" in which the employee suffers a total incapacity to earn wages. *Fred's Inc., v. Jefferson*, 361

Ark. 258, 206 S.W.3d 238 (2005). Our statutes define "healing period" as "that period for healing of an injury resulting from an accident." Ark. Code Ann. § 11-9-102(12) (Repl. 2002). The healing period ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition; the determination of when the healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by substantial evidence. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

We hold that substantial evidence does not support the conclusion of the Commission. The Commission stated that it gave greater weight to the opinions of Drs. Kornblum, Sorenson, Schnapp, Gera, and Moore, and it was correct in its assertion that none of them opined that appellant remained within his healing period or that there had been a misdiagnosis. However, the record does not reflect that any of these doctors, other than Dr. Schnapp, gave an opinion or were asked to give an opinion as to whether appellant had reached the end of his healing period. Nevertheless, Dr. Moore, a neurosurgeon, opined, even after it was determined that appellant had reached MMI, that "an EMG/Nerve Conduction Velocity Study [NCV] might be of some value as well as myelographic survey with contrasted CT if this has not already been done[.]" These tests are diagnostic in nature.[1] We recognize that 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

[1] The EMG/NCV tests the nerves and muscles of the entire lower extremity. The EMG portion of the test is used to record the electrical activity in the muscles and can diagnose diseases of the nerves and muscles. Dr. Matthew Rockett, D.P.M., *Electromyography (EMG)/Nerve Conduction Velocity (NCV)*, *at*, http://podiatrynetwork.com; *see also*, THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY (West 1987). The NCV portion of the test evaluates the health of the peripheral nerve by recording how fast electrical impulse travels through it. Dr. Matthew Rockett, D.P.M., *Electromyography (EMG)/Nerve Conduction Velocity (NCV)*, *at*, http://podiatrynetwork.com. A myelogram is done to detect narrowing of the spinal canal or abnormalities of the nerves branching off the canal, which may be caused by spinal stenosis, herniated disc, a tumor or infection; it is usually accompanied by a CT scan and may help to verify the cause of pain that could not be found by other imaging methods. *Id.*; *see also* THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY (West 1987).

and furthermore that the Commission has the authority to accept or reject medical opinions and determine their medical soundness and probative force. *See Brotherton v. White River Area Agency*, 93 Ark. App. 432, 220 S.W.3d 219 (2005); *Jim Walter Homes v. Beard, supra*. The Commission here, however, did not reject Dr. Moore's medical opinion that appellant needed further medical treatment; instead, it specifically relied on him and gave great weight to his expert opinion. As such, we hold that the Commission erred in determining that appellant failed to prove by a preponderance of the evidence that he was entitled to temporary-total-disability compensation after April 24, 2003, as he clearly was in need of the additional medical testing as recommended by Dr. Moore's expert opinion on which the Commission relied.

Reversed and remanded.

HART, BIRD, GLOVER and ROAF, JJ., agree.

GLADWIN, GRIFFEN, VAUGHT and CRABTREE, JJ., dissent.

ROBERT J. GLADWIN, Judge, dissenting. I respectfully dissent. In reversing the Commission's opinion, the majority has taken on the role of fact finder. The majority's brief recitation of the facts is adequate. Our standard of review is clear. In reviewing the decisions of the Commission, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms the decision if it is supported by substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Geo Specialty, supra*. It is the Commission's function to determine witness credibility and the weight to be afforded to any testimony. *Wal-Mart Stores, Inc. v. Stotts*, 74 Ark. App. 428, 58 S.W.3d 853 (2001). The Commission must weigh the medical evidence and, if such evidence is conflicting, its resolution is a question of fact for the Commission. *Searcy Indus. Laundry Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003).

The majority holds that substantial evidence does not support the Commission's conclusion that appellant had reached maximum medical improvement. In doing so, the majority simply

disregarded Dr. Schnapp's opinion that appellant had reached the end of his healing period on April 24, 2003. No other doctor indicated that appellant had not reached the end of his healing period. It is well settled that the mere persistence of pain does not prevent a finding that the healing period has ended so long as the underlying condition has stabilized. *See Georgia-Pacific Corp. v. Dickens*, 58 Ark. App. 266, 950 S.W.2d 463 (1997).

Dr. Schnapp's April 24, 2003 report states, "I believe that at the present time, he has reached maximum medical improvement. I would like to have a brief function capacity assessment, and after that, I will come up with a permanent physical impairment for him. I doubt that he will be able to lift 150 pounds lightly like he claims that he has to do at work and I told him so. I will release him to go back to work with limitations next week." On May 23, 2003, Dr. Schnapp gave appellant a five percent permanent physical impairment rating to the body as a whole. These reports clearly support the Commission's findings.

The majority relies on the report of Dr. Moore to find that appellant had not reached maximum medical improvement. However, Dr. Moore does not state that appellant had not reached maximum medical improvement. In his report, Dr. Moore states, "I think that if Dr. Eubanks is his official physician neurosurgeon that a repeat diskogram as recommended is within his sphere of control. It might very well give some further light on this patient's problems, although I tried to point out to the patient that when the classic pattern of findings is at variance the success rate for corrective surgery falls precipitously. I do think that an EMG/Nerve Conduction Velocity Study might be of some value as well as [a] myelographic survey with contrasted CT if this has not already been done . . . ."

Assuming that Dr. Moore's statement meant that appellant had not reached maximum medical improvement, and clearly that is questionable, it was within the Commission's province to give greater weight to Dr. Schnapp's opinion that appellant's healing period had indeed ended. 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). Furthermore, the Commission has the authority to accept or reject medical opinions and determine their medical soundness and probative force. *See Brotherton v. White River Area Agency on Aging*, 93 Ark. App. 432, 220

S.W.3d 219 (2005). Dr. Schnapp's unequivocal opinion that appellant had reached maximum medical improvement on April 24, 2003, constituted substantial evidence to affirm the Commission's decision.

GRIFFEN, VAUGHT, CRABTREE, JJ., join.

Rodney RICE, Pat Rice, Hubert Moore, and Ann Moore *v.* WELCH MOTOR COMPANY

CA 05-1136 234 S.W.3d 327

Court of Appeals of Arkansas
Opinion delivered April 19, 2006

Graddy & Adkisson, LLP, by: *William C. Adkisson*, for appellants.

Eudox Patterson, for appellee.

OLLY NEAL, Judge. This case concerns a dispute over a strip of land along appellants' and appellee's common

border. The trial judge quieted title to the property in appellee, and appellants now appeal from that ruling. We affirm.[1]

The parties are long-time owners of adjoining lots on Lake Catherine in Garland County. Appellants' deed grants them 75 feet of road frontage on the north and 150 feet of lake frontage on the south. To their west is a lot owned by appellee, Welch Motor Company; appellee's deed grants it 204 feet of road frontage on the north and 278 feet of lake frontage on the south. Along their common border, there is a small indentation in the land, a valley of sorts, that runs downhill from the road to a small cove on the lake. This valley contains the fifteen-foot strip at issue.

Uncertainty over ownership of the strip has its origins in two 1930s deeds to the parties' predecessors. Those deeds contain fifteen-foot overlapping conveyances. However, no active dispute arose until 2003 when appellee commissioned a survey that reflected it as the owner of the area in question. According to appellee, when appellant Hubert Moore expressed dissatisfaction with the survey, it filed the present quiet-title action. Appellants answered and counterclaimed, asserting their own claim to the area by virtue of adverse possession. Later, they obtained a survey depicting them as owners of the fifteen-foot strip.

On April 8, 2004, the case was tried before the circuit judge sitting as fact-finder. After hearing the testimony of over a dozen witnesses, viewing more than twenty exhibits, and visiting the property in question, the judge ruled that 1) the deed in appellee's chain of title, which conveyed the fifteen-foot strip, was the superior deed, and 2) appellants did not establish their claim for adverse possession. The judge then entered an order quieting title to the disputed strip in appellee as per appellee's survey. Appellants filed a timely notice of appeal and now argue that the trial court erred in: 1) finding that they did not establish their adverse-possession claim; 2) adopting the legal description from appellee's survey; 3) finding that the deed in appellee's chain of title was superior.

Traditional equity cases, such as quiet-title actions, are reviewed de novo on appeal. *See White River Levee Dist. v. Reidhar*, 76 Ark. App. 225, 61 S.W.3d 235 (2001). However, we will not reverse the trial court's findings of fact unless they are clearly

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[1] A prior appeal in this case was dismissed for lack of an appealable order. *Rice v. Welch Motor Co.*, No. CA04-1063 (Ark. App. June 8, 2005) (not designated for publication).

erroneous. *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.*

Deed Superiority

Although appellants present the issue regarding deed superiority as their third point on appeal, we believe that logic dictates that we address this issue first in order to establish which party held paramount legal title. The pertinent facts are as follows.

The property in question lies in the Southwest Quarter of the Southwest Quarter of Section 22 in Garland County, which will hereafter be referred to as "the forty." The land in the forty was acquired by E.O. Kilpatrick in 1928, and thereafter, he began selling it in lots. A lot contiguous to the eastern line of the forty was sold to a man named Guthrie, and a lot much farther west was sold to a man name Willingham. The area between those two lots would eventually be sold to appellants' and appellee's predecessors.

The first deed in appellee's chain of title was from Kilpatrick to D.D. Glover. The deed's point of beginning is along the northern road, 110 feet west of the forty line. The description then proceeds as follows:

> Magnetic south 6 degrees and 30 minutes, West 375 feet to a White Oak about 14 inches in diameter on the Flood Line of Lake Catherine said tree marked with a blaze on four sides, thence in a westerly direction along the flood line 278 feet to the south east corner of Willingham's Property said corner being marked by an Iron Stake, thence North 27 degrees East 4 chains and 55 links (Equals 303.3 feet) to the North East Corner of Willingham['s] property, and thence to center of the road, thence east along the center of the road 204 feet to the point of beginning.

This deed was recorded in 1939, although it stated that it was a duplicate of a deed executed in 1934.

The relevant deed in appellants' chain of title was from Kilpatrick to Lloyd Rhodes, conveying the western portion of what is now appellants' lot (the eastern portion had previously been conveyed to Ed Davis, but that deed is not pertinent here). Its description reads:

> Pt. of SW SW 1/4 Sec. 22 Twp. 3 S. R. 18 West, more minutely described as following, Commencing at a point 200 feet Westerly

> from the East line of said forty and at the Ed Davis S.W. Corner on lake; thence northerly along flood line of lake *about 110 feet to center of the valley to the D.D. Glover lot corner*; thence northerly about 470 feet to center of road; thence East along center of road fifty feet to corner of Ed Davis Lot; thence South about 475 feet to place of beginning.

(Emphasis added.) This deed was recorded in 1936.

Although it is difficult to tell from the bare descriptions, the above conveyances overlap by fifteen feet on their northern ends. Appellants argued at trial that the deed of their predecessor, Rhodes, contained the paramount grant of the fifteen-foot strip because it was recorded first. The trial court ruled, however, that the reference in the Rhodes deed to "the D.D. Glover lot corner" showed that Kilpatrick and Rhodes had actual knowledge of the Glover conveyance and, thus, the Glover deed, although recorded later, took priority.

Generally, an instrument in writing that affects real property shall not be valid against a subsequent purchaser unless it is filed of record in the county where the real estate is located. *See Killam v. Tex. Oil & Gas Corp.*, 303 Ark. 547, 798 S.W.2d 419 (1990); *Smith v. Parker*, 67 Ark. App. 221, 998 S.W.2d 1 (1999); *see also* Ark. Code Ann. § 14-15-404(b) (Repl. 1998), which provides:

> No deed, bond, or instrument of writing for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, made or executed after December 21, 1846, shall be good or valid against a subsequent purchaser of the real estate for a valuable consideration without actual notice thereof or against any creditor of the person executing such an instrument obtaining a judgment or decree which by law may be a lien upon the real estate unless the deed, bond, or instrument, duly executed and acknowledged or proved as required by law, is filed for record in the office of the clerk and ex officio recorder of the county where the real estate is situated.

However, if a subsequent purchaser has actual notice of a prior unrecorded deed, he takes subject to it. *See Killam, supra*; *see also Wasp Oil, Inc. v. Ark. Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983); *Henderson v. Ozan Lumber Co.*, 216 Ark. 39, 224 S.W.2d 30 (1949); *Skelly Oil Co. v. Johnson*, 209 Ark. 1107, 194 S.W.2d 425 (1946). A subsequent purchaser will be deemed to have actual notice of a prior

interest in property if he is aware of such facts and circumstances as would put a person of ordinary intelligence and prudence on such inquiry that, if diligently pursued, would lead to knowledge of the prior interest. *Killam, supra.* This type of notice must be enough to excite attention or put a party on guard to call for an inquiry. *Id.* Whether one buying land has actual notice of another's interest in the land is a question of fact. *See Smith, supra.*

We note first that Rhodes's grantor, Kilpatrick, clearly had knowledge of the prior deed to Glover because Kilpatrick was Glover's grantor. Moreover, we do not believe that the trial court clearly erred in ruling that Rhodes had notice of the Glover deed as well. Rhodes's deed, in establishing its dimensions, makes reference to "110 feet to center of the valley to the D.D. Glover lot corner." Rhodes was thus notified that the property adjacent to his had been conveyed to Glover, that Glover's lot corner was in the center of the valley, and that, to a significant extent, his (Rhodes's) interest was defined by the location of Glover's boundary. This information was sufficient to put Rhodes on "such inquiry that, if diligently pursued, would lead to knowledge of the prior interest." *Killam, supra.* By either calling for a copy of Glover's deed or simply making an inquiry to Kilpatrick, Rhodes could have discovered the existence of the prior holding. *See, e.g., Killam, supra,* where language in a "wild deed" indicating a possible prior interest put a subsequent purchaser on notice.

Appellants contend, however, that the Glover deed's description was inadequate to convey any notice to subsequent purchasers. Yet, the cases they cite in support of this argument — *Bowlin v. Keifer,* 246 Ark. 693, 440 S.W.2d 232 (1969); *Turrentine v. Thompson,* 193 Ark. 253, 99 S.W.2d 585 (1936); and *Evans v. Russ,* 131 Ark. 335, 198 S.W. 518 (1917) — are distinguishable in that they contain descriptions from which it is wholly impossible to locate the land in question. The court in *Turrentine* went so far as to observe that the descriptions in that case could not even identify the property as being in any particular county or state. The description in the Glover deed, by contrast, furnishes several keys for locating the property. It places the lot in a specific forty-acre parcel, provides an exact beginning point, states the dimensions of the lot size, and references various monuments. In light of these factors, we find no error on this point.

Adverse Possession

Appellants argue next that the trial court erred in ruling that they failed to prove adverse possession of the disputed area. To prove the common-law elements of adverse possession, the claimant must show that he has been in possession of the property continuously for more than seven years and that his possession has been visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the true owner. *Reidhar, supra.* It is ordinarily sufficient proof of adverse possession that the claimant's acts of ownership are of such a nature as one would exercise over his own property and would not exercise over the land of another. *Id.* Whether possession is adverse to the true owner is a question of fact. *Id.*[2]

At trial, appellants presented proof of various activities that they conducted in the disputed area and argued that they, rather than appellee, exercised control and dominion over the area. While we agree that appellants presented some evidence on this point, we also note that appellee presented similar evidence on its behalf. Its witnesses, which included the son of one of appellants' predecessors in title, testified that it had always been understood that the disputed area was under appellee's ownership. Other witnesses testified that appellee (actually, the Welch family) had used and maintained the disputed property. Further, there was evidence that, prior to this dispute, appellants and the Welch family were close friends and that appellants amicably came onto appellee's property at will, thus indicating that appellants' use of the disputed area may have been permissive rather than adverse. *See Reidhar, supra* (recognizing that, generally, occupation of property is not adverse where a claimant has the owner's permission to enter the property).

In any event, this is a case in which there was evidence on both sides of the issue, and, when the evidence is conflicting or evenly poised, or nearly so, the judgment of the trial judge on the question of where the preponderance of the evidence lies is

[2] In 1995, the General Assembly added, as a requirement for proof of adverse possession, that the claimant prove color of title and payment of taxes on the subject property or contiguous property for seven years. *See* Ark. Code Ann. § 18-11-106 (Repl. 2003). Because we are upholding the trial court's ruling that appellants did not prove the common-law elements of adverse possession, it will not be necessary for us to address the statutory requirements.

persuasive. *Belcher v. Stone*, 67 Ark. App. 256, 998 S.W.2d 759 (1999). Further, the genuineness of the witnesses' testimony, which appellants question herein, is a credibility question on which we defer to the trial court. *See id.* Based on these considerations, we decline to reverse on this point.

Use of Appellee's Survey

Finally, we address appellants' claim that the trial court erred when, in its final order quieting title in appellee, it adopted the description contained in appellee's survey. One of appellants' points of error is that the description was recited in the final judgment but not in the trial court's prior letter opinion. However, a trial court is required, in a quiet-title action, to enter a final judgment that specifically describes the boundary between the litigants' properties. *See Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). Further, the fact that the description was not contained in the letter opinion did not prevent the court from placing it into the final judgment. *See Moses v. Dautartas*, 53 Ark. App. 242, 922 S.W.2d 345 (1996) (holding that a final determination of the parties' rights was not made until the entry of judgment).

Appellants also question some of the methods used by appellee's surveyor, R.L. Smith, in establishing the lot boundaries. Without going into the specifics of the survey, we believe it is sufficient to say that there was evidence from which the trial court could have concluded that Smith conducted a studied and commendable effort at establishing the parties' true boundaries, given the confused state of their predecessors' deeds. The credibility of a surveyor is a question for the fact-finder. *See Killian v. Hill*, 32 Ark. App. 25, 795 S.W.2d 369 (1990); *see also Ward v. Adams*, 66 Ark. App. 208, 989 S.W.2d 550 (1999) (deferring to the trial court on the comparison and credibility of surveys). We therefore affirm the trial court's use of the Smith survey.

Affirmed.

BIRD and BAKER, JJ., agree.

Marc Jess HENLEY, Jr. *v.* STATE of Arkansas

CA CR 05-1152 234 S.W.3d 316

Court of Appeals of Arkansas
Opinion delivered April 19, 2006

J. Blake Hendrix, for appellant.

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

LARRY D. VAUGHT, Judge. Marc Jess Henley appeals[1] his convictions following a conditional guilty plea for attempt to manufacture methamphetamine, possession of drug paraphernalia with intent to manufacture, and maintaining a drug premises. On appeal he argues that the trial court erred in its denial of his motion to suppress because the evidence supporting his convictions was discovered after a warrantless search of his home. We agree that the evidence was obtained following an illegal search of Henley's home and should have been suppressed. Accordingly, we reverse and remand.

On the evening of July 21, 2004, Officer Andy Shock of the Faulkner County Sheriff's Office received a call from Investigator Wesley Potts of the Van Buren County Sheriff's Office wanting to talk to Marc Henley about a burglary that occurred in Van Buren County. Potts did not have a warrant, but Shock checked his warrant log and discovered that Henley had a misdemeanor warrant for a failure to appear on a speeding ticket.

Later that night, around 10:00 p.m., Potts and Shock — along with another Van Buren County officer — met at the Eight Mile Store (a convenience store located about a mile from Henley's home). From there, they drove in two separate vehicles to Henley's home, arriving at 10:18 p.m. The officers parked their vehicles in Henley's driveway, behind several other vehicles. After the officers exited their car, armed with flashlights, they looked into the other cars parked in the drive. Shock and Potts then proceeded to the front door of Henley's home. As they approached the door the officers looked into Henley's home through a bay window (although the window had a blind covering it, a section of the blind was damaged allowing officers to see inside the home). The officers observed Henley and a female (later identified as Natalie Bailey) inside the home standing around a pool table.

Once Shock and Potts arrived at the front door, they began knocking and shouting for Henley to come to the door. As Potts

[1] Henley's notice of appeal states that he is appealing "from his conviction for Attempt to Manufacture Methamphetamine, Possession of Drug Paraphernalia with Intent to Manufacture, and Maintaining a Drug Premises." His notice of appeal further states that the "Judgment and Commitment Order was entered on May 25, 2005." However, the judgment and commitment order was actually entered on July 27, 2005. There was a continuance order entered on May 25, 2005. We are satisfied that the date reflected in Henley's notice of appeal was a typographical error, and the fact that the notice of appeal states that Henley is appealing from the judgment and commitment order is adequate to address the merits.

continued knocking on the door, Shock went back to look through the bay window, where he observed Henley and Bailey under the pool table. Meanwhile, the third officer walked around to the back of the residence.

Eventually Henley opened the front door and was placed under arrest on the misdemeanor warrant and was handcuffed. He was then questioned by Potts about the burglary until Potts was satisfied that Henley was not involved in any Van Buren County burglary. However, when Henley opened the door to exit his home, Shock smelled an overwhelming chemical odor that he associated with the processing of methamphetamine. While Henley was being questioned, Bailey also came outside, where she was subjected to a pat-down search. The search revealed a quantity of an illegal substance (later identified as methamphetamine). She responded to the discovery of the secreted black-zippered bag containing methamphetamine by stating "You can't tell Marc I gave it to you. He told me to put it in there. He would kill me if I told you that." At this point the officers asked Henley if he would consent to a search of his home. He refused their request. However, as Henley was being placed in the squad car, he mentioned that he was on probation. Shock then called Kelly Brock, a Faulkner County Probation Officer, who, suspecting narcotic activity, called Detective Todd Mize, a narcotics officer. Once Brock and Mize arrived, Henley and Bailey were taken back into the home. As Henley and Bailey were being watched, officers — primarily Mize — conducted a search of the home. The search revealed the components of a methamphetamine laboratory. Following this discovery, Henley was arrested and eventually convicted of the numerous offenses that are the subject of this appeal.

On appeal, Henley argues that the illegal drugs and prohibited laboratory items discovered in his home should be suppressed because they were discovered as a result of a warrantless search. The State responds that according to one of the conditions of Henley's probation — which required that he allow a supervising probation officer to visit with him — the entry did not require a warrant. The State alternatively argues that the search was justified because it was a result of his arrest on an outstanding warrant.

In reviewing the trial court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by

the trial court and proper deference to the trial court's findings. *See Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004). As an initial matter, we note that all warrantless searches are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. *Bratton v. State*, 77 Ark. App. 174, 72 S.W.3d 522 (2002). The burden of proof is on the State to justify the search. *Mays v. State*, 76 Ark. App. 169, 61 S.W.3d 919 (2001). A warrantless entry into a private home is presumptively unreasonable. *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Norris v. State,* 338 Ark. 397, 993 S.W.2d 918 (1999). The burden is on the State to prove that the warrantless activity was reasonable. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997). With few exceptions, the question of whether a warrantless search of a home is reasonable and hence constitutional must be answered, "no." *Kyllo v. United States*, 533 U.S. 27 (2001). On appeal, we make an independent determination based on the totality of the circumstances to ascertain whether the State has met its burden. *Norris*, *supra.*

There is no question that Henley's home was searched without a warrant, and the State does not contend or attempt to prove that there were exigent circumstances justifying a warrantless search or that the evidence discovered in the search of Henley's home would have inevitably been discovered through lawful investigatory work. Instead, the State argues that the search was valid because it falls within the "probation exception" to the warrant requirement. At the outset, we note that there is no such exception. Instead, it is common that as a condition to probation or parole a party will consent-in-advance to allow officers to search his person, automobile, or other property in his control. In *Cherry v. State* our supreme court considered the constitutionality of a typical consent-in-advance agreement that stated:

> Any parolee's person, automobile, residence, or any property under his control may be searched by a parole officer without a warrant if the officer has reasonable grounds for investigating whether the parolee has violated the terms of his parole or committed a crime.

302 Ark. 462, 464, 791 S.W.2d 354, 356 (1990). The court concluded that such consent-in-advance clauses are not constitutionally infirm as long as the consent agreement meets certain criteria. *Id.* In order to support a warrantless search, the court reasoned, the form signed by the defendant must amount to a consent to search, and the search must have been conducted in accordance with the terms of the consent granted. *Id.*

Here, however, the officers made an understandable, but serious error by assuming that Henley's probation agreement contained a typical consent-in-advance provision. Unlike the search language discussed in the *Cherry* decision and contained in most probation agreements, the only consent-in-advance language in Henley's Franklin County probation agreement details a consent to *visit*:[2]

> You must report as directed to a supervising officer and permit him or her to visit you in your residence, place of employment, or other property.

We are unable and unwilling to construe the language in Henley's agreement in any way that would justify something more than a routine visit with the person supervising his release — certainly not an intrusive search of Henley's home.[3] In its brief, the State uses the words search and visit as synonyms. This is a liberty that neither the language nor the law will permit.

The words "search" and "visit" are different words, with distinct meanings. According to the *Merriam-Webster Online Dictionary*, to "search" means to "look into or over carefully or thoroughly in an effort to find or discover something: as a : to examine in seeking something <*searched* the north field> b : to look through or explore by inspecting possible places of concealment or investigating suspicious circumstances." The term "visit" means "to pay a call on as an act of friendship or courtesy." In this case, Henley's probation agreement outlining his consent to visit and be visited by his "supervising officer" does not amount to a consent-in-advance to search his home. As the only evidence introduced by the State to support its claim that Henley consented to the officers' search of his home was the probation agreement, we find that the

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[2] By way of contrast, the other actor in this case, Bailey, was a Faulkner County parolee that had a clause in her parole agreement that mirrored the visitation clause in Henley's, but it also had a search provision similar to the one discussed in *Cherry*.

[3] Moreover, at the time of the search, Henley was on "unsupervised probation" and therefore did not have a "supervising officer" that he was required to routinely visit. Furthermore, the probation officer who searched his home was neither his current nor former "supervising officer." She was from a different county and had no ongoing relationship with Henley.

State has failed to carry its required burden of proof — by clear and convincing evidence — that Henley consented to the search of his home.

In the alternative, the State argues that the search was justified because it followed the arrest of Henley on a valid warrant. Henley responds that the evidence seized from his home followed a pretextual arrest and must be suppressed as dictated by *State v. Sullivan*, 348 Ark. 647, 74 S.W.3d 215 (2002), and *Smith v. State*, 265 Ark. 104, 576 S.W.2d 957 (1979). In *Smith* our supreme court concluded that if the initial arrest is simply a pretext to search, the search cannot stand. *Smith v. State*, 265 Ark. 104, 576 S.W.2d 957 (1979). The supreme court reasoned that a pretextual arrest exists if the officer would not have gone to the defendant's home to arrest him otherwise. *Id.* The court specifically singled-out the misdemeanor nature of the warrant and concluded that the officers would not have arrested the defendant on such a warrant but for their desire to search his home. *Id.*

Here, the officers' initial intent in their contact with Henley was to interrogate him about a Van Buren County burglary. Having no warrant for that purpose, Officer Shock found an old misdemeanor warrant for Henley based on his failure to pay a speeding ticket. The officers proceeded to Henley's home where he was arrested on the outstanding misdemeanor warrant as a pretext to investigate the burglary. We find no fault with the officers' presence at Henley's home to question him about the crime they were investigating — with or without the pretext of the warrant — the officers were legally entitled to investigate the burglary crime by questioning Henley. However, the search following the arrest cannot be justified because the serving of the warrrant was merely a pretext. There was no evidence that these types of warrants were routinely served in person, after 10:00 p.m. Therefore, based on the reasoning contained in *Smith* and *Sullivan*, we agree with Henley's assertion that the evidence seized from his home followed a pretextual arrest and must be suppressed.

Finally, the State mentions — in a footnote — that there is a third justification for the search of Henley's home because Bailey, a parolee with a consent-to-search provision in her parole agreement, was an overnight guest of Henley. This argument was not developed at trial or on appeal to a sufficient degree to allow review. In order to consider the merits of the State's assertion we would need far more information regarding Bailey's status and stay

as Henley's guest. Because the record and the briefs are silent as to any meaningful argument justifying a search of Henley's home based on Bailey's consent-to-search, we will not consider the argument on appeal. Therefore, following our review of the totality of the circumstances, we hold that the search of Henley's home was unreasonable and did not fall within one of the exceptions to the rule that a search must rest upon a valid warrant. Accordingly, the trial court's denial of Henley's motion to suppress is clearly erroneous and is reversed.

Reversed and remanded.

GLADWIN and CRABTREE, JJ., agree.

Charles V. SIMMONS *v.* STATE of Arkansas

CA CR 04-1279 234 S.W.3d 321

Court of Appeals of Arkansas
Opinion delivered April 19, 2006

Michael Loggains, for appellant.

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

LARRY D. VAUGHT, Judge. Appellant Charles Simmons appeals following his conviction by a Cleburne County jury of five counts of rape and one count of producing, promoting, or directing a sexual performance. He was sentenced to a total of 210 years in prison. On appeal, he argues that books, videos, and photographs obtained during a search of his residence were improperly admitted into evidence; that the deposition testimony of a victim who died before trial was improperly admitted into evidence; and that his sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment. We affirm.

At trial, six young men testified against Simmons, all of whom had either lived or been a frequent guest in Simmons's home.[1] Their testimony revealed that Simmons allowed them to abuse controlled substances, drink alcohol, watch pornographic

[1] Simmons had legal custody of at least one of the boys.

videos, and look at pornographic pictures on his computer. They recalled raucous parties where both adult men and teenage boys drank heavily, abused drugs, and engaged in sexual activity. The boys testified that Simmons encouraged them to engage in homosexual relations with older men and that they were forced to have sex with Simmons and his older, male friends. One boy described how he passed out from drinking too much alcohol and woke up to find Simmons performing oral sex on him. Many of the boys recalled Simmons taking their photographs in sexually explicit poses. One victim identified photographs presented at trial as ones Simmons had taken of him in seductive poses. Several of the boys stated that they could not recall everything that had happened because they had been so inebriated at the time; however, they stated they often "woke up" naked. One of the boys described being handcuffed to a bed and sodomized with something that felt like "a broomstick." The boys also recounted how Simmons had them strip for him and his male friends.

One of Simmons's co-defendants, Jason Willabanks, testified that he witnessed Simmons performing oral and anal sex on at least two of the boys. Willabanks admitted that he had sex with two of the boys. He also stated that teenagers under the age of eighteen were often at Simmons's home; that he had seen pornographic photographs and videos at Simmons's home; that one of the photographs displayed one of the teenagers passed out and nude; that other photographs illustrated two of the boys posing together in the nude; and that he was aware of the boys stripping for Simmons, but he had never witnessed it.

During the trial, Simmons objected to several exhibits that were introduced into evidence, including five books, entitled *Bayou Boy*, *Boys of the Night*, *A Matter of Life and Sex*, *Growing Up Gay: From Left Out to Coming Out*, and *Seduced: Erotic Tales About Boys with Fun on Their Minds*; five videos, one entitled *Boy's Life*, which told the story of an older male seducing a young boy, and four adult movies; and seven photographs depicting males in sexually explicit poses. He also objected to the introduction of deposition testimony of a witness who had died prior to the trial. The trial judge overruled Simmons's objections and allowed the exhibits and the deposition into evidence.

For his first point on appeal, Simmons contends that the trial court erred in admitting the books, videos, and photographs into evidence. He argues several points, including that the evidence constituted improper character evidence, that it was irrelevant,

and that even if it was relevant, it was more prejudicial than probative. Our supreme court has noted that trial courts have broad discretion with regard to evidentiary rulings, and when reviewing a ruling on the admissibility of evidence, the trial court should not be reversed absent an abuse of that discretion. *Owens v. State*, 363 Ark. 413, 214 S.W.3d 849 (2005). Furthermore, we will only review arguments that have been preserved for appeal; arguments raised for the first time on appeal are not considered. *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004).

Rule 402 of the Arkansas Rules of Evidence provides that irrelevant evidence is inadmissible. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The test of admissibility of evidence over an objection for irrelevancy is whether the fact offered into proof affords a basis for rational inference of the fact to be proved. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003). It is sufficient if the fact may become relevant in connection with other facts, or if it forms a link in the chain of evidence necessary to support a party's contention. *Id.* at 198, 119 S.W.3d at 492.

Even if relevant, evidence may nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403. In addition, evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity with that trait on a particular occasion. Ark. R. Evid. 404(a). In such cases, evidence is not barred by the rule if it is independently relevant and not offered to show merely that the defendant has bad character. *Holt v. State*, 85 Ark. App. 308, 151 S.W.3d 1 (2004). Furthermore, evidence that is offered by the State to corroborate other evidence is relevant. *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003).

With regard to the books, Simmons argued at trial that the books had no probative value and were only introduced to unfairly prejudice the jury. He complained that the books would inflame the jury to be "possibly disgusted with him [and] with his lifestyle" and that the jury would want to "punish somebody for just having a book like this." On appeal, Simmons argues that the books were inadmissible character evidence, and alternatively, that the prejudice of the books outweighed their probative value. Although the State contends that Simmons raises the character-evidence argument for the first time on appeal, we are satisfied that Simmons's

contention at trial that the books would cause the jury to be disgusted with his lifestyle is enough to preserve his character-evidence argument.[2]

On the merits, we agree that the books are only marginally relevant to the case. None of the victims testified that Simmons showed them any pornographic books or used the books to lure them in any way. In fact, it appears the only reason for introducing the books was to inform the jury that Simmons was homosexual. Regardless, we find any error to be harmless in light of the wealth of other evidence (including the testimony, videos, and photos) of Simmons's homosexual lifestyle.

With regard to the five pornographic videos, we disagree that those were improperly admitted. Several of the boys testified that Simmons had them watch pornographic videos on a regular basis, many times as a prelude to or in conjunction with engaging in sexual acts. Therefore, the discovery of these videos corroborated the boys' testimony, and we are satisfied that the trial court did not abuse its discretion in admitting the videos.

In challenging the photographs at trial, Simmons argued that they were irrelevant because they did not include photos of any of the victims and because they were more prejudicial than probative. The trial court overruled the objection, specifically ruling that the probative value of the photos was not substantially outweighed by the danger of unfair prejudice. On appeal, Simmons argues the photos were irrelevant, more prejudicial than probative, and improper character evidence. Because he only raised the relevancy and prejudicial arguments at trial, he is prohibited from expanding those arguments on appeal.

As for the merits of those arguments, two victims actually testified that they were in the photographs. Additionally, a few of the boys testified that Simmons had taken pictures of them and had

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[2] The State also argues that even if we find Simmons raised the character-evidence issue below, he never received a ruling on it. From our review of the record, when Simmons first objected to the books, the court summarily overruled the objection on all the grounds Simmons had given, which included inadmissible character evidence and more prejudicial than probative. Simmons then asked the court to reconsider, and Simmons again argued that the jury would be inflamed because of Simmons's gay lifestyle and that the books were unfairly prejudicial. The court then overruled the objection specifically because the probative value of the books was not outweighed by their prejudicial value. We are satisfied that the court's initial ruling on Simmons's objection preserved the issue.

showed them pornographic photographs on the computer. Therefore, as with the videos, these photographs corroborate the boys' testimony, and the trial court did not err in admitting the photographs into evidence.

While criminal charges were pending against Simmons, the parents of several of the boys initiated a civil lawsuit against Simmons. During this civil action, one of the victims, Derek Desanto, gave a videotaped deposition describing his interactions with Simmons. At the time of his deposition, Desanto had not yet been listed in the information as one of Simmons's victims. Although Simmons's attorney, who represented Simmons in the civil and criminal matters, had received notice of the deposition, he decided to allow an attorney for one of Simmons's co-defendants to depose Desanto on Simmons's behalf. Desanto committed suicide before Simmons's trial, and Simmons moved to bar the admission of Desanto's deposition on the basis that it was inadmissible hearsay and would violate his Sixth Amendment right to confront all witnesses. The trial court denied that request.

In his second allegation of error, Simmons contends that the trial court improperly admitted the deposition of a witness who had died prior to the trial and violated his constitutional right to confront all witnesses. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Prior to the landmark United States Supreme Court case *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause did not bar the statement of an unavailable witness against a criminal defendant if the statement bore adequate "indicia of reliability," which could be inferred where the statement fell within a firmly rooted hearsay exception or contained particularized guarantees of trustworthiness. *See Ohio v. Roberts*, 448 U.S. 56 (1980). However, *Crawford* overruled previous precedent and established a new analysis, making clear that any hearsay permitted under the rules of evidence is also subject to the defendant's constitutional right of confrontation. 541 U.S. at 38. In *Crawford*, the Court held that, pursuant to the Sixth Amendment, no matter how "firmly rooted" an exception may be, if the statement is "testimonial," it is admissible only where the declarant is unavailable and the defendant had a prior opportunity to cross examine. *Id.* at 59. Although the Court declined to give a comprehensive definition of "testimonial," it gave several examples of the type of statements that would be included in such a definition, including prior testimony

at a preliminary hearing, testimony given before a grand jury or a former trial, and police interrogations. *Id.* at 68.

Rule 804(b)(1) of the Arkansas Rules of Evidence provides that former testimony or deposition testimony of an unavailable declarant can be offered at trial where the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony on direct, cross, or redirect. Section (a)(4) states that a witness is unavailable if that witness is unable to be present or testify because of death. Rule 32 of the Arkansas Rules of Civil Procedure specifically anticipates that deposition testimony may be used against or in place of a witness's live testimony at trial.

We hold that a deposition taken in anticipation of a future civil trial constitutes a "testimonial" statement as required by *Crawford*. Therefore, we must determine whether the declarant was unavailable and whether Simmons had a prior opportunity to cross examine that declarant. It is clear to us that Desanto, because he was deceased, was unavailable. Additionally, although Simmons's civil attorney chose not to cross examine Desanto during the deposition, criminal charges had been filed against Simmons, and his attorney had the opportunity to depose Desanto. The civil trial and the criminal trial involved the same facts and the same participants. The attorney for the co-defendant that cross examined Desanto had the same motive as Simmons — to discredit his testimony regarding the sexual encounters. Therefore, we find no error.

For his final point, Simmons argues that his sentence — forty years on five counts of rape and ten years on a count of producing, directing, or promoting a sexual performance, all to run consecutively — violates the Eighth Amendment's prohibition on cruel and unusual punishment. However, Simmons never made this argument to the trial court. It is our well-settled precedent that we will not consider an argument — even a constitutional one — that is raised for the first time on appeal. *See London v. State*, 354 Ark. 313, 125 S.W.3d 813 (2003). We note, however, that on the merits, his argument would fail. Our supreme court has held that a prison sentence, even to a term of life without possibility of parole, is not cruel and unusual punishment. *Rogers v. State*, 257 Ark. 144, 515 S.W.2d 79 (1974). Furthermore, an appellate court is not free to reduce a sentence — even one it feels is unduly harsh — as long as the sentence is within the range of punishment

contemplated by the legislature. *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001). Arkansas Code Annotated § 5-4-401(a)(1) (Repl. 1997) authorizes a sentence of ten to forty years or life in prison for a class Y felony, which rape is considered to be. Additionally, Ark. Code Ann. § 5-4-403(a) (Repl. 1997) allows a court to impose consecutive sentences for multiple convictions. Therefore, under *Bunch*, Simmons's sentence was not unduly harsh.

Affirmed.

GLADWIN and CRABTREE, JJ., agree.

Michael FARLER *v.* CITY of CABOT
and Arkansas Municipal League

CA 05-1212 234 S.W.3d 352

Court of Appeals of Arkansas
Opinion delivered April 26, 2006

[Rehearing denied June 14, 2006.]

Caldwell Law Firm, P.A., by: *Andy L. Caldwell*, for appellant.

J. Chris Bradley, for appellees.

SAM BIRD, Judge. Michael Farler appeals a decision of the Worker's Compensation Commission that denied his claim for multiple injuries sustained in an automobile accident on January 13, 2004. He contends that his claim was compensable because it fell within an exception to the "going and coming rule." Appellee City of Cabot, who was Farler's employer at the time of the accident, and appellee Arkansas Municipal League, the City's insurance carrier, contend that this case does not fall within any such exception; further, they contend that Farler was not in the course of his employment and was not providing employment services when the accident occurred. We agree with appellees, and we affirm the Commission's decision.

At the hearing before the administrative law judge, Farler testified that he was employed by the City of Cabot as an operator at the water treatment plant. His duties included maintaining six wells "within a mile and a half of the . . . plant, off of Highway 236," and responding to "call outs" for such things as water quality complaints, computer problems, and electronic failures. The City provided him with a truck, cell phone, pager and laptop computer; he used the truck to answer the call outs and to check the wells. His work weeks began on Saturdays, and he sometimes had "on call duty" Saturday and Sunday. Monday was his day off, but he was on call Monday night. He received extra pay of twenty-five dollars each day of his weekend call, whether or not he actually was called out to work, and on weekdays he was paid an additional two hours for being on call at night.

Farler testified that his accident occurred on Tuesday, January 13, 2004, and that he had been on call the weekend before. He said that he had not gone to work on Monday because he had been sick. He testified regarding the circumstances that surrounded the vehicular accident in which he was injured:

> The Friday before the weekend I would have taken the laptop and gotten in the truck with all of the other equipment and [gone] home. I would then have gotten my pay over the weekend.
>
> No, I did not go to work on Monday. I was on call on Monday evening even though I did not go to work. If I had gotten a call I would have been expected to go out. If something had happened I would have been expected to monitor the system or make whatever arrangements that were necessary.

> I was supposed to be on my duty station by 7:00 a.m. On Tuesday morning I was on my way to work. The accident happened at roughly ten minutes before 7:00 a.m. I was three-quarters of a mile from the water plant, turning off Highway 31 onto 236. The whole time that morning until I arrived Tuesday morning, I was on call.

Farler stated that conditions were foggy, damp, and "semi-dark." He testified, "The next thing I know, I hear tires squalling and I am being shoved sideways across the road into the telephone pole." He was hit on the driver's side by another truck, and he had to be cut out of his vehicle.

On cross-examination, Farler testified:

> [A]t the time of the accident I was proceeding to this water plant from my home on Highway 31. Correct, I had not reported to work yet that particular day. On Monday after having this weekend work, I would report to work at 7:00 a.m. and I would do my regular normal duties for a Monday, Tuesday, or Wednesday. At 4:00 p.m. that afternoon I would have laptop duty. With that duty I have to be prepared to monitor certain readings at the plant. That responsibility would carry over until I drive into work at 7:00 a.m. the next day. . . .
>
> When the accident happened, it was my week to do weekend duty and then laptop duty. It happens that I did not go to work on Monday at 7:00 a.m. because I was off sick that day. I was able to be home at four that afternoon and do any laptop work that needed doing. It wasn't until the next day, Tuesday, sometime before 7:00 a.m. that I was driving to work when the accident happened.

Farler said that he was not using his laptop or cell phone when the accident occurred, nor was he responding to a call on his pager as he traveled to work. Under questioning by the law judge, Farler testified that he routinely checked in at the plant before making his rounds to the wells.

A compensable injury is an "accidental injury . . . arising out of and in the course of employment . . . ." Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2003). An injury is not compensable if it is "inflicted upon the employee at a time when employment services were not being performed." Ark. Code Ann. § 11-9-102(4)(B)(iii). When an employee is doing something that is

generally required by his or her employer, the employee is performing employment services. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 478, 6 S.W.3d 98, 100 (1999); *Ray v. Univ. of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999). The phrase "performing employment services" is synonymous with the phrase "acting within the course of employment," in that the test for both 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 v. Excel Spec. Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002).

An employee traveling to and from the workplace is generally not acting within the course of employment; the going-and-coming rule ordinarily precludes recovery for an injury sustained while an employee is going to or returning from work. *Moncus v. Billingsley Logging*, 93 Ark. App. 402, 219 S.W.3d 680 (2005).[1] One rationale for this general rule is that all persons, including employees, are subject to the recognized hazards of travel to and from work in a vehicle. *See id.*; *Swearengin v. Evergreen Lawns*, 85 Ark. App. 61, 65, 145 S.W.3d 830, 832 (2004); *American Red Cross v. Hogan*, 13 Ark. App. 194, 681 S.W.2d 417 (1985). There are exceptions to the going-and-coming rule when the journey itself is part of the employment service, such as traveling men or women on business trips and employees who must travel from job site to job site. *Linton v. Arkansas Dep't of Correction*, 87 Ark. App. 263, 190 S.W.3d 275 (2004).

The decision of the Commission, adopted from the opinion of the administrative law judge, included the following discussion of exceptions to the going-and-coming rule:

> [A]n employee . . . must still be engaged in a work-related task at the time of injury.
>
> 1) the premise exception has been eliminated. (where an employee is injured while in close proximity to the employer's premises at the time of injury). *Hightower v. Newark Public School System*, [57 Ark. App. 159, 943 S.W.2d 608 (1997).]
>
> 2) transportation provided by the employer does not automatically make the claim compensable, there must be a nexus or

[1] *Moncus* is currently under review by the Arkansas Supreme Court.

connection between the travel and employment. (transportation provided as part of compensation, transportation provided because the employee was perpetually "on call", transportation customarily supplied to all employees). *Arkansas Power and Light Company v. Cox*, 229 Ark. 20, 313 S.W.2d 91 (1958), . . ., *Campbell v. Randal Tyler Ford Mercury*, 70 Ark. App. 35, 13 S.W.3d 797 (2000), *Swearingen v. Evergreen Lawns*, 85 Ark. App. 61, 145 S.W.3d 830 (2004), *Lepard v. West Memphis Machine & Welding*, 51 Ark. App. 53, 908 S.W.2d 666 (1995).

When a workman is so injured, while being transported in a vehicle furnished by his employer as an incident of the employment, he is within, "the course of his employment", as contemplated by the Act. In other words, when the vehicle is supplied by the employer for the mutual benefit of himself and the workman to facilitate the progress of *the work*, the employment begins when the workman enters the vehicle and ends when he leaves it on the termination of his labor. (Emphasis Added.)

3) traveling salesman
the journey is considered part of the work and injuries sustained while traveling are compensable.

The travel must be something that is required by the employer or the nature of the job, *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997), *American Red Cross v. Hogan*, 13 Ark. App. 194, 681 S.W.2d 417 (1985), *Coble v. Modern Business*, 62 Ark. App. 26, 966 S.W.2d 938 (1998).

. . . .

Arguably, the claimant falls within the second or third category, but he was still not performing a work-related task at the time of the accident.

In summary, the employee in this case is provided transportation by his employer in a job that requires travel and he is subject to being "on call", for which he receives remuneration. The Court has reminded the Commission to focus on the activity occurring at the time of injury in analyzing the compensability of the claim. *Collins v. Excel Specialty Products*, 347 Ark. 811, 69 S.W.3d 14 (2002), *Pifer v. Single Source Transportation*, 347 Ark. 851, 69 S.W.3d 1 (2002), *Wallace v. West Fraser South et al*, 90 Ark. App. 38, 203 S.W.3d 646 (2005). In the case at bar, the claimant was not "on call" at the time of the

> accident, and he was not performing his duties of checking wells or responding to customers. He was merely driving to the plant. Accordingly, . . . the claimant cannot meet his burden of proof under either the "employment services" test or the going and coming rule.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Jones Truck Lines v. Pendergrass*, 90 Ark. App. 402, 206 S.W.3d 272 (2005). Substantial evidence is evidence that a reasonable person might accept as adequate to support a conclusion. *Id.* In our review, we defer to the Commission in determining the weight of the evidence and the credibility of the witnesses; a decision of the Commission is reversed only if we are convinced that fair-minded persons with the same facts before them could not reach the conclusion reached by the Commission. *Id.* The issue is not whether we may have reached a different conclusion or whether the evidence might have supported a contrary finding. *Id.* When the Commission denies benefits upon finding that the claimant failed to meet his burden of proof, the substantial-evidence standard of review requires us to affirm if the Commission's decision displays a substantial basis for the denial of relief. *Cooper v. Hiland Dairy*, 69 Ark. App. 200, 11 S.W.3d 5 (2000).

Farler contends on appeal, as he did at the hearing before the administrative law judge, that his claim was compensable as an exception to the going-and-coming rule. He directs our attention to such cases as *Moncus*, *supra*, and *Hogan*, *supra*. Citing *Swearengin*, *supra*, he asserts that his injury fell within the following exceptions to the going-and-coming rule: (1) the employee is injured while in close proximity to the employer's premises, (2) the employer furnishes transportation to and from work, and (3) the employee is a traveling salesman.

Farler asserts that he was injured in close proximity to the water treatment plant, that his employer furnished his transportation to and from work, and that he had to travel in order to complete the duties of his employment. He argues that although he did not work on Monday, the day before the wreck, he was on call Monday evening and would have been expected to go out had he gotten a call. He points out that he was compensated with two hours of overtime pay for being on call that day. He argues that, even though he had not reported to the plant and was not actually

traveling to one of the wells, he was clearly within the scope of his employment when the wreck occurred. He asserts that although his duties were normally confined to the water treatment plant, he often traveled outside the plant in order to carry out his employment duties in the city-provided vehicle. Thus, he concludes that his claim falls within exceptions to the going-and-coming rule.

We need not address Farler's argument that, because his vehicular accident occurred within close proximity to the water treatment plant, the injury he suffered was compensable. The Commission correctly noted that the premises exception, which previously allowed compensation for an employee injured in close proximity to the employer's premises, has been eliminated. *See Linton, supra*; *Hightower v. Newark Pub. Sch. Sys.*, 57 Ark. App. 159, 164, 943 S.W.2d 608, 610 (1997). *See also Srebalus v. Rose Care, Inc.*, 69 Ark. App. 142, 149, 10 S.W.3d 112, 116 (2000) (holding as a matter of law that under *Hightower, supra,* the employee's injury, which occurred in the employer's parking lot while the employee was on her way to work, was not compensable under our workers' compensation law). Act 796 of 1993 and Ark. Code Ann. § 11-9-102 redefined "compensable injury" to exclude an injury that was inflicted upon the employee "at a time when employment services were not being performed," clearly eliminating the premises exception to the going-and-coming rule. *Hightower, supra.*

We agree with Farler that the critical inquiry in this case is whether he was performing employment services when he was involved in the vehicular accident, but we are not persuaded that his injury was compensable under our workers' compensation law. There was testimony before the Commission to support its findings that Farler was not "on call" at the time of the accident, that he was not performing his duties of checking wells or responding to customers, and that he was merely driving to the water plant, which was his duty station, to begin the day's work. We therefore hold that substantial evidence supports the Commission's finding that Farler failed to prove the compensability of his claim either as the performance of employment services or as an exception to the going-and-coming rule.

Because the Commission's opinion displays a substantial basis for the denial of this claim, its decision is affirmed.

Affirmed.

NEAL and BAKER, JJ., agree.

OFFICE MACHINES, INC. *v.* Bruce MITCHELL, *et al.*

CA 05-323 234 S.W.3d 906

Court of Appeals of Arkansas
Opinion delivered May 3, 2006

Hartsfield, Almand & Denison, PLLC, by: *Larry J. Hartsfield*, for appellant.

Bridges, Young, Matthews & Drake, PLC, by: *Joseph A. Strode*, for appellees.

JOHN MAUZY PITTMAN, Chief Judge. Appellant is an office-supply business serving southeast Arkansas. Appellees are former employees of appellant who, after an agreement for them to purchase the business fell through, quit their employment with appellant and started a rival business that hired several of appellant's employees. Appellant, which has since replaced those employees and continues to do business in the region, sued appellees alleging that they committed numerous torts by hiring the employees, including

disparagement and misuse of proprietary information. The trial court granted summary judgment to appellees, holding that the evidence presented in support of appellant's allegations was insufficient to create a genuine issue of material fact. Appellant has abandoned its allegations of disparagement and misuse of proprietary information. The sole argument on appeal is whether the organizers of the new business breached a fiduciary duty to appellant and committed the tort of tortious interference by hiring several of appellant's employees. We affirm.

Although a covenant in restraint of trade such as a covenant not to compete is valid when founded on a valuable consideration, such agreements are not favored in the law and will be enforced only if the restraint imposed is reasonable as between the parties and not injurious to the public by reason of its effect upon trade. *See Girard v. Rebsamen Insurance Co.*, 14 Ark. App. 154, 685 S.W.2d 526 (1985). The law will not enforce such a covenant simply to provide protection against ordinary competition. *Import Motors v. Luker*, 268 Ark. 1045, 599 S.W.2d 398 (Ark. App. 1980). Furthermore, absent a restrictive agreement, Arkansas courts have declined to shackle the privilege to engage in legitimate competition by extending a non-compete agreement to third parties. *Dawson v. Temps Plus, Inc.*, 337 Ark. 247, 987 S.W.2d 722 (1999). Here, it is undisputed that no such agreement was entered into by any of the appellees.

Arkansas has recognized wrongful interference with a contract as an actionable tort for nearly a century. *See Mahoney v. Roberts*, 86 Ark. 130, 110 S.W. 225 (1908). The underlying premise of this cause of action is that a person has a right to pursue valid contractual and business expectancies unmolested by the wrongful and officious intermeddling of a third party, so that a third party who intentionally and with malice interferes with the contractual relations of another incurs liability for his action in tort. *United Bilt Homes v. Sampson*, 310 Ark. 47, 832 S.W.2d 502 (1992).

The elements of tortious interference that must be proved are: (1) the existence of a valid contractual relationship or a business expectancy; (2) knowledge of the relationship or expectancy on the part of the interfering party; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Id.* However, the defendant will not be liable if he shows that his interference was

privileged. *Conway Corp. v. Construction Engineers, Inc.*, 300 Ark. 225, 782 S.W.2d 36 (1989). Arkansas recognizes a privilege to compete, and the scope of this privilege is broad:

> In short, it is no tort to beat a business rival to prospective customers. Thus, in the absence of prohibition by Statute, illegitimate means, or some other unlawful element, a defendant seeking to increase his own business may cut rates or prices, allow discounts or rebates, enter into secret negotiation behind the plaintiff's back, refuse to deal with him or threaten to discharge employees who do, or even refuse to deal with third parties unless they cease dealing with the plaintiff, all without incurring liability.

Kinco, Inc. v. Schueck Steel, Inc., 283 Ark. 72, 77, 671 S.W.2d 178, 181 (1984) (quoting W. Prosser, *Law of Torts*, 130 (3rd ed. 1971)). The *Kinco* court also adopted the following definition of the circumstances under which competition will justify interfering with another's business expectancy:

> (1) One who intentionally causes a third person not to enter into a prospective contract relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if
>
> (a) the relation concerns a matter involved in the competition between the actor and the other and
>
> (b) the actor does not employ wrongful means and
>
> (c) his action does not create or continue an unlawful restraint of trade and
>
> (d) his purpose is at least in part to advance his interest in competing with the other.

Kinco, Inc., 283 Ark. at 78, 671 S.W.2d at 181-82 (quoting Restatement (Second) of Torts 768 (1977)).

Summary judgment should only be granted when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *Castaneda v. Progressive Classic Insurance Co.*, 357 Ark. 345, 166 S.W.3d 556 (2004). The purpose of summary judgment is not to

try the issues, but to determine whether there are any issues left to be tried. *Id.* Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *George v. Jefferson Hospital Association, Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999). On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. *Id.* In so doing, we view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998). When the facts are not at issue but possible inferences therefrom are, we will consider whether those inferences can be reasonably drawn from the undisputed facts and whether reasonable minds differ on those hypotheses. *Flentje v. First National Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000).

Here, it is undisputed that appellees intended for some time to operate a business like that of appellant for their mutual profit; that appellant was aware of this intention and negotiated for the sale of its business; that the sale fell through and, after resigning, appellees continued with their intended business by forming their own concern; that they needed employees for their new business; that they offered employment to several of appellant's employees, none of whom were bound by non-competition agreements; that some of those offered employment accepted; that appellant has replaced the employees who were hired by appellees; and that both concerns remain in operation, competing for business in the same general area. Under these circumstances, we think that the only conclusion that could reasonably be drawn is that appellees were engaged in privileged competitive activity, and we hold that the trial court therefore did not err in granting summary judgment.

Affirmed.

ROBBINS and BAKER, JJ., agree.

Jerald MEDLOCK, Jr., as Personal Representative of the Estate of Glenda Kay Mitchell *v.* Michelle MITCHELL, as Personal Representative of the Estate of George Richard Mitchell

CA 05-891 234 S.W.3d 901

Court of Appeals of Arkansas
Opinion delivered May 3, 2006

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

Christian & Byars, by: *Joe D. Byars, Jr.*, and *Eddie Christian, Jr.*, for appellee.

JOSEPHINE LINKER HART, Judge. This is a contest over the validity of the will and amendments to the declaration of trust of George Richard Mitchell (Richard). Richard's widow, Glenda Kay Mitchell (Kay), died during the pendency of the action below, and her son, appellant Jerald Medlock, was appointed personal representative of her estate. Jerald brings this appeal from an order of the Sebastian County Circuit Court finding that the 2003 will and amendments to the trust proffered by Kay were the product of undue influence while the 1998 will proffered by appellee Michelle Mitchell was valid. Michelle is Richard's daughter and was appointed executrix of his estate. Jerald raises two points on appeal, arguing that the trial court erred in applying the presumption of undue influence and that, even if the trial court correctly applied the presumption of undue influence, Jerald showed by a clear preponderance of the evidence that there was no undue influence. We disagree and affirm.

Richard Mitchell executed a will on August 20, 1998, leaving his estate equally to two of his five children, Mark and Michelle.[1] Richard and Kay were married on December 28, 1998. The will appointed Michelle and Kay as co-executrixes. On the same day, Richard created a revocable living trust, with himself as trustee and the primary beneficiary of the trust. The trust was to terminate ten years after Richard's death. Upon termination of the trust, the corpus was to be distributed to Mark and Michelle. Michelle and Kay were named as successor co-trustees. The trust declaration also contained a "no contest" clause. On August 9, 2000, Richard amended the trust to name Kay as the sole first successor trustee. If Kay was unable or unwilling to serve, or if she resigned or was removed, Michelle was to be named successor trustee in her place.

In March 2003, Richard was diagnosed with terminal lung cancer. On June 30, 2003, Richard executed another will, leaving his entire estate to Kay. The will specifically stated that it made no provision for any of Richard's children and named Kay as execu-

[1] The will specifically stated that no provisions were being made for three of Richard's children, Richard Mitchell, Michael Mitchell, or Robert Mitchell. Richard had adopted Michael and Robert, the children of his ex-wife, Beverly Mitchell. Richard and Beverly were divorced in 1989.

trix. Richard amended the declaration of trust on July 8, 2003, to provide that, upon termination of the trust, Michelle was to receive $10,000 and a condominium, and the remaining assets were to be transferred to Kay. During the ten years after Richard's death, the trust was to pay Kay $2,500 per month for her support and $200 per month for Michelle's support. The trust was also amended to specifically provide that Mark was not to benefit from the trust.

Richard died on August 10, 2003. On December 1, 2003, Michelle filed a petition seeking to probate the August 20, 1998, will. She also asserted that she was named coexecutrix and sought to be appointed personal representative of the estate. The petition alleged that the value of the estate was in excess of $3,500,000. On January 6, 2004, Kay responded to Michelle's petition, alleging that the 1998 will had been revoked by a will dated June 30, 2003. Kay also filed a petition on that day seeking to have the June 30, 2003 will admitted to probate and to be appointed sole personal representative of the estate. Kay's response and petition both alleged that the trust established in August 1998 had been modified on June 30, 2003, and contained a "no contest" provision. Michelle responded to Kay's assertions, alleging that the June 30, 2003, will was invalid because of Richard's incompetence at the time of its execution and further that it was the product of undue influence or fraud. She also objected to Kay's appointment as personal representative. On February 1, 2005, Michelle filed a supplemental petition for declaratory judgment that the July 2003 amendment to the declaration of trust was likewise void and invalid.

At trial, numerous witnesses testified for both sides. Jerald, in arguing for the validity of the 2003 will and amendments to the trust, relied on statements Richard made to Kay and to his attorneys that he was disappointed in Mark and Michelle, as well as his desire to see that Kay was provided for. The disappointment in Mark resulted from statements Kay made Kay also held powers of attorney limited to two specific investment accounts. to Richard that Mark had wanted Richard removed from life support; that he had broken into Richard's home and office; that he had stolen $10,000 from Richard; and that he had made sexual advances towards Kay. Richard was also said to have been upset to discover that Mark was sharing information about Richard's finances with his mother. Richard's disappointment with Michelle stemmed

from her problems with drugs and alcohol, a lesbian relationship she had, and her inability to hold a job or manage money.

Michelle argued that the 2003 will and trust amendments were the product of undue influence exercised by Kay, which, according to Michelle, was shown by the dramatic changes in Kay's relationship with Richard's children after Richard was diagnosed with cancer. These changes include Kay's statement that she wanted the will changed; her false accusations about Mark to Richard; her presence in the hospital room when Richard discussed the changes to the will and the trust declaration with his attorneys; her presence when both the will and the trust amendments were executed; and her holding Richard's general power of attorney.[2]

The trial court issued a letter opinion, finding that a confidential and fiduciary relationship existed between Richard and Kay, resulting in a rebuttable presumption of undue influence. The court noted that the burden of establishing that the new beneficiary did not take advantage of the confidential relationship rests with Jerald as the proponent of the 2003 will and trust amendments and must be established by a clear preponderance of the evidence. The court then concluded that Jerald did not rebut the presumption of undue influence as a result of the confidential and fiduciary relationship between Richard and Kay. Judgment was entered on May 13, 2005, and a timely notice of appeal followed.

Jerald raises two points on appeal: that the trial court erred in finding that a confidential relationship existed between Richard and Kay and that the relationship gave rise to a presumption of undue influence and, further, even if the trial court correctly found that a confidential relationship existed between Richard and Kay, the trial court erred in finding that Jerald did not rebut the presumption.

We review probate cases de novo, but we will not reverse the decision of the probate court unless it is clearly erroneous. *Dillard v. Nix*, 345 Ark. 215, 45 S.W.3d 359 (2001). Due deference will be given to the superior position of the probate judge to determine the credibility of the witnesses and the weight to be accorded their testimony. *Wells v. Estate of Wells*, 325 Ark. 16, 922 S.W.2d 715 (1996).

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[2] Kay also held powers of attorney limited to two specific investment accounts.

In his first point, Jerald argues that the trial court erred in finding a confidential relationship between Richard and Kay that can give rise to a presumption of undue influence. He argues that the factors cited by the trial court in its order do not establish a confidential relationship. Rather, according to Jerald, the cited factors show a normal relationship between a husband and wife. However, our supreme court has indicated that the relationship between a husband and wife is a confidential relationship, which, when coupled with other facts, can trigger a presumption of undue influence. *Dunn v. Dunn*, 255 Ark. 764, 503 S.W.2d 168 (1973). A confidential relationship also arises between a person who holds power of attorney and the grantor of that power. *Dent v. Wright*, 322 Ark. 256, 909 S.W.2d 302 (1995). It is undisputed that Kay held Richard's power of attorney. Jerald argues that the power of attorney Kay held was limited to two investment accounts. This ignores the testimony of attorneys James Pierce and Kelly Pierce that Richard executed a broad, durable general power of attorney in favor of Kay prior to the execution of the 2003 will or trust amendments.

Whether two individuals have a confidential relationship is a question of fact. *See Lucas v. Grant*, 61 Ark. App. 29, 962 S.W.2d 388 (1998); *Savage v. McCain*, 21 Ark. App. 50, 728 S.W.2d 203 (1987). We cannot say that the trial court clearly erred in finding under the facts of the case that a confidential relationship existed between Kay and Richard, either because of their confidential relationship as husband and wife and Richard's terminal illness or because Kay had Richard's durable power of attorney. It is the combination of both confidential relationships that gives rise to a presumption of undue influence in the present case. We affirm on this point.

In his second point, Jerald argues that, even if this court agrees that a confidential relationship existed between Richard and Kay, he successfully rebutted the presumption. Whether a will was procured by undue influence is a question of fact for the trier of fact. *Jones v. Balentine*, 44 Ark. App. 62, 866 S.W.2d 829 (1993); *Carpenter v. Horace Mann Life Ins. Co.*, 21 Ark. App. 112, 730 S.W.2d 502 (1987). The test to determine whether a will is the product of undue influence is the same for a trust that takes effect, in part, at death. *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997); *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984).

It is not enough that a confidential relationship exist in order to void a testamentary instrument; there must be a malign influence resulting from fear, coercion, or any other cause which deprives the testator of his free agency in disposing of his property. *Pyle v. Sayers*, 344 Ark. 354, 39 S.W.3d 774 (2001); *Hodges v. Cannon*, 68 Ark. App. 170, 5 S.W.3d 89 (1999). Undue influence on a testator may be inferred from the facts and circumstances. *Looney v. Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992); *Orr v. Love*, 225 Ark. 505, 283 S.W.2d 667 (1955). First, we consider the fact that Richard was in the hospital in a weakened state at the time the 2003 instruments were prepared. This could indicate undue influence. *Pyle, supra.* According to Michelle, during Richard's hospitalization, Kay indicated that she wanted Richard's will changed, suggesting that Kay was the driving force behind the changes. *Dunn, supra.* By her own testimony, Kay admitted to being present when Richard discussed the will and amendments to the trust with the Pierces, another possible sign of undue influence. *See In re Estate of Garrett*, 81 Ark. App. 212, 100 S.W.3d 72 (2003). She was also present at the execution of the will and the trust amendments, another factor indicating undue influence if other factors are present. *Estate of Brock*, 692 So. 2d 907 (Fla. App. 1996); *see also Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984).

A will may also be invalidated for undue influence under certain circumstances where a person makes false statements and accusations to a testator concerning the natural objects of his bounty. *In re Estate of Accomazzo*, 492 P.2d 460 (Ariz. App. 1972); *Allee v. Estate of Sigears*, 182 S.W.3d 772 (Mo. App. 2006); *see also Allison v. Stroh*, 231 Ark. 862, 333 S.W.2d 737 (1960). Here, the trial court specifically found that Kay's statements to Richard that Mark broke into the office and wanted Richard taken off of life support precipitated the changes to the will and trust made in June and July 2003.

[redacted] In arguing that he rebutted the presumption of undue influence, Jerald relies almost exclusively on the testimony of Kay and attorney Kelly Pierce concerning Richard's statements about the reasons why he did not want to leave Mark and Michelle anything. Cases involving undue influence will frequently depend on the credibility of witnesses and, as stated above, we give due deference to the superior position of the trial judge to determine the credibility of the witnesses and the weight to be accorded their testimony. *Pyle, supra.* We cannot say that the trial court was clearly

erroneous when it found that Jerald had not rebutted the presumption of undue influence.

Affirmed.

ROBBINS and GLOVER, JJ., agree.

Jerome MOORE *v.*
ARKANSAS DEPARTMENT OF HEALTH
& HUMAN SERVICES

CA 05-759 234 S.W.3d 883

Court of Appeals of Arkansas
Opinion delivered May 3, 2006

DeeNita D. Moak, for appellant.

Gray Allen Turner, Dept. of Human Servs., Office of Chief Counsel, for appellee.

JOSEPHINE LINKER HART, Judge. Jerome Moore appeals from an order of the Conway County Circuit Court terminating his parental rights. Moore argues that the trial court erred: 1) in terminating his parental rights pursuant to Arkansas Code Annotated section 9-27-341 (Supp. 2005) because termination is only permissible when it is required for a permanent placement that would be compromised with maintaining his parental rights; 2) in finding that there was sufficient evidence to terminate his parental rights; and 3) by repeatedly and flagrantly violating his constitutional rights with regard to notice and an opportunity to be heard. We affirm.

T.D. was born on November 16, 1996. Moore is the child's biological father, and Mary Crabtrey is the child's biological mother. For almost all of T.D.'s life, Moore has been absent, either by choice or because he was incarcerated. T.D. has never resided with Moore.

On February 16, 2004, Crabtrey turned her children over to DHS and went to Living Hope for inpatient-mental-health services. Crabtrey had already had extensive contact with DHS, and she previously had her parental rights terminated as to other children. T.D. was subsequently adjudicated dependent-neglected and entered therapeutic foster care.

On November 3, 2004, DHS petitioned to terminate Moore's parental rights, alleging that he had abandoned T.D. The petition also recited that DHS was seeking termination of the parental rights of Crabtrey and David Morgan, the biological father of Crabtrey's other child, K.M., who is not the subject of this appeal. After the filing of the petition, Moore, who was in prison for sexually molesting a three-year-old girl, was notified for the first time that T.D. was in foster care and that DHS had filed a petition to terminate his parental rights.

At the termination hearing, Crabtrey testified that Moore "run out the day I told him I was pregnant [which was in 1996] and didn't show back up until Ninety-nine or Two Thousand." She admitted that Moore had sent presents through Angel Tree one time in 2000 and sent a single letter that she was aware of. Moore did not dispute that his contact with T.D. was limited to a single two-week period in 2000. He asserted, however, that he had sent several cards and letters, as well as gifts to T.D. through Angel Tree. Moore confirmed that he was currently serving a fifteen-year sentence after being convicted of molesting the daughter of David Morgan, but denied having committed the offense. Moore stated that he was eligible for parole, and in any case, would leave prison in 2011.

In its February 28, 2005, order terminating Moore's parental rights, the trial court recited that it was "contrary to [T.D.]'s best interests, health and safety, and welfare to return him to the parental care and custody" of Moore. It further found that Moore had "willfully failed to maintain meaningful contact with the child and has willfully failed to provide significant material support." The trial court did not, however, terminate Crabtrey's parental rights. Instead it directed DHS to develop a case plan with the goal of reunification.

Moore first argues that the trial court erred in terminating his parental rights pursuant to Arkansas Code Annotated section 9-27-341 because termination is only permissible when it is required for a permanent placement that would be compromised with maintaining his parental rights. He contends that "it is absolutely required that there be an appropriate permanency placement plan for the juveniles before the trial court can consider termination," and that his rights should not have been terminated because "the legislature has mandated that the termination of parental rights statute only be used when it is necessary to clear a juvenile for permanent placement." We find no merit in this argument.

Termination of parental rights cases are reviewed de novo. *Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). However, while we review the factual basis for terminating parental rights under a clearly erroneous standard, with regard to errors of law, no deference is given to the trial court's decision. *See Sanford v. Sanford*, 355 Ark. 274, 137 S.W.3d 391 (2003).

The portion of Arkansas Code Annotated section 9-27-341 that Moore urges us to find dispositive states:

> (a)(1)(A) This section shall be a remedy available only to the Department of Health and Human Services or a court-appointed attorney ad litem.
>
> . . .
>
> (2) It shall be used only in cases in which the department is attempting to clear a juvenile for permanent placement.

However, we note that the statute merely requires DHS to be "attempting" to clear a juvenile for permanent placement. *Id.* In the instant case, DHS was attempting to terminate both Moore's and Crabtrey's parental rights, which would have "cleared" T.D. for adoption or, more appropriately, long-term therapeutic foster care.[1] The fact that DHS failed to convince the trial court to terminate Crabtrey's parental rights is of no moment as the statute clearly contemplates termination of only a single parent's parental rights. *See* Ark. Code Ann. § 9-27-341(c)(1)(2)(A)(i).

Regarding Moore's assertion that the trial court proceeded without an appropriate permanency placement plan, we find that this contention is not supported by the record. While it is true that a permanency-planning hearing was not held, a permanency planning report was filed for record and has been made a part of the addendum.

For his second point, Moore argues that the trial court erred in finding that there was sufficient evidence to terminate his parental rights because DHS failed to meet its burden of proof. Without citation of authority, he attacks the finding that he "abandoned" T.D., claiming that "in and of itself" it does not establish a reason for termination because "many parents do not have their children in their physical custody [and] that does not necessitate termination." He notes that he testified that he had

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[1] We note that T.D. has been seriously abused as a child and suffers from significant mental illness. Among his demonstrated symptoms was his penchant for killing animals. It is documented that he killed "some" kittens by bouncing them on the floor and "some" puppies by placing them in a microwave. Given this history, we question whether the child may be reasonably considered "adoptable."

tried to send cards and gifts to T.D., but largely was frustrated by his inability to find Crabtrey. Further, citing *Minton v. Ark. Dep't of Human Servs.*, 72 Ark. App. 290, 34 S.W.3d 776 (2000), he contends that the trial court's finding that he failed to materially support T.D. cannot be a dispositive finding because DHS never requested that he pay support. We disagree.

In reviewing the trial court's evaluation of the evidence in termination-of-parental-rights proceedings, we will not reverse unless the court's finding of clear and convincing evidence is clearly erroneous. *Baker v. Ark. Dep't of Human Servs.*, 340 Ark. 42, 8 S.W.3d 499 (2000). 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. *Id.* In resolving the clearly erroneous question, we must give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Beeson v. Ark. Dep't of Human Servs.*, 37 Ark. App. 12, 823 S.W.2d 912 (1992).

In pertinent part, Arkansas Code Annotated section 9-27-341(b)(3) lists as grounds for termination of parental rights the situation where:

> (ii)(a) The juvenile has lived outside the home of the parent for a period of twelve (12) months, and the parent has willfully failed to provide significant material support in accordance with the parent's means or to maintain meaningful contact with the juvenile.
>
> (b) To find willful failure to maintain meaningful contact, it must be shown that the parent was not prevented from visiting or having contact with the juvenile by the juvenile's custodian or any other person, taking into consideration the distance of the juvenile's placement from the parent's home.
>
> (c) Material support consists of either financial contributions or food, shelter, clothing, or other necessities when the contribution has been requested by the juvenile's custodian or ordered by a court of competent jurisdiction.
>
> (d) It is not necessary that the twelve-month period referenced in subdivision (b)(3)(B)(ii)(a) of this section immediately precede the filing of the petition for termination of parental rights or that it be for twelve (12) consecutive months;
>
> . . .

(iv) A parent has abandoned the juvenile;

We hold that the trial court did not err in finding that Moore failed to maintain meaningful contact with T.D. By Moore's own testimony, it was established that his contact with his son was limited to a single two-week period. Furthermore, while it is true that Moore was incarcerated for a portion of this time, there was other evidence that Moore chose not to be a part of T.D.'s life. As noted above, Crabtrey testified that Moore absented himself from the child's life as soon as he found out that Crabtrey was pregnant, and he did not return until some three or four years later. Accordingly, giving the deference that we must to the trial court's superior position to make credibility determinations, we cannot conclude that the trial court's finding that Moore had failed to maintain meaningful contact with T.D. was clearly erroneous. Because only a single ground is required for termination under the statute, we need not address the second reason for termination, Moore's alleged failure to support T.D.

Finally, Moore argues that the trial court erred by repeatedly and flagrantly violating his constitutional rights with regard to notice and an opportunity to be heard. He concedes that this argument was not raised to the trial court, but nonetheless urges us to consider it. We must decline. It is settled law that we do not reach constitutional arguments in termination cases if the argument is not raised to the trial court. *Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992); *Walters v. Arkansas Dep't of Human Servs.*, 77 Ark. App. 191, 72 S.W.3d 533 (2002).

Affirmed.

VAUGHT and ROAF, JJ., agree.

Jonathan B. GONDER *v.* STATE of Arkansas

CA CR 05-262 234 S.W.3d 887

Court of Appeals of Arkansas
Opinion delivered May 3, 2006

Brown & McKissic, LLP, by: *Gene E. McKissic*, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Jonathan B. Gonder appeals his convictions for possession of controlled substances (marijuana and cocaine) with intent to deliver. This appeal follows his entry of a conditional guilty plea after the trial court denied his motion to suppress. The State argues that we do not have jurisdiction to consider appellant's appeal because appellant's conditional guilty plea

does not conform with Ark. R. Crim. P. 24.3(b) (2005), and asks that we dismiss the appeal. We do not dismiss the appeal. However, upon consideration of the merits, we affirm appellant's convictions.

Whether a defendant has complied with Rule 24.3(b) is a jurisdictional question. *See Ray v. State*, 328 Ark. 176, 941 S.W.2d 427 (1997). The State filed a motion to dismiss for lack of jurisdiction, prior to this appeal being submitted to our court, which we denied on January 11, 2006. Upon the State's reassertion of its motion to dismiss, we again consider the jurisdictional question.

The general rule is that when a defendant pleads guilty to a charge, he or she waives the right to appeal that conviction. *Green v. State*, 334 Ark. 484, 978 S.W.2d 300 (1998). For relevant purposes before us, only a conditional plea pursuant to Rule 24.3(b) enables a defendant to retain the right to appeal an adverse suppression ruling. Ark. R. App. P.–Crim. 1(a) (2005); *Barnett v. State*, 336 Ark. 165, 984 S.W.2d 444 (1999). Rule 24.3(b) states:

> With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

Our supreme court has interpreted Rule 24.3(b) to require strict compliance with the requirement that the right to appeal be reserved in writing. *Barnett v. State, supra.* This is so even when there has been an attempt to enter a conditional plea at the trial court level. *Ray v. State, supra.* In addition, the writing must be contemporaneous with the defendant reserving his or her right to appeal. *Tabor v. State*, 326 Ark. 51, 930 S.W.2d 319 (1996). We also look for an indication that the conditional plea was entered with the approval of the trial court and the consent of the prosecuting attorney. *Noble v. State*, 314 Ark. 240, 862 S.W.2d 234 (1993).

In this instance, the transcript reveals the following pertinent facts. After a search for and seizure of marijuana and cocaine from appellant's home in March 2002, his attorney filed a motion to suppress, which was ultimately denied in December 2002. In December 2004, the prosecution and defense entered into plea negotiations. On December 9, 2004, a document was filed,

entitled "Report of Plea Negotiations," which reflected that for the two drug charges, the prosecutor was recommending two ten-year sentences, for appellant to forfeit any seized property, and for appellant "to remain free on bond through the pendency of his appeal of the Court's denial of his Motion to Suppress Evidence." The opening paragraph of the document reflected that both the State and the defendant and his counsel had agreed to dispose of this case by a "plea of guilty CONDITIONAL" subject to the approval of the trial court. This document was signed by the prosecuting attorney, appellant's attorney, and appellant.

On December 14, 2004, appellant formally entered his negotiated plea of guilty in open court, with the trial judge, the prosecutor, defense counsel, and appellant present. The trial judge announced the crimes with which appellant had been charged and the range of punishments for each crime, asked appellant if he was satisfied with his representation, and verified that appellant was knowingly and intelligently waiving his right to a jury trial. The prosecutor asked the trial judge if she had a copy of the plea; the trial judge responded affirmatively. The trial judge recited verbatim the "deal" contained in the Report of Plea Negotiations, including that appellant would be free pending his appeal of the suppression issue, and she asked appellant if he had been promised anything else in order to acquire a guilty plea from him. Appellant responded, "no." After reading the specific details of the plea negotiation from the Report, the trial judge asked if that was his understanding of the plea negotiation. Appellant affirmed that it was and that he intended to plead guilty in line with that offer. The judge asked defense counsel if he concurred in the plea agreement; defense counsel said that he did. The judge accepted the recommendation of the State, sentenced appellant to concurrent ten-year sentences, and reaffirmed to appellant that he would be free during the appeal of his motion to suppress.

A judgment containing the two convictions was signed by the trial judge and filed on December 28, 2004, reflecting the sentences imposed and that each was a "negotiated plea of guilty (CONDITIONAL)." The judgment also recited:

> **SPECIAL CONDITIONS: DEFENDANT SHALL FORFEIT ALL PROPERTY SEIZED. DEFENDANT SHALL REMAIN FREE ON BOND THROUGH THE PENDENCY OF HIS APPEAL OF THE COURT'S DENIAL OF MOTION TO SUPPRESS EVIDENCE.

Appellant filed a timely notice of appeal on January 13, 2005, appealing the denial of his motion to suppress and the judgment of convictions.

We hold that this conditional plea is sufficient to confer appellate jurisdiction in our court. Therefore, we deny the State's second motion to dismiss. The Report of Plea Negotiations reflected what was agreed between the State and appellant; it was denoted a conditional guilty plea specifically noting that appellant would be free during his appeal of the suppression issue; and it was in writing, signed by the prosecutor, defense counsel, and appellant. This Report was provided to the trial court for the actual entry of the plea on December 14, 2004. The contents of the Report were recited in open court by the trial court and agreed to by appellant and the State, as well as by the trial court by verbal assent. The judgment that followed days later, signed by the trial judge and filed of record, reflected without ambiguity that these sentences were conditional negotiated pleas, with capitalized type emphasizing that appellant would be free pending the appeal of the motion to suppress. We are convinced that the Report was a sufficient writing to memorialize appellant's intent to enter a conditional plea.

Further, we are convinced that because the Report was presented in open court at the plea hearing and was accepted by the trial court in total, this rendered it contemporaneous within the case law construing Rule 24.3(b). Even assuming that the judgment that was filed two weeks later would not be considered "contemporaneous" to the plea, the judgment does nothing but reinforce what occurred at the plea hearing where the Report was accepted by the trial court. *Compare Hill v. State*, 81 Ark. App. 178, 100 S.W.3d 84 (2003). On these facts, we hold that there was compliance with Ark. R. Crim. P. 24.3 establishing appellate jurisdiction.

This brings us to the merits of the appeal. Appellant contends that the trial court clearly erred in not granting his motion to suppress. We disagree. On appeal from the denial of a motion to suppress, we conduct a de novo review based upon the totality of the circumstances, reviewing findings of historical fact for clear error, giving due weight to inferences drawn by the trial court. *See Thornton v. State*, 85 Ark. App. 31, 144 S.W.3d 766 (2004). Thus, the trial court's ruling will not be reversed unless it is clearly

erroneous. *See id.* In this instance, the search of appellant's house came as the result of the police obtaining consent to enter and then searching the premises. There is a presumption of unreasonableness regarding warrantless entry into a home, but it may be overcome if the State obtains consent from the homeowner. *See Carson v. State*, 363 Ark. 158, 211 S.W.3d 527 (2005); Ark. R. Crim. P. 11.1. The State bears the burden to demonstrate clear and positive testimony that consent was freely and voluntarily given. *See Medlock v. State*, 79 Ark. App. 447, 89 S.W.3d 357 (2002). Consent must not be the product of express or implied coercion or duress. *Russey v. State,* 336 Ark. 401, 985 S.W.2d 316 (1999).

With these statements of the law, we proceed to examine the interaction between appellant and the police on the night of the search. Appellant's home was under surveillance by the Pine Bluff Police Department when an officer observed a vehicle leave the residence. Upon following that vehicle, the police tried to initiate a stop, but the driver fled the vehicle, abandoning a one-pound bag of marijuana in plain view inside the vehicle. Close in time to that stop, other officers stopped another vehicle that had left the residence; appellant's wife was driving.

Officer Whitfield told appellant's wife that he wanted to follow her back to their house to talk to appellant about drugs being in their house. The wife was cooperative and complied, and they drove back to the Gonder residence; it was around midnight. Officer Whitfield said he approached the door, knocked, and appellant came to the door. Appellant's wife was with Officer Whitfield at the time. The officer asked to come in, and appellant let him. Officer Whitfield said he immediately smelled a strong odor of marijuana when the door was opened. He told appellant that he had just stopped a car that came from appellant's house; that there was a pound of marijuana in the car; and that he suspected there were more drugs in appellant's house.

Upon entry, the officer saw two men sitting in the living room, and one had a bag of marijuana in plain view; there was also a roach clip in plain view. Appellant at first said that the young man, whose car was found with the marijuana in it, had set him up. Officer Whitfield said he asked appellant for consent to search the house, but if none were given and appellant wanted him to leave, he would leave and obtain a search warrant. Appellant asked the officer to come into the kitchen to speak in private, and appellant

expressed concern about his wife and children. Officer Whitfield told appellant that the smell of marijuana smoke was already in the house, and that he should not have his children there if he was going to sell or smoke the drug; appellant apologized to the officer for that. When appellant asked the officer to let his wife and kids go, Officer Whitfield assured appellant that he was only there regarding other drugs that might be in the house. After some discussion with the officer, appellant began taking responsibility for the marijuana that the young man had in the living room. The officer verbally Mirandized appellant. The officer added that if appellant was cooperative and gave consent to search, then neither appellant or his family would be taken into custody that night. The officer said that when he offered to leave and get a search warrant, appellant told him to come back and talk again, whereupon he agreed to the search. At 12:45 a.m., appellant signed the consent form to search. Following that, appellant said he did not want his house "torn up" like it was the last time his house was searched. Thereupon, he reached up to pull the cord attached to the disappearing stairway leading to the attic, which was where appellant kept approximately eighteen pounds of marijuana and a small amount of cocaine.

Officer Whitfield agreed that he and appellant had a long conversation inside the house. However, he stated that he never was confrontational, nor did he ever state that appellant was legally obligated to cooperate, having more than once offered to leave to get a warrant. The officer denied ever threatening appellant or his family in order to get consent, and he confirmed that no one was taken to jail that night.

The State entered into evidence the "Consent To Search" form, signed by appellant, which delineated appellant's constitutional rights, specifically noting appellant's right to refuse to give consent and to revoke consent and stop the search at any time, and stating affirmatively that permission was given "voluntarily and without threats, coercion or promises from any agent of the City of Pine Bluff Police Department."

Mrs. Gonder testified in contradiction to the officer, stating that she essentially felt bullied to return to the house with officers following her. She also said that she saw Officer Whitfield push open their door and enter against her wishes, and also against her husband's wishes when he saw the officer coming inside. She recalled that she and her husband repeatedly told the officer to

leave, but he would not. She said the officer threatened that she and the two men in the house would be going to jail, and their kids would be taken away, if appellant did not sign a consent. She agreed that her husband signed the consent, but that he was forced by the threats. Appellant's testimony mirrored his wife's.

Appellant argues on appeal that there were no exigent circumstances that would permit entry and search of the house pursuant to Ark. R. Crim. P. 12.1, and that the consent was obtained under duress.[1] Therefore, appellant contends that the motion to suppress was denied in error. We agree that Arkansas Rule of Criminal Procedure 12.1 would not be a valid basis to uphold the search in this instance because there was no emergency relating to bodily harm or destruction of evidence that would create a warrant exception. Indeed, the State did not elect to argue this Rule as a basis to support the search. Instead, we focus on the second argument asserted, which is whether the State carried its burden to demonstrate that consent to search was freely and voluntarily given.

Appellant agrees that he gave both verbal and written consent to search, but he argues that there is no corroborating evidence of the officer's testimony about what led to the consent being given. Because individuals have a high expectation of privacy in their homes, our courts require voluntary consent absent other grounds to effectuate a warrantless search of the home. *See Payton v. New York*, 445 U.S. 573 (1979). Indeed, physical intrusion into the privacy of a person's residence absent a warrant is the primary evil that the Fourth Amendment seeks to eradicate. *See United States v. Miller*, 933 F. Supp. 501 (M.D. N.C. 1996). He argues that his and his wife's testimony demonstrate that they were bullied and that appellant gave consent only after threats of incarceration and of taking the children from the home. This argument focuses on credibility determinations that we are not at liberty to disturb on appeal. *Bogard v. State*, 88 Ark. App. 214, 197 S.W.3d 1 (2004). The validity of consent is a fact question determined by the totality of the circumstances. *Medlock v. State*, 79 Ark. App. 447, 89 S.W.3d 357 (2002). Based upon the testimony

[1] Appellant does not argue on appeal that the initial entry into the doorway of the house was constitutionally infirm. Instead, his argument focuses on the acquisition of verbal and written consent inside the house. Therefore, we do not address or offer any opinion on the legality of the initial entry into the house.

presented by the officer, which the trial court was entitled to believe, we cannot say that the trial court's denial of the motion to suppress was clearly erroneous.

Affirmed.

PITTMAN, C.J., and BAKER, J., agree.

Greg THORNTON *v.* ARKANSAS VALLEY ELECTRIC COOPERATIVE CORPORATION and Centurytel, Inc.

CA 05-1234 234 S.W.3d 915

Court of Appeals of Arkansas
Opinion delivered May 3, 2006

John Terrell Holleman, for appellant.

Wright, Lindsey & Jennings, LLP, by: *Alston Jennings, Jr.*, for appellee Centurytel, Inc.

Friday, Eldredge & Clark, LLP, by: *James C. Baker, Jr.*, and *Kimberly D. Young*, for appellee Arkansas Valley Cooperative Corporation.

LARRY D. VAUGHT, Judge. Appellant Greg Thornton argues that the trial court improperly granted summary judgment to appellees Centurytel, Inc., and Arkansas Valley Electric Cooperative resulting in the dismissal of his personal-injury action. We find no error in the trial court's determination and affirm.

On August 2, 2002, Greg Thornton was injured when an energized electrical line owned by Arkansas Valley arced into his back. At the time of his injury, Thornton was employed by Big Mac Mobile Homes and was delivering a mobile home. In order to place the mobile home in the spot designated by its new owners, it had to be moved under three overhead lines — one telephone line and two electrical lines. The telephone line — which was the lowest hanging line — was owned by Centurytel, Inc. The middle line was a neutral line owned by Arkansas Valley, and the highest line was an energized electrical line owned by Arkansas Valley.

The mobile home was too tall to go underneath the telephone line without contact. Thornton and a coworker stood on the roof of the mobile home while it was moved underneath the telephone and electrical lines. The men were warned about the

dangers of the electrical line and its proximity to the mobile home by their supervisor. After discussing the danger, the men decided that they would simply bend down low enough to avoid contact with the energized top line. Unfortunately, Thornton came too close to the electrical line and suffered a contact injury.

Thereafter he filed suit against Centurytel and Arkansas Valley, seeking compensation for his injuries. Centurytel answered, alleging that any injury Thornton suffered was a result of his own negligence and assumption of risk. Specifically, Centurytel argued that Thornton's complaint failed to allege how Centurytel's negligence proximately caused his injuries. Arkansas Valley answered Thornton's complaint by arguing that it had no duty to Thornton. The trial court granted each utility summary judgment and this appeal followed.

Pursuant to Arkansas Rule of Civil Procedure 56, 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. The purpose of summary judgment is not to try the issues but to determine whether there are any issues to be tried. *Ginsburg v. Ginsburg*, 353 Ark. 816, 120 S.W.3d 567 (2003). We no longer refer to summary judgment as a drastic remedy and now simply regard it as one of the tools in a trial court's efficiency arsenal. *Ponder v. Gorman*, 94 Ark. App. 159, 227 S.W.3d 428 (2006). Once the moving party has established a prima-facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.*

First, we turn our attention to the trial court's decision to grant Centurytel's motion for summary judgment. Thornton alleged that "but for" the low-hanging telephone line, he would not have been on top of the mobile home. In support of this claim he submitted a statement from his engineering consultant, Paul Mixon, stating that the telephone line did not meet the requirements of the National Electrical Safety Code because it was less than ten feet above a "residential driveway." However, Mixon did

concede that the line was eight and one half feet above the ground and that the Code called for a clearance of only eight feet when there was no driveway in place.

Assuming arguendo that Thornton successfully created a question of fact as to the height requirement for Centurytel's line — eight or ten feet high — this fact question alone is insufficient to overcome Centurytel's summary-judgment motion. Thornton does not argue that any particular telephone-line clearance (residential or otherwise) would have avoided the accident. Specifically, he provided no evidence that Centurytel was negligent or that any negligence of Centurytel proximately caused his injury. At a very minimum, Thornton is required to allege breach of a legal duty owed to him, which proximately caused his injury, and he is required to reveal this theory to the court and to Centurytel. Accordingly, because Centurytel supported its motion for summary judgment by making a prima-facie showing of an absence of factual issues and entitlement to judgment as a matter of law, and the adverse party failed to set forth *specific facts* showing a genuine issue of material fact, summary judgment was properly granted. *See Pyle v. Robertson*, 313 Ark. 692, 694, 858 S.W.2d 662 (1993).

Next we consider the trial court's grant of summary judgment to Arkansas Valley based on its contention that it owed no duty to Thornton because it was not given sufficient notice of the work to be done near its power line. Arkansas Code Annotated section 11-5-307 (Repl. 1996), provides:

> (a)(1) When any person, firm, or corporation desires to temporarily carry on any function, activity, work, or operation in closer proximity to any energized overhead electrical line or conductor than permitted by this subchapter, the person or persons responsible for the work to be done shall promptly notify the Director of the Department of Labor and the operator or owner of the electrical lines in writing of the work to be performed and make appropriate arrangements with the operator of the electrical lines before proceeding with any work which would impair the clearances required by this subchapter.
>
> (2) The written notice shall be given to the owner or operator of the electrical lines by submitting notification to the manager of the nearest local office of the operator or owner of the electrical lines with a copy forwarded to the director.

> (b)(1) The work shall be performed only after satisfactory mutual arrangements have been negotiated between the owner and operator of the electrical lines and the person or persons responsible for the work to be done.
>
> (2) The owner or operator of the electrical lines shall commence work on the mutual arrangements as provided herein within three (3) working days of the mutual arrangement. Once initiated, the clearance work will continue without unreasonable interruption to complete.

Although Thornton concedes that neither he nor his employer complied with the requirements of § 11-5-307, he maintains that a duty arose nonetheless because Arkansas Valley was notified of the construction by the third-party homeowner. The basis for this assertion comes from the deposition of Mr. Carl Newman, the owner of the lot where the mobile home was delivered:

> A: We called the electrical company, or my wife supposedly called the electrical company. Now this is hearsay what I'm telling you now. She called the electrical company, they come (sic) out there and they checked and measured, said it was standard, it was good check; the telephone line was the only thing that was down too low.
>
> . . . .
>
> A: Well it was one of the engineers come out there and I helped measure it, and then they said that was standard height for that area.
>
> Q: About when, in relation to Mr. Thornton's injury, did this happen that they came out?
>
> A: Oh, about a week before.

As we begin our analysis considering whether Arkansas Valley owed a duty to Thornton, we are mindful that the existence of a legal duty is always a question of law and never a question of fact. *Clark v. Transcon. Ins. Co.*, 359 Ark. 340, 197 S.W.3d 449 (2004). As to this duty, our supreme court has recognized that electric utility companies must meet the public demand for a ready and adequate supply of power and, in doing so, they are not

insurers against accident or injury and are not held liable for such as cannot be reasonably foreseen. *Id.* However, an electric company does have a duty to inspect and maintain its power lines in proper and safe working order. *Stacks v. Ark. Power & Light Co.*, 299 Ark. 136, 771 S.W.2d 754 (1989). But, when a person, firm, or corporation desires to temporarily carry on any function, activity, work, or operation within ten feet of an energized, high-voltage line, the electric utility has no duty until the electric utility receives "written notice" from the "person or persons responsible for the work." *See* Ark. Code Ann. § 11-5-307. Accordingly, without such notice, the electric company has no duty to those working near its lines. *Id.*

On appeal Thornton argues that although he and his employer did not technically comply with the statute, Arkansas Valley was placed on notice that work would be conducted near its line and that at that point a duty arose. In support of this argument Thornton relies heavily on our supreme court's holding in *Clark v. Transcontinental Ins. Co.*, 359 Ark. 340, 197 S.W.3d 449 (2004). Like this case, in *Clark*, the electrical company — Entergy — argued that it did not owe Mr. Clark a duty because it did not receive written notice that work would be conducted near its power lines as required by § 11-5-307. However, the court concluded that Entergy in fact had received notice sufficient to trigger a duty. Specifically, the court relied on the fact that Entergy had received a route slip titled "application for a Commercial Building Permit," which informed Entergy that plans of the building to be constructed were available for review. *Id.* at 350. The court went on to conclude that the notice was sufficient to create a duty on Entergy's part. *Id.* at 351.

In this case, there are three salient facts that distinguish Thornton's case from the factual predicate presented in *Clark*. First, the alleged "notice" was not from the affected employee or his employer; instead, it came from a third party. Second, the testimony of the third-party homeowner — when viewed in the light most favorable to Thornton — does not notify the electrical company that work was to be done. A circumspect reading of the homeowner's deposition merely establishes that Arkansas Valley was asked to come out and measure and "check" its lines. The homeowner's deposition, which is in most part hearsay, makes no mention of informing Arkansas Valley that there will be construction within ten feet of the line. Third, this alleged "notice" was

not in writing. These three factual distinctions greatly diminish the relevance of the *Clark* precedent as applied to this case.

It is undisputed that neither Thornton nor his employer notified Arkansas Valley in writing — or otherwise — that work would be conducted near its power line. To conclude that an oral hearsay statement from a third-party homeowner — establishing nothing more than the fact that Arkansas Valley was asked to "check" and "measure" its lines — amounts to the type of statutory notice required by § 11-5-307 would require a stretching of the statute beyond its breakpoint. We are unwilling and unable to ignore the rigors of statutory limits. Because Arkansas Valley was not properly notified that Thornton would be working within ten feet of its energized, high-voltage line, the electric company owed him no duty. Therefore, we affirm the trial court's decision to grant summary judgment in Arkansas Valley's favor.

Affirmed.

HART and ROAF, JJ., agree.

Detrick Deshawn CROSTON *v.* STATE of Arkansas

CA CR 05-881 234 S.W.3d 909

Court of Appeals of Arkansas
Opinion delivered May 3, 2006

Lesley E. Freeman, for appellant.

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

ANDREE LAYTON ROAF, Judge. Appellant Detrick Croston was found guilty of two counts of forgery in the second degree by a jury and sentenced to nine years' imprisonment. Croston now argues on appeal that the trial court erred (1) in requiring him to wear prison attire during his trial; and (2) in allowing the State to introduce evidence of incriminating statements he made to Bailiff Art Noel. We affirm.

On November 24, 2003, Croston was charged with two counts of forgery in the second degree. Wal-Mart security cameras recorded Croston entering the store and handing a cashier a check that belonged to Thomas Green, whose home had recently been burglarized.

Prior to his arrival at court for trial, Croston was offered civilian clothing for his court appearance, but he refused to wear it. At a hearing before the trial judge, Croston interjected that he did not want the clothes because they were too small. The trial court found that Croston was offered an opportunity to change clothes and refused; thus, he would be required to stand trial while wearing the prison attire. Furthermore, the trial court allowed the State to introduce evidence that Detective Williams and Bailiff Noel were familiar with Croston and were able to identify him from the Wal-Mart security tape; however, they could not mention that they knew him from past arrests or juvenile court.

At the subsequent trial, Bailiff Noel testified that while escorting Croston to jail he said to Croston, "I've known you for four years and I saw your face on that [surveillance] video, Detrick, and I know it was you," and that Croston replied, "you may know my mannerisms but no one else will."

On appeal, Croston first argues that the trial court erred by requiring him to appear for trial in jail attire. A criminal defendant does not have a constitutional right to be provided clothing of a particular style; the Constitution merely prohibits compelling a criminal defendant to appear in "clearly identifiable" jail clothing. *See United States v. Henry*, 47 F.3d 17 (2d Cir. 1995) (*cert. denied* 515 U.S. 1110 (1995)); *see also United States v. Martin*, 964 F.2d 714 (7th Cir. 1992). Absent a waiver an accused should not be forced to stand trial in distinct and identifiable prison garb. *Box v. State*, 348 Ark. 116, 123, 71 S.W.3d 552, 556 (2002). A waiver is present where civilian clothing is offered to the defendant and he refuses to change. *Id.*; *e.g.*, *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003); *Holloway v. State*, 260 Ark. 250, 539 S.W.2d 435 (1976) (holding that the defendants waived their right not to be tried in prison garb where they twice rejected the trial court's offer to change clothes).

The State has the burden of establishing that the accused has waived his right not to be tried in prison garb, and all doubts must be resolved in favor of the individual rights and constitutional safeguards. *Box*, *supra*. Furthermore, where an accused is tried in prison garb, his right to a fair trial is placed in serious jeopardy; thus the need to accommodate the jury and to save time cannot be paramount. *Id.* Finally, grounds for reversal are present where the defendant is required, against his will, to wear identifiable prison attire during trial, notwithstanding a lack of proof that he suffered prejudice. *Id.*

In *Washington v. State*, 6 Ark. App. 23, 637 S.W.2d 614 (1982), we held that the defendant waived his right not to be tried in prison attire, where he told the bailiff that he did not want to change before the trial. Later, when asked by the trial judge if he wanted to wear the orange prison jumpsuit, the defendant replied, "wear the jumpsuit."

Here, the State put on evidence of Croston's waiver through testimony by the bailiff, Art Noel. The testimony and colloquy concerning the waiver in its entirety is as follows:

> STATE: Additionally it is my understanding that the bailiff went to pick up Mr. Croston. They had civilian clothes ready for him over there. He refused to change clothes. He informed them that he wasn't coming to court; they could issue a failure to appear. Basically he said, he did not want to participate in our activities

today. They brought him over in shackles and jail attire and I would ask that he remain that way. He was afforded an opportunity to come over in civilian clothes. He has chosen not to do that. We have a jury out there and we are ready to go.

DEFENSE COUNSEL: We object to Mr. Croston appearing in jail attire and shackles. We would like to have the Court explain to him that he, at least, has the option of reviewing his thoughts along those lines.

COURT: In regard to the jail attire matter, it is my understanding that Mr. Croston was provided with civilian clothes and refused those clothes.

STATE: The bailiff is here if you would like to hear testimony about what actually occurred.

BAILIFF NOEL: At some point this morning Mr. Croston was afforded the opportunity to dress in civilian clothing. They were not his clothes, they were provided by the 309s that are here. According to Sergeant McCoombs, Mr. Croston stated that it was not his attire and he was not going to wear it and that he was not coming to court just give him a failure to appear. So, he refused to put on the civilian clothes and gave the jailer notice he did not want to come to court. I have not had any problem getting him to court this morning, he has complied. He told me he wasn't coming over and that he did not want to be in front of a jury without his clothes and that if I was going to make him come it would require force. I replied that if force was needed then it would be used and he did not want to go that route. He was afforded the opportunity to wear civilian clothes.

CROSTON: The clothes were too small.

COURT: He at first refused to come to court and even offered to have a failure to appear issued?

NOEL: Yes.

COURT: Does counsel have any questions for Officer Noel?

DEFENSE COUNSEL: Again, I would request that Court to allow Mr. Croston to reconsider his demand and put on civilian clothing. I think he surely realizes it's not going to help the situation to be here in jail attire.

COURT: Does the State have any argument?

STATE: We have a jury sitting out there and he has been given a chance. He knows what is going on and this is his third jury trial. The defendant cannot cause his own delay or mistrial.

COURT: I think he has been afforded the opportunity at 8:30 this morning and he turned the opportunity down and voiced concerns that he did not want to come at all. He overcame his refusal to come because he is here. At this point in time he will go to trial in jail attire. You are talking about an hour delay by the time you get back over and given the fact that Mr. Croston has been down this road before at least three other times, he is well aware of how it operates. At this point in time he will go to trial in jail attire. He refused to put on civilian clothes when offered prior to arriving at court so he will go to trial in his jail attire.

CROSTON: They were two sizes too small.

After the State put on evidence of Croston's refusal to change into the civilian clothing provided to him, Croston's counsel presented no evidence to dispute the refusal. While Croston's counsel asked the trial court to "explain" to Croston that he should "review his thoughts along those lines" and to allow Croston to "reconsider his demand" and put on civilian clothing, he did not request a continuance to obtain replacement clothing, or, as in *Box*, *supra*, elicit any testimony or make any argument regarding the clothing provided to Croston, whether it was appropriate for trial, whether alternate clothing was either available or on the way, or where it would be coming from. Croston's ambiguous interjections neither constitute evidence nor indicate the desire on his part to change his mind even if they are considered as such. Here, the State put forth evidence of a waiver by Croston, and counsel failed to present any evidence or even make an argument that disputed the waiver.

Croston also argues that the trial court erred in allowing the State to introduce evidence of incriminating statements made by him to Bailiff Noel, in violation of rights secured to him under the federal Constitution. As an introductory matter, Croston's objection to the trial court did not include a claim of violation of his Fifth, Sixth, and Fourteenth Amendment rights or that he was interrogated in the absence of counsel by Bailiff Noel. Croston merely objected to the officers testifying as to how they came to know him. Croston did not object to the testimony that was later given by Bailiff Noel in regard to his incriminating statements.

It is well settled that the appellate courts will not hear arguments or errors, even constitutional ones, which were not raised at the trial court level by means of a timely, specific objection. *Nooner v. State*, 339 Ark. 253, 4 S.W.3d 497 (1999); *Ussery v. State*, 308 Ark. 67, 822 S.W.2d 848 (1992); *McGhee v. State*, 82 Ark. App. 105, 112 S.W.3d 367 (2003) . Because Croston did not make a timely specific objection as to the introduction of the incriminating statements made to Bailiff Noel in absence of counsel, this argument was not preserved for our review. Therefore, we cannot consider this argument on its merits.

Affirmed.

GLOVER, VAUGHT, and CRABTREE, JJ., agree.

HART and BIRD, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. I compliment the majority's very even-handed recitation of the facts in this case and thorough citation of the applicable law. I part company only with their conclusion, which emerges like an ending from an O. Henry short story, that Croston "waived" his right not to appear in jail clothing. The majority does not satisfactorily explain how an unequivocal objection on the record by Croston's trial counsel, testimony from the State's only witness that Croston stated that he would accept a "failure to appear" rather than face the jury in the clothing the jailers offered, and Croston's own interjection that the proffered clothing was "too small" constitute a waiver.

In *Box v. State*, 348 Ark. 116, 71 S.W.3d 552 (2002), the supreme court noted that the burden is on the State to establish that appellant waived his rights, and all doubts must be resolved in favor of the individual rights and constitutional safeguards. *Id.*(Citing *Bradford v. State*, 306 Ark. 590, 815 S.W.2d 947 (1991)).

Further, it noted that the term "waiver" is defined as the "renunciation, repudiation, abandonment, or surrender of some claim, right or privilege, or of the opportunity to take advantage of some claim, right, irregularity or wrong." Here, it is apparent from the record that Croston did not wish to be tried in prison clothing and that he was merely objecting to the clothing that was offered to him. Under these facts, it is clear that the State failed to prove that Croston waived his right to be tried in civilian clothes.

The authority that the majority cites only bolsters my conclusion that they simply got it wrong. In *Holloway v. State*, 260 Ark. 250, 539 S.W.2d 435 (1976)(*rev'd on other grounds Holloway v. Arkansas*, 435 U.S. 475 (1978)), the appellants *twice* rejected the trial court's offer to allow them to change clothes. In *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003), not only did the appellant waive his right to appear in street clothes *on the record*, he "expressly requested to stay in jail togs." Finally, in *Washington v. State*, 6 Ark. App. 23, 637 S.W.2d 614 (1982), the appellant was asked by the judge if he wanted to wear the clothing that he was arrested in or the prison jumpsuit, and the appellant answered "wear the jumpsuit." In the instant case, the trial court did not inquire of Croston his reasons for rejecting the institutional clothing that the jailers were seeking to provide him with. I submit that not asking Croston on the record whether he was waiving his right to appear in civilian clothing, the procedure approved of by our supreme court in *Holloway* and *Newman* and this court in *Washington*, constitutes reversible error.

The majority does not explain, and I cannot fathom why the right to a fair trial was so easily lost by Mr. Croston. It is well settled that a person may waive his constitutional rights, but, that waiver must be knowing, intentional, and unambiguous. For instance, the right to a jury trial may be waived, but 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. Similarly, a criminal defendant may waive his right to counsel and represent himself; we require however, 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. *Mayo v. State*, 336 Ark. 275, 984 S.W.2d 801 (1999). Furthermore, our supreme court requires a specific warning of the dangers and disadvantages of self-representation, or

a record showing that the defendant possessed such required knowledge from other sources, to establish the validity of a waiver. *Bledsoe v. State*, 337 Ark. 403, 989 S.W.2d 510 (1999). The waiver of a defendant's right against self-incrimination has long required unambiguous proof that the defendant was apprised of these rights and knowingly and intelligently waived them. *Miranda v. Arizona*, 384 U.S. 436 (1966). Moreover, the statements arising from custodial interrogation are presumed to be involuntary, and like the right not to appear in jail clothing, the burden is on the State to prove that a defendant knowingly and intelligently waived his privilege against self-incrimination and his right to an attorney, and that he voluntarily made the statement. *Scherrer v. State*, 294 Ark. 227, 742 S.W.2d 877 (1988).

Prior to today's decision, the right to a fair trial afforded by prohibiting the State from trying an individual in jail clothing was protected by the courts of this state in a manner similar to the way that we still protect the right to a jury trial, the right to counsel, and the right against self-incrimination.

I am authorized by Judge BIRD to state that he joins in this dissent.

Richard H. GIVENS, Guardian of the Person and Estate of Rosie Givens, and Odessa Piggee, Guardian of the Person and Estate of Joanna Campbell *v.* HAYBAR, INC., and Mark Wilcox, in his Official Capacity as State Land Commissioner

CA 05-924 234 S.W.3d 896

Court of Appeals of Arkansas
Opinion delivered May 3, 2006

Danny R. Williams and *Bennie O'Neil*, for appellants.

Mark Alan Peoples, PLC, for appellee Haybar, Inc.

Carol Ann Lincoln, for appellee Mark Wilcox.

ANDREE LAYTON ROAF, Judge. Appellants Richard Givens and Odessa Piggee (hereafter "Givens" collectively), as guardians of Rosie Givens and Joanna Campbell, appeal from the trial court's summary judgment denying their petition to redeem property that had been sold for delinquent taxes. We affirm.

Mrs. Givens and Mrs. Campbell were declared incapacitated in the early 1980s. They are the sisters of the late Earl Campbell, who, during his lifetime, owned approximately forty acres in Pulaski County. Taxes were not paid on the property for the 1995 tax year, and, as a result, the property was certified to the State Land Commissioner on or about June 1, 1998. Earl died a little over a year later in September 1999. There is no evidence that he made any effort to redeem his property prior to his death. In fact, there is some indication in Givens's pleadings that, at the time that the property was certified to the State, Earl was in a nursing home and unable to attend to his affairs. For the purpose of our analysis, we will assume that Earl was incapacitated.

On May 18, 2000, the State Land Commissioner sold the forty acres to appellee Haybar, Inc., at a public auction. A limited warranty deed was issued to Haybar on June 21, 2000. No effort to redeem the property was made until October 7, 2003, when Givens tendered $432.15 to the State Land Commissioner for that purpose. The Commissioner denied the redemption as untimely, causing Givens to file the present lawsuit on June 14, 2004. The complaint alleged that, upon Earl's death, title to the property passed immediately to Mrs. Givens and Mrs. Campbell as his closest surviving heirs. It further alleged that, because these ladies were incapacitated, Arkansas law extended the time within which they, as owners of the property, could redeem the land.

The case was presented to the trial court on Haybar's motion to dismiss, which the trial court treated as a motion for summary judgment (Givens had also filed a motion for summary judgment). Following a hearing, the court ruled that Mrs. Givens and Mrs. Campbell did not own the property at the time of the tax sale and that no proper attempt at redemption was made within the applicable statutory periods. Summary judgment was thus granted to Haybar, and Givens appeals from that ruling.

Normally, on a summary-judgment appeal, the evidence is viewed in the light most favorable to the party resisting the motion, and any doubts and inferences are resolved against the

moving party. *Tunnel v. Progressive N. Ins. Co.*, 80 Ark. App. 215, 95 S.W.3d 1 (2003). But when both parties file motions for summary judgment, as was done in this case, they essentially agree that there are no material facts remaining, and summary judgment is an appropriate means of resolving the case. *See id.*

Arkansas law provides that all lands upon which taxes have not been paid for one year following their due date shall be forfeited to the State. Ark. Code Ann. § 26-37-101(a) (Repl. 1997).[1] However, the county collector "holds" the land for one year, and, during this period, the land may be redeemed by paying the taxes, interest, penalties, and costs due. *See* Ark. Code Ann. § 26-37-302; Ark. Code Ann. § 26-37-101(b). If the property is not redeemed by July 1 of the following year, the county collector transfers the property to the State by certification. Ark. Code Ann. § 26-37-101(a) and (b). Since the passage of Act 791 of 1993, title vests in the State upon receipt of certification. Ark. Code Ann. § 26-37-101(c).

Once the land has been certified, a sale of the property shall be held no earlier than two years after the certification. *See* Ark. Code Ann. § 26-37-301(b).[2] The property may be redeemed at any time before the sale, Ark. Code Ann. § 26-37-311(a), or within thirty days after the sale. Ark. Code Ann. §§ 26-37-203(a) and -202(e). If no such redemption takes place, the Commissioner issues a limited warranty deed to the purchaser. *Id.*

Thereafter, all actions to contest the conveyance shall be brought within two years after the date of the conveyance. Ark. Code Ann. § 26-37-203(b)(1). However, the ordinary limitations periods for redemption and setting aside the conveyance do not apply to persons who suffer "a mental incapacity" or are "insane." Arkansas Code Annotated section 26-37-203(b) provides:

> All actions to contest the validity of the conveyance shall be brought within two (2) years after the date of the conveyance or thereafter be barred, except as to causes of actions by persons suffering a

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[1] Some of the statutes cited herein were amended in 2005; however, unless otherwise indicated, we cite to the statutes contained in the 1997 Replacement Volume, which were applicable on the dates relevant to this case.

[2] If the June 1, 1998 certification date and the May 18, 2000 sale date pled by Givens are correct, the sale may have been held less than two years following certification, contrary to this statute. However, Givens has asserted no such irregularity.

> mental incapacity, minors, or those serving in the United States armed forces during time of war during the two-year period.
>
> Those persons shall not be allowed to contest the validity of the conveyance after the expiration of two (2) years after the disability is removed or the person reaches majority or the person is released from active duty with the armed forces.

Similarly, Ark. Code Ann. § 26-37-305(a) provides:

> All lands or city or town lots belonging to insane persons, minors, or persons in confinement that have been or may hereafter be sold for taxes may be redeemed within two (2) years from and after the expiration of such a disability.

In the case at bar, Givens argues that the above quoted statutes permitted Mrs. Givens and Mrs. Campbell, who suffered from mental incapacity, to redeem the land at issue more than three years after it was sold. We disagree.

At the time of Earl's death in 1999, he no longer held title to the property because title had vested in the State upon certification in 1998. Ark. Code Ann. § 26-37-101(c). Therefore, Mrs. Givens and Mrs. Campbell could not, as they asserted in their complaint, acquire ownership of the property upon Earl's death. *See generally Rich v. Rosenthal*, 223 Ark. 791, 268 S.W.2d 884 (1954) (holding that an heir's rights in property cannot be greater or rise above the intestate's or testator's). However, Earl did have, at the time of his death, a right to redeem the property. Our supreme court has recognized that "the right to redeem descends to the heir of the person who had the right to redeem." *Tarrence v. Berg*, 202 Ark. 452, 454, 150 S.W.2d 753, 754 (1941). Thus, under the holding in *Tarrence*, Mrs. Givens and Mrs. Campbell inherited Earl's right of redemption. The question, however, is the time within which they were required to exercise that right.

Givens argues that Ark. Code Ann. §§ 26-37-203(b) and 26-37-305(a) permit Mrs. Givens and Mrs. Campbell to redeem the land up to two years after the expiration of their own disabilities. However, that argument is directly contrary to *Tarrence, supra*. In that case, Will Tarrence, an insane person, died in 1916 while owning the right to redeem lands that had been sold for taxes. Will's son, Herman, filed suit to redeem the property in

1940, which was two years after he reached his majority. Our supreme court held that the son was required to redeem the property within two years of the expiration of the *father's* disability, not his own disability, stating:

> The appellant here [Herman] cannot tack his disability to that of his father in order to suspend or continue the suspension of the operation of the statute.
>
> Will Tarrence was insane, and under the statute he had two years after the removal of his disability to exercise his right of redemption. His heirs had the right under the statute to redeem within two years after his disability was removed by death, and they could not tack the disability of minority to that of the father and thereby extend the statute.
>
> While the right to redeem descended to the minor, that right must be exercised within two years after the death of his father, and not thereafter.

Tarrence, 202 Ark. at 456, 150 S.W.2d at 754-55 (citations omitted). Likewise, in the present case, if Earl was disabled as implied in Givens's complaint, Mrs. Givens and Mrs. Campbell cannot tack their disability onto Earl's for the purpose of extending the redemption period. Rather, they had the right to redeem the land within two years after Earl's disability was removed by death in 1999. That being the case, the limitations period expired in 2001, making their 2003 attempt at redemption untimely. Further, if Earl was not disabled, at the absolute outside, his deadline to set aside the 2000 conveyance to Haybar expired in 2002. Consequently, Mrs. Givens and Mrs. Campbell, as inheritors of Earl's right to redeem, were untimely in their 2003 attempt at redemption.

The dissent believes that we have misapplied *Tarrence*, based on certain facts contained in the background history of that opinion regarding Will Tarrence's inheritance from *his* father, Ben. However, the supreme court's ruling was not premised on the situation between Will and Ben but between Will and his son, Herman. We should not consider matters addressed by the court *sub silentio*. *Leonards v. E.A. Martin Mach. Co.*, 321 Ark. 239, 900 S.W.2d 546 (1995). The dissent also cites *Chambers v. Burke*, 194 Ark. 665, 109 S.W.2d 117 (1937), as being applicable here. However, *Chambers* differs from this case in a significant respect.

The minor in that case acquired title to the land before it was sold and thus was capable of asserting his own right of redemption. By contrast, in the present case, Mrs. Givens and Mrs. Campbell, under the law in effect since 1993, *see* Ark. Code Ann. § 26-37-101(c), could not take title to the land because it had vested in the State upon certification in 1998. Therefore, they could only assert Earl's right of redemption.

In fact, the older cases cited by Givens and by the dissent precede by decades the current statutory scheme governing delinquent-tax sales. They are, therefore, inappropriate to use in our analysis regardless of any factual similarity to the present case. Moreover, the dissent's characterization of Haybar as being "owned by a prominent Little Rock attorney" and specializing in "picking up bargains at tax sales," — of which there is no evidence in the record as abstracted and addended — and its particular mention of the Givens wards as African-Americans, suggests an unfounded basis for our ruling. Regardless of the parties' identities or characterizations, Givens's attempt at redemption was simply not timely under Arkansas law.

Givens also argues that the trial court erroneously based its ruling, at least in part, on the fact that the redemption was attempted by Mrs. Givens and Mrs. Campbell alone, even though there were children and grandchildren of other deceased brothers and sisters who could claim an interest in the action. Specifically, the court commented:

> They [the sisters] still have to do it within two years of the sale. It would be different if the only people I was dealing with was [sic] the disabled people. But there were four other heirs who were not disabled, and they didn't try to do anything to redeem this land.

Givens is correct that all co-tenants need not join in an action to redeem property and that the property may be redeemed by one on behalf of all. *See, e.g., Mitchell v. Chester*, 208 Ark. 781, 187 S.W.2d 899 (1945). However, the trial court's comment was not mentioned in the final judgment as a reason for the court's ruling. We generally do not consider a trial court's observations made from the bench as meriting reversal where they do not appear in the final order. *See, e.g., Comm. Bank of N. Ark. v. Tri-State Propane*, 89 Ark. App. 272, 203 S.W.3d 124 (2005).

Affirmed.

BIRD, GLOVER, and VAUGHT, JJ., agree.

HART and CRABTREE, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. I respectfully dissent because I believe that the majority makes both mistakes of fact and mistakes of law. Regarding their mistakes of fact, the majority asserts that the appellants' pleadings imply that Earl Campbell was "incapacitated."[1] There are no facts in the record, save for the fact that he resided in a nursing home, to support this assumption. At any rate, it should have no bearing on how this case is decided except that this otherwise insignificant piece of data seems to draw this case more completely within the loose language of *Tarrence v. Berg*, 202 Ark. 452, 150 S.W.2d 753 (1941), which I believe the majority wrongly concludes is dispositive. The appellants argue in their brief that *Tarrance* actually supports their case, and I agree. A brief recitation of the facts in *Tarrance* illustrates this point.

Ben Tarrence owned certain lands in Ouachita County when he died intestate in 1892. The property was "forfeited for taxes" the same year that he died. The land was sold for taxes in 1893. Will Tarrence was the oldest of Ben's heirs, and he was incompetent by reason of insanity. Nonetheless, Will married and fathered five children. Will himself died intestate on September 23, 1916. Will's youngest child, Herman Tarrance, was born on June 2, 1917. On May 6, 1940, Herman filed suit, seeking to redeem the property that had originally been forfeited by Ben. In affirming the trial court's dismissal of the case, the supreme court stated:

> Will Tarrance was insane, and under the statute he had two years after the removal of his disability to exercise his right of redemption. His heirs had the right under the statute to redeem within two years after his disability was removed by death, and they could not tack the disability of minority to that of the father and thereby extend the statute.

202 Ark. at 456, 150 S.W.2d at 75.

In the instant case, Earl Campbell's death corresponds to the demise of Ben Tarrance, and appellant Richard H. Givens, as guardian of two incompetent heirs stands in the shoes of persons

[1] We cannot say whether or not Mr. Campbell was incapacitated because Judge Sims inexplicably denied the appellant's request to put on proof of incapacity at the hearing.

who occupy a position analogous to Will Tarrance, who inherited the property after his father allowed the property to go into default. The fact that the majority makes this fundamental mistake of fact leads them to apply the wrong precedent, or more accurately, apply the right precedent wrongly.

Furthermore, the supreme court in *Tarrance* stated that the "right to redeem descends to the heir of the person who had the right to redeem." 202 Ark. at 454, 150 S.W.2d at 754. I believe that this holding is completely in concert with another supreme court case, *Chambers v. Burke*, 194 Ark. 665, 109 S.W.2d 117 (1937), which held that when a minor succeeds to his father's right to redeem forfeited land, the statutory protection afforded under what is now codified as Arkansas Code Annotated section 26-37-305 attaches to his right to redeem. In the instant case, the disability is different, but the principle is the same.

The fact that the appellee in *Burke* acquired the right to redeem by a means different from the case at bar is of no moment. It is well settled that the right of redemption is not an estate or interest in the land, but an "absolute" statutory privilege to defeat the tax title within a limited time. *Rinke v. Schuman*, 246 Ark. 976, 440 S.W.2d 765 (1969). As to the nature of the statutory protections at issue here, it should be self-evident that the privilege to redeem cannot have a disability — only the persons entitled to exercise that privilege can.

I cannot ignore the fact that here, the persons who have the right to redeem are two African-Americans who have been adjudged to be mentally incompetent, and the prevailing party in this case is Haybar, Incorporated, a business owned by a prominent Little Rock attorney, that apparently specializes in picking up bargains at tax sales. I find it ironic that the statutory protections afforded incapacitated persons under Arkansas Code Annotated section 26-37-305 are directly descended, virtually unchanged, from among the oldest acts of our legislature that are currently in force and that long ago our supreme court determined that "statutes providing for redemption from tax sales always receive a liberal construction." *Woodward v. Campbell*, 39 Ark. 580 (1882). The majority ignores the clear mandate to protect our most vulnerable citizens. Therefore, I respectfully dissent.

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

Brenda VANWAGNER *v.* WAL-MART STORES, INC.
and Claims Management, Inc.

CA 05-1210 234 S.W.3d 893

Court of Appeals of Arkansas
Opinion delivered May 3, 2006

McKinnon Law Firm, by: *Laura J. McKinnon*, for appellant.

Bassett Law Firm, LLP, by: *Curtis L. Nebben*, for appellee Wal-Mart Stores, Inc.

ANDREE LAYTON ROAF, Judge. Appellant Brenda VanWagner appeals from the Arkansas Workers' Compensation Commission's holding that her claim for additional permanent partial disability benefits is barred by the statute of limitations. VanWagner argues that the Commission erred when it found that her claim was time barred, asserting that the timely filing of her claim for additional benefits had tolled the statute of limitations. We reverse the Commission's decision and remand for a determination of VanWagner's entitlement to permanent partial disability benefits.

The facts of this case are not controverted. While working for appellee Wal-Mart, VanWagner injured her right shoulder on November 17, 1994, which eventually required surgical intervention. Wal-Mart began paying benefits on December 12, 1994. Wal-Mart last paid benefits to VanWagner in December 1994. On January 12, 1995, VanWagner filed a Commission Form AR-C requesting additional benefits. She requested additional temporary total disability benefits, additional permanent partial disability

benefits, additional medical expenses, and attorney's fees. At the hearing, both parties had agreed to litigate only the temporary total disability benefits claim, the issue of related medical expenses, the determination of whether VanWagner remained in her healing period, and the issue of attorney's fees. On August 19, 1996, the Commission affirmed the administrative law judge's opinion finding that VanWagner was still in her healing period but denying VanWagner's petition for additional temporary total disability benefits based upon Wal-Mart's defense of the refusal of suitable work.

On November 6, 2000, VanWagner filed a request for additional benefits. VanWagner requested a hearing on the issue of her entitlement to additional permanent partial disability benefits relating to a ten percent permanent partial impairment rating issued by the company physician. Wal-Mart defended the claim by raising the statute of limitations. The ALJ found that VanWagner's claim for additional benefits in January 1995 operated to toll the statute of limitations. The ALJ ruled that VanWagner's claim was not time barred and awarded permanent partial disability benefits and attorney fees. The Commission reversed the ALJ's decision and held that the statute of limitations did bar VanWagner's claim.

On appeal, VanWagner argues that the Commission erred in holding that her claim was time barred. When reviewing decisions from the Commission, this court views the evidence and all reasonable inferences therefrom in the light most favorable to the Commission's findings and will affirm the decision if the findings are supported by substantial evidence. *Dillard v. Benton Co. Sheriff's Office*, 87 Ark. App. 379, 192 S.W.3d 287 (2004). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

This court must first consider the allowable time for filing a claim for benefits as set out in Ark. Code Ann. § 11-9-702 (Repl. 2002). This statute sets out two types of claims. Subsection (a) covers an initial claim, which must be filed within two years of the date of injury. Ark. Code Ann. § 11-9-702(a)(1). The second type of claim is a claim for additional benefits and is set out in subsection (b) of the statute. In cases where any compensation has been paid, the claim for additional compensation, including disability or medical, will be barred unless filed within one year from the date of the last payment of compensation or two years from the date of the injury, whichever is greater. Ark. Code Ann. § 11-9-702(b)(1). When a claimant files a timely request for additional

benefits, the statute of limitations is tolled. *Eskola v. Little Rock Sch. Dist.*, 93 Ark. App. 250, 218 S.W.3d 372 (2005); *Dillard, supra*; *Spencer v. Stone Container Corp.*, 72 Ark. App. 450, 38 S.W.3d 309 (2001); *Bledsoe v. Georgia-Pacific Corp.*, 12 Ark. App. 293, 675 S.W.2d 849 (1984).

There is no question that VanWagner filed her 1995 request for additional benefits within two years of her injury, thus tolling the statute of limitations. The issue here is whether the 1995 hearing disposed of the claims and lifted the toll. The Commission held that it did, but we disagree. The Commission's opinion reads in pertinent part:

> Although [VanWagner] initially filed a claim for additional benefits on December 19, 1994, well within the statute of limitations period, and which tolled the statute of limitations, *this claim for additional benefits was litigated* on August 23, 1995, and disposed of via the Full Commission opinion filed August 19, 1996, thus lifting the toll. [VanWagner] did not file a subsequent request for additional benefits until November 3, 2000, well beyond the statute of limitations. [Emphasis added.]

A hearing was held in 1995; however, it adjudicated only the issues of temporary total disability benefits, end of healing period, and medical and attorney fees. The statute of limitatons was tolled when VanWagner filed her 1995 claim for benefits, but Wal-Mart asserts and the Commission found that the 1995 hearing lifted the toll on the statute of limitations in all respects, barring VanWagner's subsequent 2000 request for permanent partial disability benefits. The parties agreed, however, not to litigate the issue of permanent partial disability at the 1995 hearing, even though VanWagner indicated on the 1995 claim that she was requesting this benefit. No determination was ever made regarding VanWagner's entitlement to permanent disability benefits. Because the Commission found that VanWagner was still in her healing period in 1995, a determination of permanent partial disability benefits at that time would not have been appropriate. VanWagner's 2000 request for additional benefits was thus unnecessary and irrelevant to any statute of limitations calculation.

In sum, VanWagner filed a timely request for additional benefits in the form of permanent partial disability benefits in 1995, tolling the statute of limitations. The claim was neither litigated nor dismissed, the toll was never lifted, and the claim for

permanent partial disability benefits remains outstanding. Thus, VanWagner's claim for permanent partial disability benefits is not time barred.

Reversed and remanded.

PITTMAN, C.J., and GRIFFEN, J., agree.

Sherry ROARK *v.*
POCAHONTAS NURSING & REHABILITATION

CA 05-1226 235 S.W.3d 527

Court of Appeals of Arkansas
Opinion delivered May 10, 2006

M. Keith Wren, for appellant.

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

DAVID M. GLOVER, Judge. Sherry Roark appeals the Commission's affirmance and adoption of the Administrative Law Judge's determination that she had failed to prove that she remained totally disabled after May 14, 2004, and that the provisions

of Arkansas Code Annotated section 11-9-505(a)(1) were not applicable in her case. She raises four arguments on appeal:

> I. Claimant is entitled to benefits pursuant to Ark. Code Ann. § 11-9-505 because the decisions of the Missouri Employment Security Division are not binding upon the Arkansas Workers' Compensation Commission.
>
> II. Merely allowing the claimant to return to work briefly before terminating her does not relieve the employer from its obligations pursuant to Ark. Code Ann. § 11-9-505.
>
> III. The undisputed evidence reveals that claimant was not terminated for good cause.
>
> IV. In the alternative, the claimant is entitled to temporary total disability benefits.

We affirm the Commission's decision.

Our standard of review in workers' compensation cases was set forth in *Arbaugh v. AG Processing, Inc.*, 360 Ark. 491, 493-94, 202 S.W.3d 519, 521 (2005) (citations omitted):

> On appeal, this court views the evidence and all reasonable inferences therefrom in the light most favorable to the Commission's decision and affirm that decision when it is supported by substantial evidence. It is for the Commission to determine where the preponderance of the evidence lies; upon appellate review, we consider the evidence in the light most favorable to the Commission's decision and uphold that decision if it is supported by substantial evidence. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. There may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we had sat as the trier of fact or heard the case de novo. It is exclusively within the province of the Commission to determine the credibility and the weight to be accorded to each witness's testimony. 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.

In the present case, Roark began working for appellee Pocahontas Nursing and Rehabilitation on March 29, 2004, as a certified nursing assistant. It is undisputed that she suffered a

compensable injury on April 9, 2004. Roark was off work until April 28, when she returned to light-duty work.

At the hearing, Roark testified that prior to her injury, she worked in the nursing department and was supervised by Aneica Ball, who was responsible for making out the CNA schedules. Roark said that Ball gave her two schedules, one for April, which she received prior to her injury, and another schedule for May, which she received after she returned to work. Prior to her injury, Roark asked Ball to be off work May 14-15 for a family wedding. Roark said that when she returned to light duty, the schedule she received reflected that she was not scheduled to work on the days that she had asked to be off, and that there was a notation of "RO" by those dates, which meant that she had specifically "requested off" on those days. Roark testified that her regular shift was 3 p.m. to 11 p.m., but that when she returned to work on light duty, she worked from 7 a.m. to 3 p.m. Roark said that when she returned for light-duty work, she reported to Ball, and that she was never told to report to Pam Murphy, the administrator of the center. Roark also testified that she also was never told by Murphy or anyone else that her new light-duty schedule did not include the days off that she had previously requested.

Roark did not go to work on May 10 because she had car trouble; she said she called in, but she did not recall with whom she spoke. She said that she tried to contact Murphy twice on May 10 but was unable to reach her. Roark said that she went to work on May 11 and reported to the charge nurse, but she did not recall seeing Murphy that day. She went to work on May 12 but not on May 13 because she had to take her son to Little Rock for a medical appointment. Roark said that she called in on the night of May 12 but again did not recall with whom she spoke. She did not go to work on May 14 because she had earlier requested that day off; when she returned to work on May 17, she was advised that she was being terminated because she was a no call/no show on May 14.

Roark testified that she was never given a new work schedule after returning to light-duty work and that Murphy never verbally or otherwise gave her another schedule. Roark said that she never discussed taking May 14-15 off with Murphy, and that Murphy never told her that she could not take those days off. Roark said that since May 17 she has been ready, willing, and able to return to light-duty work.

On cross-examination, Roark said that she had filed for unemployment in Missouri, where she lived, but that it was denied. She said that at the time of her injury, she was still in her probationary period and that her regular shift was 3 p.m. to 11 p.m. Roark admitted that when she began light-duty work her schedule switched to 8 a.m. to 4 p.m. but that she was still going by her April schedule that showed her shift as being from 3 p.m. to 11 p.m. She said that she thought the April schedule did not show her light-duty hours because it was too close to the end of the month to change it, and that the second schedule (May) was prepared before she returned to light-duty work.

Roark acknowledged that there was a rule that required employees to call into work at least two hours beforehand if they were going to be absent, and that this rule was contained in the attendance policy, which she had signed. She also acknowledged that the attendance policy had a zero tolerance for a no call/no show, and that an employee could be terminated for the first instance of a no call/no show.

Roark said that the May schedule she had reflected that she had requested off May 14-15, but that she did not confirm that she would be off those days with Murphy when she began light-duty work because she had confirmed it with Ball. She said that Ball never told her that she had to discuss her request for days off with Murphy after she returned to light-duty work. Roark said that after she was terminated that she did not speak to Ball or Murphy about the situation.

Pam Murphy, the administrator of Pocahontas Nursing and Rehabilitation, testified that Aneica Ball was the director of nursing at the center, and that she prepared schedules on the 20th or 25th of the month preceding the month of the schedule so that the center could ensure that there would be enough CNAs for each shift to comply with the law. Murphy said that the schedules were always a "work in progress" because they changed as employees called in sick or requested days off. Murphy said that copies of the schedules were not handed out, but that employees were allowed to make copies of them.

Murphy said that when an employee suffers a work-related injury and must perform light-duty work, he or she comes under her direct supervision and is assigned to the day shift, which is 8 a.m. to 4 p.m., and that duties are assigned based upon the employee's restrictions. With regard to Roark, Murphy testified

that she told Roark in front of Trish Beckler, the person in charge when Murphy was not on the premises, that she would be working a schedule of 8 a.m. to 4 p.m. Monday through Friday under Murphy's direct supervision and that Roark was to get all of her assignments and permission to do anything from her. Murphy said that she told Roark to report to Beckler and ask her any questions if Murphy was unavailable. Murphy said that the schedules Roark had no longer applied when she began working in a light-duty capacity, that Roark no longer reported to Ball, and that Roark never requested any days off from her. Murphy said that when Roark did not call in on May 14 before 8 a.m., she was considered to be a no call/no show.

On cross-examination, Murphy said that light-duty work was available for Roark and that she was not let go because there was no light-duty work available. Murphy said that she never discussed the days that Roark had requested off from Ball with her, but that she had no reason to doubt that Roark had requested those days off. She said that there was no particular reason that she would not have allowed Roark to be off on the days that she had requested, that she just had to ask her; she said that Roark did not communicate with her. Murphy stated that Roark was not terminated for unexcused absences, but rather she was terminated because she did not show up for work and did not call.

Murphy acknowledged that on May 13, the day before Roark was terminated, she had a letter typed that was to be mailed via certified mail to Roark if she did not come to work the next day. Murphy said that she was going to be out of the office on May 14, and that she had the letter prepared "based on the assumption" that Roark had already been called and that she already had two unexcused absences.

Upon examination from the ALJ, Murphy said that she did not personally advise Roark that her requested days off were no longer valid because she was unaware that Roark had requested any days off. Murphy said that when Roark did not come to work on May 14 and did not call, she was considered to be a no call/no show and was considered terminated, although she acknowledged that that was the day that Roark had previously requested off from Ball.

The ALJ found that Roark failed to prove that she was totally disabled after May 14, 2004, and he further found that the provisions of Arkansas Code Annotated section 11-9-505(a)(1) were not applicable to Roark's claim. Roark now brings this appeal.

Roark's first three points on appeal center around the provisions of Arkansas Code Annotated section 11-9-505(a)(1) (Repl. 2002), which provides:

> Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

Before this provision is applicable, an employee must prove by a preponderance of the evidence (1) that he sustained a compensable injury; (2) that suitable employment which is within his physical and mental limitations is available with the employer; (3) that the employer has refused to return him to work; and (4) that the employer's refusal to return him to work is without reasonable cause. *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

Roark asserts that the first three requirements are not in dispute, but that the only dispute is whether the refusal to return her to work was without reasonable cause. However, Roark's second point of appeal concerns the third prong of this test, whether the employer refused to return Roark to work. We hold that the employer did not refuse to return Roark to work.

Roark's second point is "merely allowing the claimant to return to work briefly before terminating her does not relieve the employer from its obligations pursuant to Ark. Code Ann. § 11-9-505." In support of this contention, Roark cites *Allen v. Int'l Paper*, 89 Ark. App. 266, 202 S.W.3d 13 (2005), and *Clayton Kidd Logging Co. v. McGee*, 77 Ark. App. 226, 72 S.W.3d 557 (2002). However, we hold that the present case is distinguishable from the cases cited by Roark.

In *Allen*, the appellant suffered a compensable injury and was restricted by his physician to performing only light-duty work, which the employer initially provided. However, after approximately six months, appellant was told that he could no longer continue performing light-duty work because company policy limited light-duty work to ninety days, and that it was an oversight on the company's part that he had been allowed to continue working in a light-duty capacity past the ninety-day limit. The

employer refused to return the appellant to work until he was fully released by his physician. In reversing and remanding this case, this court held:

> In accepting the appellee's self-imposed policy, the Commission, in effect, allowed an employer to nullify the stated legislative purpose of returning an employee to work. . . . We are convinced that the legislative intent and language of the statute does not allow an employer to implement a ninety-day, light-duty policy to circumvent its obligations designed to extend for a year.

89 Ark. App. at 271, 202 S.W.3d at 16.

In *Clayton Kidd, supra,* this court affirmed an award of additional compensation to the employee under Ark. Code Ann. § 11-9-505, holding that the evidence supported the Commission's finding that the employer had in effect refused to return the employee to work by terminating him several days after he returned to work. According to the employee's testimony, which the Commission found to be credible, the employer told him that "they didn't need him any longer."

Here, the employer did not refuse to return Roark to work; she was provided with light-duty work within her restrictions. It was Roark's actions, by not clearing her days off with her new supervisor when she returned to light-duty work and by taking that day off without permission and not calling in to work, that caused her job to be terminated. The employer did not take any action against Roark until she violated the no call/no show rule that was in the attendance policy, which allowed for immediate termination.

Even if it was determined that the employer had refused to return Roark to work, we hold that such a refusal would not have been without reasonable cause. Roark argues that it was error to simply adopt the finding of the Missouri Employment Security Division denying Roark unemployment benefits as controlling in this case, citing Workers' Compensation Commission opinions that hold that decisions of the Arkansas Employment Security Division and the Social Security Administration are not binding upon the Arkansas Workers' Compensation Commission. However, simply because such decisions are not binding does not mean that the Commission must disregard the Missouri decision.

Furthermore, although Roark argues that her termination was not for good cause because no one told her that the days

that she had previously requested off were no longer valid after she returned to work on light duty, Pam Murphy testified that after Roark returned to work on light duty, she reported directly to her; that Roark's new schedule was 8 a.m. to 4 p.m. Monday through Friday; and that she told Roark that she was to get all of her assignments and permission to do anything from either her or Trish Beckler. Roark did not receive permission from Murphy to be absent on May 14 after Murphy became her supervisor, and her failure to call or come to work on that day was grounds for immediate termination.

Roark's last argument is that, alternatively, she is entitled to temporary-total disability benefits because the employer failed to provide her with light-duty work. However, we hold that this argument fails for the same reasons that her section 11-9-505(a)(1) argument fails. But for her own actions, Roark would have been provided continuing light-duty work. However, she violated a provision of the attendance policy that provided for immediate termination upon the first offense, and the employer terminated her for that reason. Roark cites no authority for the proposition that an employer is required to provide light-duty work for an injured employee who has violated a rule or policy of the employer that provides for immediate termination.

Furthermore, Roark, by her own admission, is not totally incapacitated from earning wages. In her testimony, she stated that she was ready, willing, and able to return to work in a light-duty capacity.

Affirmed.

BIRD and CRABTREE, JJ., agree.

Cynthia TAYLOR *v.* Regan L. PAYNE

CA 05-1043 235 S.W.3d 533

Court of Appeals of Arkansas
Opinion delivered May 10, 2006

Hancock & Lane, P.A., by: *C. Daniel Hancock*, for appellant.

Stuart Law Firm, P.A., by: *Ginger Stuart Schafer* and *J. Michael Stuart*, for appellee.

DAVID M. GLOVER, Judge. Appellant, Cynthia (Payne) Taylor, and appellee, Regan Payne, were divorced by decree entered on February 23, 1989. Appellant was awarded custody of the parties' minor child, Derek, whose date of birth was March 5, 1987. Appellee was ordered to pay $300 a month in child support. In February 2004, Derek began living with appellee. On August 18, 2004, appellee filed, *inter alia*, a motion for change of custody. Hearings were held on October 5, 2004, and April 13, 2005. The trial court concluded that appellant was estopped from collecting child support from appellee beginning with the date that Derek started living with appellee until he turned eighteen on March 5, 2005. For her sole point of appeal appellant contends that the trial court erred by applying the doctrine of equitable estoppel to the child-support arrearages. Finding no error, we affirm.

A trial court's ruling on child-support issues is reviewed *de novo* by this court, and the trial court's findings are not disturbed unless they are clearly against the preponderance of the evidence. *Chitwood v. Chitwood*, 92 Ark. App. 129, 211 S.W.3d 547 (2005). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.* We give due deference to the superior position of the trial court to view and judge the credibility of the witnesses. *Id.*

Once a child-support payment falls due, it becomes vested and a debt due the payee. *Id.* However, enforcement of child-support judgments is treated the same as enforcement of other judgments, and a child-support judgment is subject to the equitable defenses that apply to all other judgments. *Id.* If the obligor presents to the court or administrative authority a basis for an equitable-estoppel defense, there may be circumstances under which the court or administrative authority will decline to permit enforcement of the child-support judgment. *Id.*

Here, in February 2004, the parties' son, Derek, ran away from appellant's home. She reported him missing, and the Cabot Police Department eventually picked him up. When the police contacted appellant to pick Derek up, however, by her own

admission she did not do so. Shortly thereafter, Derek began living with appellee. On August 18, 2004, appellee filed a motion for change of custody, among other requested relief that is not pertinent to this appeal. On that same date, the trial court, in pertinent part, entered an *ex parte* order noticing the parties for a hearing on October 5, 2004, to address custody, child support, and related issues.

A brief hearing was held on October 5, 2004. During that hearing the trial court acknowledged that there was not enough time to decide the major issues but that he was trying to do what he could within the time frame with which they had to work. The parties stipulated that Derek had lived continuously with appellee from about February 24, 2004. The trial court implemented a "status quo" order for the child to remain with appellee until another hearing could be held on the change of custody issue. In addition, the court concluded that the doctrine of equitable estoppel was applicable to the situation with respect to appellee's child-support obligations to appellant. The order from this hearing was entered on October 13, 2004.

On April 13, 2005, a hearing was held on appellee's motion for change of custody and for child support. By the time of this hearing, Derek had turned eighteen. It was agreed and the court stated that a "narrow window" of time was involved concerning child support: "We're talking about from February 24, 2004, until the child reached the age of 18. That's the window we're talking about." By order entered April 25, 2005, the trial court concluded that appellant was obligated to pay child support for the period February 24, 2004 to March 5, 2005, and that the amount of support she owed for that period was $6,540. The order specifically denied appellant's request to assess child support from August 18, 2004, when the motion for change of custody was filed.

Appellant appeals from the October 13, 2004 and April 25, 2005 orders. She essentially argues that the "record in the instant case is void of any action by [her] that would have led Mr. Payne to believe that support payments were no longer expected or required; but instead, Mr. Payne knew full well his obligation to seek a change of custody and support if circumstances warranted" and "[b]ecause none of the elements of equitable estoppel are present in the instant case, . . . the trial court was erroneous in its application."

The elements of equitable estoppel are (1) the party to be estopped must know the facts; (2) the party must intend that its

conduct shall be acted on or must so act that the party asserting estoppel had a right to believe the other party so intended; (3) the party asserting estoppel must be ignorant of the facts; and (4) the party asserting estoppel must rely on the other party's conduct to his detriment. *Chitwood, supra.*

(1) the party to be estopped must know the facts

[redacted] There is really no question that appellant, as the party to be estopped, "knew the facts." She filed the missing-person report with the Cabot police, yet when they found her son and called her to come retrieve him, she did not do so. Appellee testified that he and the police spoke with appellant on the speaker phone; that she said she would get Derek "x-number" of days after appellee took him to a friend's house; that she never went to get Derek; and that appellee picked Derek up after five days and "that's when he came to live with me." Appellant knew that Derek was living with appellee. Appellant also knew that she had been awarded custody of Derek; that Derek was an unemancipated minor; that appellee would pick him up if she did not do so; that appellee provided support for Derek during the period in question; and that appellant was providing no support to appellee for Derek during that time frame. We hold that this first element of estoppel was satisfied.

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

[redacted] This element was satisfied because appellant, by her conduct, failed to retrieve Derek, and she clearly knew that appellee would pick Derek up and care for him, which appellee in fact did.

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

Here, the party asserting estoppel is appellee, and under this element he must be ignorant of the facts. We hold that he was. Appellee did not know when, or if, appellant would retrieve Derek from his home; in the past Derek had been sent to live with appellee only to return to appellant a short time later; and appellant provided no support to appellee for Derek during the period that Derek lived with appellee. In addition, appellee stated that he did

not have the money to get an attorney to petition to change custody. In short, it was impossible for appellee to know if appellant was going to come and retrieve Derek after a short stay as she had done in the past, and it was an expensive undertaking to file a motion for change of custody only to have Derek return to appellant after a short stay.

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

The fourth and final element was satisfied by the fact that appellee reacted to appellant's essential abandonment of Derek after he was located by the Cabot police, and appellee stepped in to provide room and board and other support directly to Derek, with no support from appellant.

Affirmed.

BIRD and CRABTREE, JJ., agree.

DEATH & PERMANENT TOTAL DISABILITY TRUST FUND
v. LEGACY INSURANCE SERVICES and
Lumbermen's Mutual Casualty

CA 05-732 235 S.W.3d 544

Court of Appeals of Arkansas
Opinion delivered May 10, 2006

Judy Rudd, for appellant.

Rieves, Rubens & Mayton, by: *David C. Jones*, for appellees.

OLLY NEAL, Judge. This appeal from the Arkansas Workers' Compensation Commission (Commission) presents the question of whether an insurance carrier is entitled to a credit for payments made toward a twenty-nine percent permanent-anatomical-impairment rating against its $75,000 maximum liability for permanent-total-disability benefits pursuant to Ark. Code Ann. § 11-9-502(b) (Repl. 1996). We answer this question in the affirmative; therefore, we affirm the decision of the Commission.

Joseph Thomas worked for appellee Legacy Insurance Services (Legacy) when he was injured in a motor-vehicle accident on November 14, 2000. He sustained unscheduled closed-head and hand injuries, and Legacy and its carrier, appellee Lumbermen's Mutual Casualty Company, accepted his accident as compensable. In addition to the stipulation of compensability, the parties made several other stipulations, including that (1) Thomas reached maximum-medical improvement and his healing period ended on December 10, 2002; (2) Thomas's permanent- anatomical-impairment rating was being paid, with $38,628 ultimately being the total amount paid over 130.5 weeks; and (3) Thomas was permanently and totally disabled as of December 10, 2002. The only issues presented to the administrative law judge (ALJ) were whether an actuarial valuation study dated June 30, 2003, and offered by appellant Death & Permanent Total Disability Trust Fund, was admissible into evidence and whether appellees were entitled to a credit for the payments made for the impairment rating toward their $75,000 cap for weekly permanent-total-disability benefits. The Commission issued its own opinion in which it affirmed the ALJ's determinations that the actuarial valuation study was inadmissible and that appellees were entitled to a credit. It is from this decision that appellant appeals.

Appellant does not challenge the Commission's determination on the admissibility of the actuarial valuation study; instead, for reversal, appellant asserts only that the Commission erred in its interpretations of Ark. Code Ann. §§ 11-9-501, 502, 519, and 522 as allowing appellees credit for payment of the permanent-anatomical-impairment rating against their maximum $75,000 liability as provided in Ark. Code Ann. § 11-9-502.

In appeals involving claims for workers' compensation, our court views the evidence in a light most favorable to the Commission's decision and affirms the decision if it is supported by substantial evidence. *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 225 S.W.3d 361 (2006). Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Foster v. Express Personnel Servs.*, 93 Ark. App. 496, 222 S.W.3d 218 (2006). 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. *Dorris v. Townsends of Arkansas, Inc.*, 93 Ark. App. 208, 218 S.W.3d 351 (2005).

In affirming the decision of the ALJ, the Commission wrote in part

> The parties in the present matter stipulated that the claimant was permanently and totally disabled. The parties also stipulated that claimant's healing period ended on December 10, 2002. Respondent No. 1 [Legacy Insurance Services and Lumbermen's Mutual Casualty] must therefore pay the claimant "weekly benefits" representing permanent total disability pursuant to Ark. Code Ann. § 11-9-502(b) from the date of the end of claimant's healing period, until the respondent-carrier has paid the claimant $75,000. Benefits paid pursuant to Ark. Code Ann. § 11-9-522(a) are partial benefits and once a determination of permanent and total disability has been made, the benefits due a claimant are no longer governed by 11-9-522 but are found in Ark. Code Ann. § 11-9-502(b) and Ark. Code Ann. § 11-9-519(e). Thus, when a determination of permanent total disability has been made, the benefits paid by a respondent after the end of the healing period are classified as permanent and total disability benefits under Ark. Code Ann. § 11-9-502(b). The statute then provides, "all benefits in excess of seventy-five thousand dollars ($75,000) shall be payable from the Death and Permanent Total Disability Trust Fund."

> Based on our *de novo* review of the entire record, . . . [t]he Full Commission affirms the administrative law judge's finding, "Respondent #1 is entitled to a credit for the amount of permanent anatomical impairment rating benefits ultimately paid to Claimant, against the first $75,000 of permanent and total disability benefits Respondent #1 must pay, thereby reducing the balance of the $75,000.00 due from Respondent No. 1."

We hold that substantial evidence supports the Commission's decision. There are two distinct forms of disability payments — temporary and permanent. *See* Ark. Code Ann. § 11-9-101 (Repl. 1996) ("The primary purposes of the workers' compensation laws are to pay timely temporary and permanent disability benefits to all legitimately injured workers who suffer an injury or disease arising out of and in the course of their employment. . . ."). Temporary disability is that period within the healing period in which an employee suffers a total or partial incapacity to earn wages. *Breakfield v. In & Out, Inc.*, 79 Ark. App. 402, 88 S.W.3d 861 (2002). The healing period is defined as that period for healing of an accidental injury that continues until the employee is as far restored as the permanent character of the injury will permit, and that ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. *See Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). When a claimant's healing period has ended so has his right to temporary disability. *See Legacy Lodge v. McKellar*, 26 Ark. App. 260, 763 S.W.2d 101 (1989). Until the healing period has ended, there is no way to determine whether there is permanent disability. *See Sparks Reg'l Med. Ctr. v. Death & Permanent Total Disability Bank Fund*, 22 Ark. App. 204, 737 S.W.2d 463 (1987) (where claimant's healing period ended on February 7, 1983, any payments made subsequently were for permanent-total disability and only those payments may be applied toward the employer-carrier's maximum-liability limit).

Permanent benefits are only awarded upon a determination that the compensable injury was the major cause of a disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a) (Repl. 1996). Arkansas Code Annotated section 11-9-502 (Repl. 1996) sets forth the exceptions to the limitations on compensability for death and total permanent disability benefits. Subsection b provides:

> (b)(1) For injuries occurring on and after March 1, 1981, the first seventy-five thousand dollars ($75,000) of weekly benefits for death

> or permanent total disability shall be paid by the employer or its insurance carrier in the manner provided in this chapter.
>
> (2) An employee or dependent of an employee who receives a total of seventy-five thousand dollars ($75,000) in weekly benefits shall be eligible to continue to draw benefits at the rates prescribed in this chapter, but all benefits in excess of seventy-five thousand dollars ($75,000) shall be payable from the Death and Permanent Total Disability Trust Fund.

In this instance, the parties stipulated that Thomas's healing period ended on December 10, 2002. Generally, a stipulation is "[a] voluntary agreement between opposing parties." *Ferguson v. State*, 362 Ark. 547, 556, 210 S.W.3d 53, 58 (2005) (Hannah, J., concurring) (citing *Black's Law Dictionary* 1455 (8th ed. 2004)). It has long been settled law in Arkansas that a stipulation is the equivalent of undisputed proof, and it leaves nothing for the fact-finder to decide regarding the stipulated subject. *Riddell Flying Serv. v. Callahan*, 90 Ark. App. 388, 206 S.W.3d 284 (2005). As such, on December 10, 2002, Thomas became permanently and totally disabled. "Permanent total disability" means "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." Ark. Code Ann. § 11-9-519(e)(1) (Repl. 1996).

Furthermore, Arkansas Code Annotated section 11-9-501(c)(2) (Repl. 1996) states that "[a]ny weekly benefit payments made after the commission has terminated temporary total benefits shall be classified as warranted by the facts in the case and as otherwise provided for in this chapter." By accepting the parties' stipulation that Thomas's healing period ended on December 10, 2002, at which time he was permanently and totally disabled, the Commission effectively adopted December 10 as the date that payments for temporary-total-disability benefits ended and permanent disability payments began. Therefore all payments made after December 10, 2002, were classified by the Commission as permanent-total-disability payments that could be applied towards the $75,000 maximum pursuant to Ark. Code Ann. § 11-9-502 (Repl. 1996).

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.

HOME CARE PROFESSIONALS of ARKANSAS, INC. *v.* Artee WILLIAMS, Director Employment Security Department

E 04-280 235 S.W.3d 536

Court of Appeals of Arkansas
Opinion delivered May 10, 2006

[Rehearing denied June 14, 2006.*]

Zachary Taylor, for appellant.

Alan Pruitt, for appellee.

OLLY NEAL, Judge. This is the second time that this case concerning unemployment contributions has been before us. In December 1996, appellant Home Care Professionals of Arkansas, Inc., (HCP) filed Articles of Incorporation (Articles) with the State of Arkansas indicating that the nature and purpose of its business was to "engage in the general business of home care for the elderly, and related services." Over the years, HCP ceased directly providing home-care services and evolved into a home-care referral service.

HCP currently operates as follows. HCP maintains a list of caregivers who are able to provide home-care services. A potential

* BAKER, J., would grant rehearing.

client will contact HCP and state what services they desire. HCP will collect the fees for the service up front and place them in an escrow account. HCP will then find a caregiver willing to perform the service. The client and the caregiver will negotiate a schedule and the terms of the caregiver's engagement. Once the caregiver completes the service, the caregiver turns in a time-sheet, and HCP distributes the funds from the escrow account minus its forty percent referral fee.

As to the caregivers, a caregiver will approach HCP about being placed upon its referral list. Upon acceptance by HCP, the caregiver will sign an independent-contract agreement with HCP. Paragraph nine of the contract is a non-compete clause and it provides:

> The parties to this contract agree that [HCP] has a valid and legitimate interest in the protection of its customer base from appropriation. Therefore, in order to protect this interest, [the caregiver] agrees by entering into this agreement and accepting referrals by [HCP] that he or she will not accept private employment from any client of [HCP] to whom he or she provided services for a period of twelve (12) months from the last due date of referral by [HCP].

Also, at the beginning of their association with HCP, the caregiver is informed that he/she is an independent contractor and is responsible for paying his/her self-employment taxes. The caregiver is responsible for his/her own transportation and supplies. Once the caregiver and client work out a schedule, the caregiver will inform HCP of their schedule. From then on, HCP will administer the caregiver's schedule, and when the caregiver is unable to work, HCP will schedule a replacement.

The Chief of Contributions subsequently determined that, under Arkansas law, the caregivers qualified as employees. HCP disputed the Chief's findings, and the matter was certified to the Board of Review (Board). A hearing on the matter was held before a hearing officer.

At the hearing, the following testimony was received. Ed Rolle, former director of the Employment Security Department, testified that he hired HCP to assist with his mother. He said that he stipulated his requirements to HCP, and HCP found an appropriate caregiver. He did not remember screening or selecting

the caregiver himself. Mr. Rolle testified that, when he first contacted HCP, a member of HCP's management brought a caregiver out to meet him and his mother and that, during the visit, the manager surveyed the house where the services were to be provided.

Lisa Randles testified that she was on HCP's referral list. She described herself as an independent contractor. She said that HCP was not her only source of referrals. Ms. Randles explained that she takes jobs on her own and receives referrals from other sources. She testified that, when she signed on with HCP, she was given a list of the available jobs, and after choosing the jobs that she wanted, she would then interview with the client. Ms. Randles said that the client would pay HCP for the services she performed and that HCP would then pay her.

Linda Schay, HCP's president, testified that the caregivers are not required to be exclusively listed with HCP. She explained that the purpose of the non-compete clause was to prevent clients from hiring a caregiver without first paying the referral fee. She stated that there were instances where clients had bought out the non-compete clause. Ms. Schay did not think that the non-compete clause gave HCP control over the caregivers. During her testimony, Ms. Schay stated that HCP did not terminate the caregivers; she said that the client makes the decision to terminate. She also denied inspecting a client's home prior to making a referral.

The Board found that HCP satisfied the first and third statutory exemption requirements found in Ark. Code Ann. § 11-10-210(e) but failed to satisfy the second exemption requirement, found in section 11-10-210(e). Because HCP was unable to satisfy the second requirement, the Board ruled that HCP was liable for unemployment insurance taxes based upon the caregiver's remuneration. An appeal of the decision was brought before our court. In an unpublished opinion, we remanded the case back to the Board for a determination as to whether the remunerations constituted wages. *See Home Care Prof'ls of Ark. Inc. v. Director*, E04-280, slip op. at 3 (Ark. App. June 1, 2005). Upon remand, the Board found that the remunerations qualified as wages. From that decision HCP now brings this appeal.

On appeal, the findings of the Board of Review are conclusive if they are supported by substantial evidence. *Barb's 3-D Demo Serv. v. Director*, 69 Ark. App. 350, 13 S.W.3d 206 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* We review

the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Steinert v. Director*, 64 Ark. App. 122, 979 S.W.2d 908 (1998). Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

On appeal, HCP urges us to rule that the Board erred when it determined that the remunerated services of the caregivers using HCP as a source of referrals qualify as employment subject to the payment of unemployment insurance taxes. HCP specifically argues that the remuneration received by the caregivers does not constitute wages for the purpose of establishing unemployment insurance liability. In the alternative, HCP argues that, even if the caregiver remuneration qualifies as wages under the relevant statute, HCP bears no liability for unemployment insurance taxes because it satisfies all three statutory requirements for exemption.

Arkansas Code Annotated section 11-10-210(e) (Supp. 2005) provides:

> (e) Service performed by an individual for wages shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the director that:
>
> (1) Such individual has been and will continue to be free from control and direction in connection with the performance of the service, both under his or her contract for the performance of service and in fact; and
>
> (2) The service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
>
> (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

Subparagraphs (1) through (3) only apply when three precedent conditions are found to exist. *See Palmer's Boutique v. Arkansas Employment Sec. Div.*, 265 Ark. 571, 580 S.W.2d 683 (1979); *McCain v. Crossett Lumber Co.*, 206 Ark. 51, 174 S.W.2d 114 (1943). The

precedent conditions are: (1) that services were performed; (2) by an individual; (3) for wages. Palmer's, supra; McCain, supra.

HCP first argues that the remunerations were not wages. Wages are defined as "all remuneration paid for personal services, including, but not limited to, commissions, bonuses, cash value of all remuneration paid in any medium other than cash." Ark. Code Ann. § 11-10-215(a) (Supp. 2005). In making the determination if remuneration is paid, section 11-10-210(e) must be construed strictly against the State with any doubts being resolved in favor of the taxpayer. *Palmer's, supra.*

In its order finding that the remunerations qualified as wages, the Board wrote:

> [HCP's] own contract with its clients states that the client is paying [HCP] a "referral fee." After deducting its referral fee, [HCP] pays the balance to a caregiver for the caregiver's personal services rendered to the client. The caregivers are paid by [HCP] commensurate with the extent of services and hours of care they provide to [HCP's] clients. It is clear that the caregivers perform personal services for wages. Therefore, the Board finds that remuneration received by the caregivers qualifies as "wages" under Ark. Code Ann. § 11-10-215(a) and for purposes of Ark. Code Ann. § 11-10-210(e).

Viewing this in a light most favorable to the Board, we are unable to say that the Board's decision finding that the remunerations qualified as wages was not supported by substantial evidence. Accordingly, we affirm the Board's findings.

HCP further argues that, even if the caregivers' remunerations constituted wages for purposes of unemployment insurance tax liability, the Board erred when it found that it was unable to satisfy subparagraph (2) of the statutory exemption, *i.e.*, the service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed. In resolving this issue, the Board wrote:

> In the instant case, caring for the elderly is necessary to [HCP's] business, and thus providing in-home services is within [HCP's] usual course of business. Since the evidence does not establish that [HCP] receives a monetary benefit when a simple referral is made, but only when a service by a caregiver is performed for a client, a finding that providing in-home services is within [HCP's] usual course of business is particularly appropriate.

> In regard to the place of business aspect of the second part of the test, an employer's place of business has been found to include not only the location of a business's office, but also the entire area in which a business conducts business. See Missouri Association of Realtors v. Division of Employment Security, 761 S.W.2d 660 (Mo. App. 1988); Employment Security Commission of Wyoming v. Laramie Cabs, Inc., 700 P.2d 399 (Wyo. 1985); and Vermont Institute of Community Involvement, Inc., v. Department of Employment Security, 436 A.2d 765 (Vt. 1981). More specifically, the representation of an entity's interest by an individual on a premises renders the premises a place of the employer's business. See Carpetland, [*Carpetland U.S.A. v. Illinois Dep't of Employment Security*, 206 Ill.2d 351, 776 N.E.2d 166 (Ill. 2002)]. In the instant case, the caregivers represent [HCP's] interest on the clients' premises, not just in a tangential fashion (e.g., satisfactory work by the caregiver may result in future referral), but in the most direct sense, that of performing the very service by which [HCP] profits.

Furthermore, HCP's Articles provide that its purpose is to provide home-care for the elderly. When we view the evidence in a light most favorable to the Board, we cannot say that the Board's decision is not supported by substantial evidence and we agree that HCP failed to satisfy subparagraph (2) of the statutory exemption. Because HCP fails to satisfy subparagraph (2), the caregivers are not independent contractors and HCP is not exempt from paying unemployment taxes. Therefore, we affirm the Board's decision.

Affirmed.

PITTMAN, C.J., and BIRD, GRIFFEN, ROAF, JJ., agree.

BAKER, J., dissents.

KAREN R. BAKER, Judge, dissenting. Two missteps in the majority's analysis prevent an accurate disposition of this case. First, the majority fails to address the Board of Review's misapplication of *Carpetland USA, Inc. v. Ill. Dept. of Empl. Sec.*, 776 N.E.2d 166 (Ill. 2002). The substantial-evidence standard is applicable only when the issue is one of fact. The rule has no application when the issue is one of law. *Arkansas Oklahoma Gas Corp. v. Director, Ark. Employment Sec. Dep't*, 80 Ark. App. 251, 94 S.W.3d 366, (2002). Second, the nature of the services provided by Home Care Profes-

sionals of Arkansas, Inc., to the clients and the nature of the services provided by the caregivers in the homes of the clients are fundamentally different.

The caregivers provide personal services of an intimate nature to the clients, such as bathing, dressing, and meal preparation. Home Care provides services to the client by compiling a list of potential caregivers and gathering information about those individuals in order to assist the client in selecting acceptable caregivers for such personal contact. Home Care also distributes payments to the various caregivers. Therefore, the services performed, which is the focus of the statutory analysis under section 11-10-210(e) (Supp. 2005), are fundamentally different.

The Board of Review found that Home Care Professionals, Inc., satisfied the first and third statutory exemption requirements found in Ark. Code Ann. § 11-10-210(e). Therefore, we begin with two premises: (1) The individual caregivers are free from the control and direction of Home Care in connection with the performance of the services provided in the client's homes, both under his or her contract for the performance of service and in fact; (2) Each individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed. In this case, the business of the same nature is home care for the elderly.

Our analysis must therefore focus on the Board's determination that the caregivers are representing Home Care's interest on the clients' premises because the caregivers are "performing the very service by which [HCP] profits." The Board, and the majority, relied upon the articles of incorporation for Home Care. These articles state that the purpose of the business is to provide home-care for the elderly. To reach the conclusion that the caregivers are performing the service by which Home Care profits, the Board relied upon *Carpetland, supra.*

In *Carpetland,* the business sold carpets with the added service of arranging for the installation of the carpet at the time of sale. Seventy-five percent of the company's business included the installation with the sale. The Illinois court found that the installers were independent contractors but applied a theory of delegation to find that the measurers for the carpet were not independent contractors:

> The situation with the measurers is not as clear cut. The report concludes that:

> "Without accurate measurements, petitioner would have a difficult time finalizing its sales to the customers. The sales persons could and were encouraged to do the measurement, by making them pay half of the measurer's fees, but such demands on their time would reduce the volume of their sales. * * * Thus, the measurer's services were integrated into the petitioner's business and therefore were clearly within the usual course of, and in furtherance of the petitioner's business."
>
> The Director concurred, noting that "the petitioner's salespeople, who are employees, can and often do the measuring themselves." The appellate court did not consider this factor.Calculating the price of goods is necessary to Carpetland's business. The salesperson cannot close the deal until he can multiply the square yardage of carpeting required by the price per square yard. The customer may provide the dimensions, in which case no measurement is needed. If not, it is the salesperson's responsibility to obtain the needed information. When one's employee is assigned the responsibility for a certain task, and has the choice between performing that task himself or delegating it to another, that task is clearly within the course of business for the employer. Thus, the measurers do perform a service within Carpetland's usual course of business.
>
> *Carpetland*, 776 N. E. 2d at 187.

The Illinois court found that the employees of Carpetland were responsible for obtaining the measurements for the sale of the carpet. They could do that by receiving the measurements from the purchasers of the carpet, measuring the room themselves, or delegating that responsibility to the measurers. The nature of selling carpet required the determination of a specific amount of carpet to be sold because the sale could not be completed without a designated yardage. Because the measurements could only be obtained in the home of the purchaser, the home of the purchaser extended the place of business of Carpetland when Carpetland sent its employees or delegated the task to the measurers. Although Carpetland provided the service of arranging for the installation of the carpet, and seventy-five percent of their business included arranging for that service and installation was performed in the customer's home, the Illinois court found that the installers were independent contractors. The key to the distinction is the fact that Carpetland delegated the performance of its duty to measure.

For this analysis to apply here, Home Care must be contractually responsible to provide the personal services received by the clients and then delegate contractual responsibility to the caregivers. That is not the case. As the majority acknowledges, over the years, Home Care ceased directly providing home-care services for the elderly and evolved into a home-care referral service. The contractual responsibility of Home Care with the clients is to provide a list of individuals with whom the clients may negotiate and enter agreements for the care provided and the fees charged. Home Care enters into one contract with the caregiver and a separate and distinct contract with the client. The client and the caregiver are required by separate provisions not to enter into a private employment arrangement for twelve months from the last date worked by the caretaker. This provision in the contract with the client is titled "NON COMPENSATION" and reads as follows:

> Client agrees by entering into this agreement and accepting referrals from HCPA that he or she will not enter into private employment with referred caregiver for a period of twelve (12) months from the last due date referred by HCPA.

"Non compensation" is an accurate title for this provision. The client is not in competition with Home Care, its agent, for this information. The client specifically contracted with Home Care to provide a list of acceptable caregivers, and Home Care is under a contractual obligation to obtain, maintain, and supply the list of caregivers to the client.

The noncompetition provision in the contract between the caregiver and HCPA is specifically titled "NONCOMPETITION CLAUSE" and contains the following stipulation:

> The parties to the Contract agree that HCPA has a valid and legitimate interest in the protection of its customer base from appropriation. Therefore, in order to protect this interest, IC agrees by entering into this Agreement and accepting referrals by HCPA that he or she will not accept private employment from any Client of HCPA to whom he or she provided services for a period of twelve (12) months from the last due date of referral by HCPA.

In order to meet its client's needs, Home Care maintains a list of elderly people identifying their specific care needs. This list is compiled by a variety of means including interviews and home

inspections. Confidential business information such as these detailed customer lists is a protectable interest. *See Statco Wireless, LLC v. Southwestern Bell Wireless, LLC*, 80 Ark. App. 284, 95 S.W.3d 13 (2003). The agreement entered into by Home Care and the client is entitled "Home Care Contract" and states specifically that "[t]he provision of this Agreement shall govern the referral of a Caregiver in the performance of companion and home care." The paperwork presented to a potential caregiver states specifically that "Home Care Professionals of Arkansas, Inc. is the client or homeowners [sic] representative and will assist them in the business of caregiving."

The Board found that the caregivers represent Home Care's interest on the clients' premises because they are "performing the very service by which Home Care profits." That finding is not supported by the evidence. Home Care profits by providing information to clients who subsequently negotiate and agree with caregivers to provide and receive elder care. Providing information is one service in elder care. Personal services are of a different nature. Home Care is not contractually liable to perform any personal care to its clients. Instead, Home Care is contractually obligated to find acceptable people to provide the elder home care and contractually obligated to receive and disburse payment for that care. Home Care cannot legally delegate a duty it has no legal duty to perform.

The Board's reasoning that the caregivers represent Home Care's interest while in the client's home because Home Care profits from the services provided in the home is clearly wrong. The Illinois court in *Carpetland* rejected the assertion that the place of business extends to "any place where a worker performs agreed-upon services" for an employing unit finding that "if this were the test for place of business, the exception for independent contractors would cease to have any meaning because any place in which a worker performed an agreed-upon service, even his own home or office, would become the place of business of the party who hired him." *Carpetland*, 776 N.E.2d at 188. Even if the caregivers entered into a contractual relationship with Home Care to provide personal services in the home of the elderly, which they do not, the majority's opinion effectively eviscerates the exception.

Accordingly, I dissent.

Jim WYATT and Visual Cosmetic Changes *v.*
Tracy GILES

CA 05-1094 235 S.W.3d 552

Court of Appeals of Arkansas
Opinion delivered May 10, 2006

Montgomery, Adams & Wyatt, PLC, by: *James W. Wyatt,* for appellant.

Harrill & Sutter, P.L.L.C., by: *Luther Oneal Sutter,* for appellee.

LARRY D. VAUGHT, Judge. On appeal Jim Wyatt argues that the trial court erroneously denied his motion to compel arbitration and dismiss the claim filed against him by Tracy Giles. Specifically, he argues that the trial court misapplied Arkansas's Uniform Arbitration Act, codified at § 16-108-201 (Repl. 2006). We affirm.

On October 13, 2004, Tracy Giles filed a complaint against Wyatt and Visual Cosmetic Changes. In her complaint she specified that she was alleging "an action in tort for negligence." She claimed that Jim Wyatt breached his duty of care by failing to "sufficiently numb [Giles's] skin, so when Mr. Wyatt started the procedure [Giles] experienced severe pain," and that "one eyeliner was larger than the other eyeliner." She also complained that, on the day following the procedure, she "awoke and saw that both of her eyes were severely swollen and black and blue."

On December 6, 2004, Wyatt answered Giles's complaint with a motion asking the trial court to dismiss Giles's claim and to compel arbitration. Wyatt based his claim on language contained in a "Disclosure and Consent for Tattoo and Dermal Procedures" agreement signed by Giles on September 29, 2002, which stated:

> I have agreed that should I have a complaint of any kind whatsoever, I shall immediately notify James L. Wyatt[,] and I further agree that any controversy or claim arising out of or relating to this consent and/or signed contract between myself and James L. Wyatt or the breach thereof, shall be settled by arbitration in the state of Arkansas in accordance with the Rules of the American Association and judgment of the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

In her response to Wyatt's motion, Giles argued that the arbitration agreement was not mutual and that without mutuality the arbitration agreement was not enforceable.

Oral arguments were heard on May 31, 2005. At the hearing, the trial court noted that because Giles's cause of action sounded in tort, not contract, arbitration was not her sole remedy. Wyatt responded that because Giles defended the motion to dismiss using a contract defense — claiming that the parties' agreement lacked mutuality — she had waived her right to argue that her claim sounded in tort and thus was not covered by Arkansas's Uniform Arbitration Act. The trial court concluded that whether or not an action sounds in tort is not a waivable issue and denied Wyatt's motion to dismiss and to compel arbitration based on the language contained in § 16-108-201(b)(2), which states that agreements to arbitrate "shall have no application to personal injury or tort matters." It is from this decision that Wyatt appeals.

A trial court's denial of a motion to compel arbitration is an immediately appealable order. *Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 27 S.W.3d 361 (2000). Our court's review is authorized by Ark. Code Ann. § 16-108-219(a) (Repl. 2006) and is conducted de novo. *Am. Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994).

In our review of this case we are particularly mindful of our review standard. In an appeal de novo, "the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Blacks's Law Dictionary* 94

(7th ed. 1999). Thus, in this case, we are left with the singular task of concluding whether — as a matter of law — Giles's exclusive remedy in her dispute with Wyatt is arbitration. As a threshold matter, we must examine the arbitration agreement entered into by the parties, the complaint filed by Giles, and our state's arbitration act. Although Giles agreed that any claims she has against Wyatt would be governed by Arkansas's Uniform Arbitration Act, the act specifically excludes claims sounding in tort from its boundaries. Therefore, if Giles's claim sounds in tort, her remedy is not exclusively arbitration.

There is no doubt that the claims outlined in Giles's complaint sound in tort. Further, we reject Wyatt's metamorphosis argument. Simply put, a tort does not cease to be a tort based on a litigant's response — or lack thereof — to a motion to compel arbitration. Therefore, because Giles has alleged a tort and torts are not subject to the provision of the arbitration act, we conclude that the motion to compel arbitration should be denied.

Affirmed.

HART and ROAF, JJ., agree.

Eddie BRAY *v.* INTERNATIONAL WIRE GROUP
and General Accident of America

CA 05-1125 235 S.W.3d 548

Court of Appeals of Arkansas
Opinion delivered May 10, 2006

Baim, Gunti, Mouser & Havner, PLC by: *Michael W. Boyd*, for appellant.

Michael Ryburn, for appellee.

ANDREE LAYTON ROAF, Judge. On January 2, 2001, appellant Eddie Bray sustained a compensable back injury for which he had surgery in May 2001. This claim has been the subject of a previous hearing in April 2002, when appellees International Wire Group (IWG) and General Accident of America (GAA) denied the claim after allowing Bray only one visit to the company doctor. The injury was found to be compensable, and IWG and GAA were directed by the administrative law judge (ALJ) in a June 2002 opinion to pay medical expenses and temporary total disability (TTD) benefits for two different time periods ending on February 7, 2002. Sometime later in 2002, IWG and GAA stopped paying medical benefits associated with Bray's visits to his regular physician, Dr. Toni Middleton, this time on the basis that Dr. Middleton was not an authorized treating physician. Bray challenged the appellees on the refusal to pay further benefits; discovery was conducted during 2003; and a hearing was ultimately held before the ALJ on June 18, 2004. The ALJ found that Dr. Middleton was not an authorized physician, that Bray was not entitled to additional temporary total disability benefits, and that Bray was not entitled to attorney's fees. The Commission affirmed and adopted the decision of the ALJ. On appeal, Bray asserts that the Commission's decision is not supported by substantial evidence. We reverse in part and affirm in part.

During the course of litigating his original claim, Bray received treatment from his general practitioner, Dr. Middleton. Dr. Middleton treated him for his back problems and referred him to Dr. P.B. Simpson, a specialist. Dr. Simpson performed surgery on Bray in May 2001 and eventually assigned him a fifteen-percent anatomical impairment rating. Dr. Simpson initially released Bray to be seen on an as-needed basis as of February 6, 2002. Dr. Simpson also saw Bray on January 31, 2003, and again instructed Bray to return to him on an "as-needed basis." Dr. Simpson noted in his 2003 report that Bray wanted pain medication, but Dr. Simpson stated that he would "let his regular physician take care of that."

After he was awarded benefits on his original claim in 2002, according to Bray, he contacted the insurance carrier about seeing Dr. Middleton and getting prescriptions. He testified that he was directed to Donna "Tuttie" Criswell, a new adjuster handling his file. He stated that he spoke with "Tuttie" on three or four occasions in an attempt to get his prescriptions filled and to see Dr. Middleton. According to Bray, in his first conversation with her,

Criswell gave him a number to take to the pharmacy to get his medication. Bray informed Criswell that Dr. Simpson had released him with instructions to follow up with pain management with his regular physician. Bray testified that Criswell told him to see his regular physician as Dr. Simpson had recommended. Criswell testified that she only had Bray's file for about a month, that she did not remember ever having a conversation with Bray, and further stated that she never told him to see his regular physician. Criswell acknowledged, however, that she did go by the nickname "Tuttie."

Bray requested a hearing to determine his entitlement to payment of medical expenses related to his visits to Dr. Middleton, temporary total disability benefits, and attorney's fees. The ALJ found in an opinion filed September 16, 2004, that Dr. Middleton was unauthorized and that Bray's healing period had ended when Dr. Simpson initially released him in 2002. Thus, the ALJ ruled that Bray was not entitled to additional medical expenses or to additional temporary disability benefits and that he was not entitled to attorney's fees. The Commission adopted the decision of the ALJ.

The well-settled standard of review for workers' compensation cases is as follows:

> This court reviews decisions of the Workers' Compensation Commission to see if they are supported by substantial evidence. *Deffenbaugh Indus. v. Angus,* 39 Ark. App. 24, 832 S.W.2d 869 (1992). In determining the sufficiency of the evidence to support the findings of 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 will affirm if those findings are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Farmers Coop. v. Biles,* 77 Ark. App. 1, 4-5, 69 S.W.3d 899, 902 (2002). Further, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Estridge v. Waste Mgmt.,* 343 Ark. 276, 33 S.W.3d 167 (2000).

Poulan Weed Eater v. Marshall, 79 Ark. App. 129, 133–34, 84 S.W.3d 878, 881 (2002).

For his first point on appeal, Bray argues that the Commission's decision that he is not entitled to additional medical expenses and additional temporary disability benefits because Dr. Middleton was not an authorized treating physician is not supported by substantial evidence. Bray specifically asserts that Dr. Middleton was authorized to treat him because Dr. Simpson referred him back to Dr. Middleton and because Dr. Middleton was his initial treating physician. IWG and GAA do not contest the reasonableness or necessity of Dr. Middleton's treatment. Arkansas Code Annotated section 9-11-514(b) (Repl. 2002) states that treatment by a physician other than the claimant's authorized physician shall be at the claimant's expense. This section, however, is inapplicable if the authorized treating physician refers the claimant to another doctor for examination or treatment. *Am. Greetings Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). Whether treatment is a result of a "referral" rather than a "change of physician" is a factual determination for the Commission. *Dep't of Parks & Tourism v. Helms*, 60 Ark. App. 110, 959 S.W.2d 749 (1998); *Patrick v. Ark. Oak Flooring Co.*, 39 Ark. App. 34, 833 S.W.2d 790 (1992). When that determination is challenged on appeal, this court will affirm if it is supported by substantial evidence. *Helms, supra.*

The Commission's opinion focuses on its finding that there is no evidence that Bray received permission from the insurance carrier to change physicians. Bray, however, clearly asserts that he did not attempt to exercise his right to a one-time change of physician under Ark. Code Ann. § 11-9-514. Instead, Bray argues that Dr. Simpson referred him to Dr. Middleton, or in the alternative, that Dr. Middleton remained authorized as his initial treating family physician.

Bray first saw Dr. Middleton, a general practitioner, after his initial injury. Dr. Middleton was the physician who originally ordered diagnostic testing and then referred Bray to Dr. Simpson, the specialist who performed surgery on Bray's back. The ALJ recognized Dr. Middleton as a treating physician in the 2002 opinion regarding the original award; this decision was issued in June 2002, after Dr. Simpson's first release letter was issued in February 2002. On January 31, 2003, Dr. Simpson again recorded in his notes that he was discharging Bray from his care and would see him back on an as-needed basis. Dr. Simpson also noted that

Bray wanted pain medication but that he would "let [Bray's] regular physician take care of that." The situation presently before this court is a treating specialist releasing his patient and referring him back to his original treating physician, who was authorized to treat him.

Dr. Middleton was Bray's original treating physician, and there is nothing in the record or the various decisions of the ALJ and Commission that states or even suggests that he did not remain an authorized physician throughout this case. Bray saw Dr. Middleton after IWG and GAA controverted his original claim. In the first decision of this case, the ALJ found the claim to be compensable and ordered IWG and GAA to pay Bray's medical bills, including bills from Dr. Middleton. Dr. Middleton was and remains an authorized treating physician in this case.

For his second point on appeal, Bray argues that the Commission erred when it found that he was not entitled to additional total temporary disability benefits because the decision is not supported by substantial evidence. He asserts that he was entitled to additional TTD benefits pursuant to Dr. Middleton's findings. Bray presented off-work slips by Dr. Middleton indicating that he should remain off work for a certain time. In the original opinion, the ALJ decided that TTD benefits should be paid through February 7, 2002. Bray was also given a fifteen-percent anatomical impairment rating. Bray did not appeal this decision. Bray now asserts that he has entered a new healing period based on the off-work slips from Dr. Middleton and a report dated June 15, 2004. There is no indication, however, that Bray's condition has materially changed in any way or that he has entered into a new healing period. When the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve that condition, the healing period for which the claimant is entitled to TTD benefits has ended. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). Dr. Middleton's report does not suggest any further treatment that might improve Bray's condition. Dr. Simpson, noting in his report that he could not find anything significantly wrong with him, released Bray from his care and referred him to his regular physician for pain management. The persistence of pain is not sufficient in itself to extend the healing period. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Thus, the

Commission's decision that Bray is not entitled to additional TTD benefits is supported by substantial evidence.

Finally, Bray argues that the Commission's decision that he is not entitled to attorney's fees and costs related to his motion to compel is not supported by substantial evidence. At a deposition on January 15, 2003, Bray's counsel hand-delivered discovery to IWG and GAA's counsel, asking for telephone logs to confirm Bray's assertion that he contacted the adjuster about seeing Dr. Middleton. IWG and GAA did not turn over the logs but answered that there were no such conversations noted in the telephone logs. Bray filed a motion to compel. A hearing was held on this matter, and IWG and GAA were ordered to provide those logs to the Bray with certain restrictions. The logs did not confirm Bray's assertions. Bray asserts that he is entitled to attorney's fees and costs related to his motion to compel because IWG and GAA were wrongfully withholding relevant information. There was no evidence in the record regarding the costs incurred by Bray concerning the hearing on the motion to compel. We do not decide whether the ALJ lacked the authority to award attorney's fees and costs as the Commission's opinion notes, but we do hold that, in this case, substantial evidence supports the Commission's decision not to award attorney's fees and costs relating to the motion to compel.

Reversed in part; affirmed in part.

HART and VAUGHT, JJ., agree.

Sherry PARKER and Sherry Crow *v.* Raymond JOHNSON and Loree Johnson

CA 05-1350

Court of Appeals of Arkansas
Opinion delivered May 17, 2006

[Rehearing denied June 14, 2006.]

Streetman, Meeks & McMillan, by: *Denise D. McMillan*, for appellants.

Vickery & Carroll, P.A., by: *Ian W. Vickery*, for appellees.

JOHN MAUZY PITTMAN, Chief Judge. Judgments were obtained separately by each of the appellants against Tiffany Johnson, and these judgments were recorded on July 1 and 24, 2002. Shortly thereafter, on July 30, 2002, Tiffany Johnson was divorced from Robert Johnson. Upon entry of the final decree of divorce, certain residential real property owned jointly by Tiffany and Robert Johnson during their marriage was converted by operation of law from an estate by the entireties to a tenancy in common pursuant to Ark. Code Ann. § 9-12-317 (Repl. 2002). The property subsequently was sold in a court-ordered partition sale conducted pursuant to a property settlement agreement that had been approved by the court and incorporated into the divorce decree. The purchaser at the partition sale was the Johnson family corporation, in which appellees Raymond and Loree Johnson are principals. The corporation then voluntarily paid the mortgage debt and sold the property to unrelated parties, the Smiths, who had knowledge of the judgment liens. Appellees brought a declaratory judgment action to clear title to the property pursuant to an indemnity agreement with the Smiths. In a prior opinion, we held that the trial judge erred in ruling that the retirement of the mortgage indebtedness by the Johnson family corporation following the public sale extinguished appellants' judgment liens, and reversed and remanded the trial court's grant of summary judgment on that basis. *See Parker v. Johnson*, 90 Ark. App. 161, 204 S.W.3d 586 (2005). On remand, the trial court conducted a hearing and found that the evidence was insufficient to show a waiver or abandonment of the homestead exemption on the property by Robert Johnson, and that the homestead exemption barred the attachment of appellants' judgment liens. On appeal, appellants contend that the trial court erred in holding that res judicata did not bar the homestead issue, and in finding that the homestead exemption applied. We affirm.

■ We first address the res judicata issue. Under the claim-preclusion aspect of the doctrine of res judicata, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim or cause of action.

Murry v. Mason, 42 Ark. App. 48, 852 S.W.2d 830 (1993). Res judicata bars not only the re-litigation of claims which were actually litigated in the first suit but also those which could have been litigated. *Id.* The doctrine of res judicata applies, however, only when the party against whom the earlier decision is being asserted had a fair and full opportunity to litigate the issue in question. *Cater v. Cater*, 311 Ark. 627, 846 S.W.2d 173 (1993). Here, no such "full and fair opportunity" to litigate the homestead issue existed in the prior proceeding because it turned on a question of intent, a factual issue that could not be decided in the context of the summary judgment motion and that the trial court expressly refused to decide on that very basis.

Nor do we think that the trial court erred in finding that the homestead exemption applied. Once acquired, a homestead right in the head of household who continues to occupy the homestead is not terminated by divorce. *Middleton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001). The Johnsons' agreement to sell the home during the divorce proceeding is not determinative: the homestead exemption may be raised as a defense to this action even though the property has been conveyed. A homestead claimant may sell his homestead free from any judgment rendered against him or execution issued thereon, except for claims which may be enforced against a homestead under the Constitution, and the plea of homestead is available to the grantee. *Triple D-R Development v. FJN Contractors, Inc.*, 65 Ark. App. 192, 986 S.W.2d 429 (1999). The sale of a homestead can convey title free of a judgment lien in existence at the time of the sale. *Blackford v. Dickey*, 302 Ark. 261, 789 S.W.2d 445 (1990). A homestead may, however, be abandoned. The principles relevant to this issue were thoroughly discussed in *Smith v. Flash TV Sales & Service, Inc.*, 17 Ark. App. 185, 706 S.W.2d 184 (1986), where the learned Judge James R. Cooper wrote for the court:

> The general rule is that the burden of proving a sufficient occupancy of the property to establish a homestead is upon the party claiming the right to the exemption. *Arkansas Savings and Loan Association v. Hayes*, 276 Ark. 582, 637 S.W.2d 592 (1982); *Automotive Supply Inc. v. Powell*, 269 Ark. 255, 599 S.W.2d 735 (1980); *Barnhart v. Gorman*, 131 Ark. 116, 198 S.W. 880 (1917); *Gibbs v. Adams*, 76 Ark. 575, 89 S.W. 1008 (1906).
>
> "[I]ntention to abandon [a homestead] is an issue of fact, and in such a situation, evidence is rarely clear. However, the legal pre-

sumption is that the homestead right continues until it is clearly shown that it has been abandoned." *Vesper v. Woolsey*, 231 Ark. 782, 785-86, 332 S.W.2d 602, 604-05 (1960). *Accord City National Bank, supra.* The burden is upon one claiming that a homestead has been abandoned to establish that fact. *Melton v. Melton*, 126 Ark. 541, 191 S.W. 20 (1917).

In *City National Bank, supra*, the Arkansas Supreme Court explained that the intention of the one claiming the exemption is central to the determination of such cases:

> The Constitution provides for the homestead, and, when once established, the presumption is that it continues until it is shown by the evidence that it has been abandoned. The question of homestead and residence, being a question of intention, must be determined by the facts in each case, and the [trial court's] finding of fact will not be disturbed unless it appears to be against the preponderance of the evidence.

192 Ark. at 949, 96 S.W.2d at 484.

In *Caldcleugh v. Caldcleugh*, 158 Ark. 224, 250 S.W. 324 (1923), the court dealt with the issue of intent in the context of abandonment of the homestead:

> It is well settled that a removal from the homestead, where there is a fixed and abiding intention to return to it, will not constitute an abandonment of it as a homestead. An abandonment of a homestead is almost, if not entirely, a question of intent, which must be determined from the facts and circumstances attending each case. A removal from the homestead may be caused by necessity or for business purposes, and if the owner has an unqualified intention to preserve it as a homestead and return to it, his removal will not result in an abandonment of the land as a homestead.

158 Ark. at 230-31, 250 S.W. at 326. *Accord Monroe v. Monroe*, 250 Ark. 434, 465 S.W.2d 347 (1971); *Harrison v. Rosensweig*, 185 Ark. 281, 47 S.W.2d 2 (1932); *McDaniel v. Conlan*, 134 Ark. 519, 204 S.W. 850 (1918); *Melton, supra*; *Stewart v. Pritchard*, 101 Ark. 101, 141 S.W. 505 (1911); *Brown v. Watson*, 41 Ark. 309 (1883); *Euper v. Alkire & Co.*, 37 Ark. 283 (1881).

It has also been held, however, that one will be presumed to have abandoned his old home when he leaves it and acquires another, where he resides for a considerable time, in the absence of convinc-

> ing testimony to the contrary. *Gillis v. Gillis*, 164 Ark. 532, 262 S.W. 307 (1924); *Wolf v. Hawkins*, 60 Ark. 262, 29 S.W. 892 (1895). "The facts that the absence extended over a period of six years, and that the debtor during that period occupied another house owned by him, tend to show a change of residence, but are not conclusive." *Robinson v. Swearingen*, 55 Ark. 55, 58, 17 S.W. 365, 366 (1891). *See also Brown, supra.* Additionally, the abandonment of a homestead may be proved by conduct, circumstances, and actions, as well as by direct testimony. *Harrison, supra; Lilly v. Lilly*, 178 Ark. 324, 11 S.W.2d 765 (1928).
>
> This Court recently considered the question of abandonment of a homestead in *Ross v. White*, 15 Ark. App. 98, 689 S.W.2d 588 (1985). In that case, we held that the trial judge's decision that the debtor had impressed a homestead on his property and never abandoned it was not clearly erroneous. In *Ross*, the debtor had moved out of state, but had continued to make the mortgage payments on the property, and had occupied and worked on the house during his returns to Arkansas. He had also allowed his sister to move into the house without paying rent. He further continued to pay taxes and was registered to vote in Arkansas and claimed to have never abandoned his Arkansas homestead.

Smith, 17 Ark. App. at 190-92, 706 S.W.2d at 187.

In the present case, the trial court found that appellants failed to meet their burden of showing an intent to abandon the homestead, basing this finding in part upon Robert Johnson's statement that he continued to maintain and improve the home, and that he intended to remain in the home by buying it back as he had done during a prior divorce. We cannot say that the court clearly erred in so finding, and we therefore affirm. *See Tri-State Delta Chemical, Inc. v. Wilkison*, 75 Ark. App. 140, 55 S.W.3d 304 (2001).

Affirmed.

ROBBINS and BAKER, JJ., agree.

Angela Michelle BLEVINS *v.* STATE of Arkansas

CA CR 05-1053 235 S.W.3d 921

Court of Appeals of Arkansas
Opinion delivered May 17, 2006

James Greer Lingle and *John Wesley Hall, Jr.*, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Angela Michelle Blevins was convicted by a jury of possession of at least ten pounds of marijuana, but less than 100 pounds, with intent to deliver. Mrs. Blevins was sentenced to seventeen years in prison and fined $32,500.00. Mrs. Blevins's sole argument on appeal is that the trial court erred in denying her motion to suppress the contraband because it was obtained as the result of illegal searches and seizures in violation of the Fourth Amendment. We affirm.

Officer Richard Pound testified at the hearing on appellant's motion to suppress. He stated that, on October 30, 2003, he received a tip from the Crime Stoppers Anonymous Tip Line. The caller advised that Mrs. Blevins was selling large quantities of marijuana out of her house in Bella Vista, and that she kept marijuana in a storage facility and possibly in her basement. Officer Pound ran a check and found that Mrs. Blevins had a prior drug arrest, and that her husband was in custody at the sheriff's office. Officer Pound also discovered that Mrs. Blevins rented storage unit F-29 at Blue Mountain Storage.

Officer Pound received another anonymous tip on November 7, 2003. The caller stated that Mrs. Blevins periodically rented vacation homes from Bella Vista Rental Vacations, where she would receive shipments of marijuana. The rental company confirmed that Mrs. Blevins had rented vacation homes on numerous occasions.

Officer Pound reviewed a phone call made from Horatio Bautista to Mrs. Blevins on November 22, 2003. The call was made from jail, where Mr. Batuista was being detained after being arrested for possession of marijuana. During the conversation, Mr. Bautista apologized for stealing money and marijuana from Mrs. Blevins. Mrs. Blevins responded, "Well how did you do this? You were snooping in my stuff."

Officer Pound stated that Blue Mountain Storage cooperated with the police and allowed them access to the storage facility and a unit adjacent to Mrs. Blevins's unit. According to Officer

Pound, a clear piece of tape was attached to the bottom of the door of Mrs. Blevins's storage unit. The police periodically checked the tape for three or four weeks and noticed that it was no longer in place on December 23, 2003. On that evening a canine officer, Jim Johnson, was contacted and arrived at the storage facility. Officer Johnson advised that his dog alerted that there were drugs in Mrs. Blevins's unit. Officer Pound did not know the specific qualifications of the drug dog, but stated that the dog was purchased for about $10,000.00, that he had used the dog in prior inspections, and that "he did a good job."

After the canine alerted to the presence of drugs, the police monitored the storage unit awaiting a search warrant. Another investigating officer, Travis Newell, swore out an affidavit dated December 23, 2003, wherein he stated the following grounds for searching the unit:

> On 30th day of October 2003, Benton County Sheriff's Office received a Crime Stoppers tip from an anonymous source stating, Angie Blevins of 72 Westbury road in Bella Vista was selling large quantities of marijuana out of her home. The source stated that Blevins received several hundred pounds of marijuana every few months. The anonymous source stated that Blevins kept the marijuana in a storage facility.
>
> I discovered that Blevins had rented a 10x10 standard storage unit, F-29, at Blue Mountain Storage on the 9th day of October 2003. The unit she rented can be accessed through a roll up door that faces a gravel driveway. Blue Mountain Storage is located a short distance from the Blevins residence. Blue Mountain Storage associates informed me that storage unit F-30, located beside Blevins unit was vacant. I was given permission to use unit F-30.
>
> I ran a criminal history check on Blevins which revealed that in 1985 she was arrested for violation of the uniformed controlled substance act, 1994 an arrest for aggravated assault, 1997 breaking and entering and theft of property.
>
> On the 7th day of November 2003, we received a second Crime Stoppers report stating that Blevins was receiving the large shipments of marijuana at Vacation Rental Homes in Bella Vista and then storing the marijuana in her house and at a storage facility. I went to Vacation Rentals and confirmed that Blevins had rented houses on numerous occasions.

> I have made numerous trips to the storage unit to see if Blevins had accessed the unit. I placed a clear piece of tape on the bottom of the door on her unit. On 23rd day of December 2003, I discovered that the tape was no longer in place. I then contacted K-9 Officer Jim Johnson of the Bentonville Police Department and requested his assistance. Officer Johnson stated that his K-9 alerted numerous times on unit F-29. I then opened unit F-30 and the K-9 alerted on the wall dividing unit 30 and 29.

Based on Officer Newell's affidavit a search warrant was issued, and it was executed on the morning of December 24, 2003. During the search of the storage shed, the police found a large quantity of marijuana. Based in part on what was discovered in the storage shed, Officer Newell swore out an affidavit for the search of Mrs. Blevins's home. This affidavit contained the same grounds for issuing a warrant that were stated in the first affidavit, along with the following additional language:

> On November 22, 2003, an inmate from the Benton County Jail named Horacio Bautista placed a call to Angela Blevins from inside the jail. Phone calls from inmates are taped pursuant to jail policy. I listened to a tape of this conversation and Bautista tells Angela Blevins that on an occasion he was at her house watching her children he took money and "weed" from her home. I know from my experience and training that "weed" is commonly used to refer to marijuana. Blevins stated that Bautista found the "weed" when he was snooping around in her basement. I noted on the first Crime Stoppers report the anonymous tip stated that Blevins was keeping the marijuana in her basement. I also learned that Bautista was stopped by Bentonville Police Department and they located blank checks with Angie Blevins' name on them. Bautista was arrested by Bentonville Officers for possession of two ounces of marijuana.
>
> . . . .
>
> A search warrant was served at approximately 9:30 a.m. on December 24, 2003, and two large black "Contico" trunks/lockers were found inside the storage unit. These containers were padlocked. Upon opening the lockers, numerous individual packages of dried marijuana in brick form were found wrapped in newspapers and plastic packaging with duct tape around each individual package. A suitcase was also found in the storage facility which had a blue blanket inside and a fabric softener sheet. I know from my experi-

> ence and training that drug traffickers commonly use fabric softener sheets to mask the odor of narcotics to make it harder to detect by law enforcement officers or narcotics dogs while transporting the narcotics.

Based on the second affidavit, a warrant was issued to search Mrs. Blevins's home. The search warrant was executed on the afternoon of December 24, 2003, and the police found additional quantities of marijuana along with a scale and various other items of drug paraphernalia.

The trial court specifically found that there was a lack of probable cause to issue either of the search warrants. However, in denying Mrs. Blevins's motion to suppress, the trial court relied on the good-faith exception to the exclusionary rule as set out in *United States v. Leon*, 468 U.S. 897 (1984).

At the trial, Officer Newell gave testimony regarding the searches and seizures executed at Mrs. Blevins's storage unit and home. Gene Bangs, a drug analyst for the Arkansas State Crime Lab, indicated that the aggregate weight of the marijuana seized from Mrs. Blevins was 86.9 pounds. Officer Debbie Woods testified that on the day Mrs. Blevins's home was searched, she helped secure the house and had a conversation with Mrs. Blevins. According to Officer Woods, Mrs. Blevins admitted that she owned the items in the storage unit and had taken over her husband's drug-dealing operation after he left her.

Mrs. Blevins testified on her own behalf, and stated:

> I understand that I don't have to testify, that neither the judge, the jury, or anybody can make any inference from the fact if I didn't testify . . . they couldn't infer anything from that. I want to testify today. I wish to tell my story to the jury. . . . I am guilty of the crime of possessing marijuana, and it was a terrible decision I made. I understand it was wrong. I possessed between ten and a hundred pounds of marijuana with intent to deliver.

On appeal, Mrs. Blevins argues that the trial court erred in denying her motion to suppress based on the application of the good-faith exception, and that the searches of her storage unit and home were illegal. She cites Ark. R. Crim. P. 13.1(b), which provides:

> The application for a search warrant shall describe with particularity the persons or places to be searched and the person or things to be

> seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched. If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. Failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

Mrs. Blevins submits that there was no reasonable cause to issue the search warrants because the reliability of the two anonymous informants was not established, and the affidavit failed to set out the qualifications of the police dog.

Mrs. Blevins acknowledges that, in *United States v. Leon*, *supra*, the Supreme Court held that an officer's objective, good-faith reliance on a facially valid warrant will avoid application of the exclusionary rule in the event that the magistrate's assessment of probable cause is found to be in error. This is because the exclusionary rule is designed to deter police misconduct rather than to punish errors of judges and magistrates. *Sanders v. State*, 76 Ark. App. 104, 61 S.W.3d 871 (2001). However, Mrs. Blevins notes that it was the State's burden to establish applicability of the good-faith exception, *see Hoay v. State*, 348 Ark. 80, 71 S.W.3d 573 (2002), and argues that the State failed to meet its burden.

The good-faith exception cannot cure certain errors, namely: (1) when the magistrate is misled by information the affiant knew was false; (2) if the magistrate wholly abandons his detached and neutral judicial role; (3) when the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when a warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid. *United States v. Leon*, 468 U.S. at 914-15. Mrs. Blevins maintains that the third error is present in this case.

Because the police did not even attempt to corroborate the reliability of the informants or canine team, Mrs. Blevins contends that the affidavit to search the storage unit was so lacking in probable cause that objective reliance upon it was entirely unreasonable. Because the search of her house was primarily based on the same information in the first affidavit along with illegally-obtained evidence from the unlawful search of the storage shed, Mrs. Blevins argues that the fruits of the search of her house should have been suppressed as well. She also urges that any incriminating statements she made to the police as a result of the searches were inadmissible.

Mrs. Blevins further relies on Ark. R. Crim. P. 16.2(e), which provides:

> Determination. A motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state. In determining whether a violation is substantial the court shall consider all the circumstances, including:
>
> (i) the importance of the particular interest violated;
>
> (ii) the extent of deviation from lawful conduct;
>
> (iii) the extent to which the violation was willful;
>
> (iv) the extent to which privacy was invaded;
>
> (v) the extent to which exclusion will tend to prevent violations of these rules;
>
> (vi) whether, but for the violation, such evidence would have been discovered; and
>
> (vii) the extent to which the violation prejudiced [the] moving party's ability to support his motion, or to defend himself in the proceedings in which such evidence is sought to be offered in evidence against him.

Mrs. Blevins asserts that all but the last of the above circumstances apply to this case, and that the trial court erred in failing to grant her motion to suppress.

We review a trial court's motion to suppress by making an independent determination 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). Under these standards, and assuming for purposes of review that the affidavits failed to provide probable cause as argued by appellant and found by the trial court, we hold that the trial court committed no error in applying the good-faith exception and denying Mrs. Blevins's motion to suppress.

In *Moya v. State*, 335 Ark. 193, 981 S.W.2d 521 (1998), our supreme court announced:

> Where there is neither a written affidavit nor sworn, recorded testimony in support of a search warrant, this court will not apply the good-faith exception to uphold the search warrant. Where, however, there is a written affidavit in support of the search warrant that later is ruled deficient, this court will go beyond the four corners of the affidavit and consider unrecorded oral testimony to determine whether the officers executing the search warrant did so in objective good-faith reliance on the judge's having found probable cause to issue the search warrant. Moreover, this court may also consider information known to the executing officers that may or may not have been communicated to the issuing judge.

Id. at 202, 981 S.W.2d at 525-26. In the instant case the affidavits cited anonymous tips and indicated that a police canine alerted numerous times on the storage unit. While the affidavit failed to disclose any qualifications of the canine, Officer Pound testified at the suppression hearing that the dog cost $10,000.00, that he has used him in the past, and that "he did a good job." Thus, there was information known to one of the executing officers that bolstered the reliability of the canine.[1] Under these circumstances, we think the officers had an objective good-faith reliance on the issuance of the warrant to search

[1] In its brief, the State, citing *Howell v. State*, 350 Ark. 552, 89 S.W.3d 343 (2002), urges us to consider the trial testimony of the canine handler, Officer Johnson, where the officer gave more detailed testimony concerning the qualifications of the canine. However, consideration of this evidence is not necessary to the disposition of this appeal because the testimony at the suppression hearing was sufficient to establish the good-faith exception. Moreover, we are hesitant to consider such evidence because, while the supreme court in *Howell v. State*,

the storage unit. Because the first search was valid, the fruits of the subsequent search and incriminating statements by Mrs. Blevins were also properly admitted.

■ While Mrs. Blevins argues that the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, we disagree. We have held that once a police canine alerts, an officer has probable cause to suspect the presence of illegal contraband. *See Miller v. State*, 81 Ark. App. 401, 102 S.W.3d 896 (2003); *Willoughby v. State*, 76 Ark. App. 329, 65 S.W.3d 453 (2002). Because the affidavit presented by Officer Newell included a positive canine sniff, at a minimum it established an objectively reasonable belief that there was probable cause to conduct a search. We do not agree with appellant's claim that there was any willful police misconduct or that the deterrent purposes of the Fourth Amendment were compromised in this case.

Having concluded that the trial court did not err, we hold that, even if the contraband should have been suppressed, the error was harmless beyond a reasonable doubt in view of the fact that Mrs. Blevins testified at her trial and admitted every element of the crime. *See Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996); *Coon v. State*, 76 Ark. App. 250, 65 S.W.3d 889 (2001); *Pool v. State*, 29 Ark. App. 234, 780 S.W.2d 350 (1989); *Barlow v. State*, 28 Ark. App. 21, 770 S.W.2d 186 (1989). At trial, Mrs. Blevins testified that she was in possession of between ten and 100 pounds of marijuana with intent to deliver, and there were no factors tending to make this statement unreliable. *See Isbell v. State*, *supra*; *Coon v. State*, *supra*.

Mrs. Blevins argues that her incriminating trial testimony is itself the fruit of the poisonous tree and thus cannot render an illegal search harmless. She contends that to hold otherwise would result in forcing a criminal defendant to sacrifice one constitutional right to protect another in violation of the Supreme Court's holding in *Simmons v. United States*, 390 U.S. 377 (1968). In this regard, Mrs. Blevins asserts that in order to protect her Fourth

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supra, relied in part on trial testimony to affirm a suppression ruling, it did so without addressing its decision in *Riggs v. State*, 339 Ark. 111, 3 S.W.3d 305 (1999), where the supreme court indicated that trial testimony should not be considered in this context because it was not before the trial court for suppression purposes.

Amendment rights she would have to refuse to take the stand in violation of her Fifth and Sixth Amendment rights to testify. With this we cannot agree.

In *Simmons v. United States, supra,* the appellant gave inculpatory testimony at a hearing on his motion to suppress evidence in order to establish an expectation of privacy and standing to contest the search. The Supreme Court held that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection. The circumstances of the present case are distinguishable from *Simmons* in that the testimony at issue was elicited at trial, and there was nothing to suggest that Mrs. Blevins was forced to testify to protect any right or present any defense. It is evident that her decision to testify and give a judicial confession was simply a matter of trial strategy, and it appears that the testimony served no purpose other than to demonstrate repentance to the jury. *See Coon v. State, supra.* Under such circumstances, she was not forced to choose between constitutional rights and simply elected to exercise her constitutional right to testify.

In light of the above it is clear that Mrs. Blevins's testimony was not a fruit of the poisonous tree. In *Pool v. State, supra,* which our supreme court agreed with in *obiter dictum* in *Towe v. State,* 304 Ark. 239, 801 S.W.2d 42 (1990), we declined an invitation to throw out a judicial confession on the ground that it had been induced by the presentation of physical evidence that should have been suppressed. We held that Pool's judicial confession was not impelled by the introduction of the disputed physical evidence, and was a voluntary act sufficiently distinguishable from the search to be purged of any taint of illegality associated with it. The same is true in the case at bar. Blevins's testimony was not calculated to mitigate or combat the State's evidence, or to provide an innocent explanation. Her testimony amounted to no more than an unprovoked judicial confession admitting guilt, and it was not the fruit of the poisonous tree.

Affirmed.

PITTMAN, C.J., and BAKER, J., agree.

Don PRICE *v.* RYLWELL, LLC
and Pulaski Lands, LLC

CA 05-908 235 S.W.3d 908

Court of Appeals of Arkansas
Opinion delivered May 17, 2006

Stuart Vess, for appellant.

Hurley & Whitwell, PLLC, by: *Stephen E. Whitwell*, for appellee.

SAM BIRD, Judge. Appellant Don Price appeals from a decree entered by the Pulaski County Circuit Court that quieted title to three separate tracts of land in favor of appellees Rylwell, LLC (Rylwell), and Pulaski Lands, LLC (Pulaski Lands). On appeal, Price contends that there was insufficient evidence to support the decree. We affirm.

Price was the record owner of three separate tracts of land (referred to in the court's decree as Tracts 1, 2, and 3) in Pulaski County, Arkansas, that were forfeited to the State of Arkansas for non-payment of taxes. Tract 2 was forfeited in 1997, and Tracts 1 and 3 were forfeited in 1998. Each tract was certified to the State of Arkansas and sold as follows: Rylwell purchased Tract 1 via a limited warranty deed issued on July 23, 2004; Rylwell purchased

Tract 2 via a limited warranty deed issued on July 21, 2003; and Pulaski Lands purchased Tract 3 via a limited warranty deed issued on July 14, 2004.

On March 16, 2005, Rylwell and Pulaski Lands filed an action to quiet title to Tracts 1 and 2 in Rylwell and to Tract 3 in Pulaski Lands. Price filed an answer to the complaint in which he denied its allegations, and he filed a counterclaim alleging, among other things, that proper notice was not sent to or received by him. By a decree entered on May 2, 2005, the trial court quieted title to Tracts 1 and 2 in Rylwell and to Tract 3 in Pulaski Lands, and dismissed Price's counterclaims.

Price's sole contention on appeal is that there was insufficient evidence to support the judgment quieting title in this case. To support this contention, Price makes three arguments: first, that the notice regarding the sale of each parcel was deficient and did not comply with the relevant statutory notice requirements; second, that the limited warranty deeds issued to the purchasers are void because, at the time the deeds were issued, the sixty-day redemption period following the Attorney General's approval had not yet expired, as required by the "Offer to Purchase" for each tract; and third, that the principles of unjust enrichment should preclude Rylwell and Pulaski Lands from "[preying] on the misfortunate by purchasing property forfeited to the State for nonpayment of taxes and selling the property to the original owners."

Standard of Review

Quiet title actions have traditionally been reviewed de novo as equity actions. *City of Cabot v. Brians*, 93 Ark. App. 77, 216 S.W.3d 627 (2005). 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.*

Notice

Price first claims that he was not provided with sufficient notice concerning the sale of the properties as required by Ark. Code Ann. § 26-37-301 (Supp. 2005). Specifically, he asserts that the notices sent by the State regarding Tracts 1, 2, and 3 did not contain the actual sale date for each property as required by statute. Arkansas Code Annotated section 26-37-301 states in part as follows:

> (a)(1) Subsequent to receiving tax-delinquent land, the Commissioner of State Lands shall notify the owner, at the owner's last known address, by certified mail, of the owner's right to redeem by paying all taxes, penalties, interest, and costs, including the cost of the notice.
>
> (2) All interested parties known to the Commissioner of State Lands shall receive notice of the sale from the Commissioner of State Lands in the same manner.
>
> (b)(1) The notice to the owner or interested party shall also indicate that the tax-delinquent land will be sold if not redeemed prior to the date of sale.
>
> (2) The notice shall also indicate the sale date, and that date shall be no earlier than two (2) years after the land is certified to the Commissioner of State Lands.

According to the record, the State sent three notices to Price via certified mail concerning Tract 1. The first notice, dated April 2, 2001, was addressed to Don M. Price, at a post office box address in Little Rock, and stated, in pertinent part, that the sale date of the property would be April 8, 2003, and that "the sale date is scheduled for two years in the future." This notice was returned to the Land Commissioner's office marked "Unclaimed." The second notice, dated March 5, 2003, was sent to Price at the same post office box address as the first notice, and also stated that the property would be sold on April 8, 2003. This notice was signed for by Don M. Price on March 18, 2003. The third notice, dated May 13, 2004, and addressed to Don Price at the same Little Rock post office box address, stated that "unless all taxes, penalties, interest and costs are paid to this office, deed conveying title to a new owner will be issued on 7/12/2004." This notice was returned, marked "Unclaimed."

The record reflects that the State sent five notices to Price via certified mail concerning Tract 2. The first notice, dated April 4, 2000, was addressed to Don M. Price, at the same Little Rock post office box address that the notices relating to Tract 1 were addressed, and stated, in pertinent part, that the sale date of the property would be April 17, 2002, and that "the sale date is scheduled for two years in the future." This notice was returned, marked "Unclaimed." The second notice, dated January 18, 2002, was sent to Don M. Price at the same Little Rock post office box

address, and stated that the property would be offered for sale on April 17, 2002, unless the taxes, penalties, interest and costs were paid by that date. This notice was returned, marked "Unclaimed." The third notice, dated May 27, 2003, was sent to Don Price at the same Little Rock post office box address, and stated that a deed conveying the land to a new owner would be issued on June 26, 2003, unless all taxes, penalties, interest and costs were paid by that date. This notice was returned, marked "Unclaimed." Finally, a fifth notice, also dated May 27, 2003, and identical in content to the fourth notice, was mailed to Don M. and Mary Jane Price, directed to the attention of Sally Leon at a post office box address in Tampa, Florida. This notice was signed for by "Mike Ferrel."

Finally, the record reflects that the State sent two notices to Price via certified mail concerning Tract 3. The first notice, dated April 2, 2001, was addressed to Don M. Price at the same Little Rock post office box address, and stated, in pertinent part, that the sale date of the property would be April 8, 2003, and noted that this sale date was "scheduled for two years in the future." This notice was returned, marked "Unclaimed." The second notice, dated May 13, 2004, and addressed to Don M. Price at the same Little Rock post office box address, stated that the land would be conveyed to a new owner on July 12, 2004, unless the taxes, penalties, interest and costs were paid by that date. This notice was signed for by Don M. Price.

In cases involving redemption of tax-delinquent lands, our supreme court has stated that strict compliance with the requirement of notice of tax sales is required before an owner can be deprived of his or her property. *Jones v. Double "D" Properties, Inc.*, 352 Ark. 39, 98 S.W.3d 405 (2003). Here, the State clearly complied with the statute: it sent multiple notices by certified mail to Price regarding each of the three tracts, and a sale date was included in the first notice sent for each property. In addition, the first notice sent for each property specified that the sale date was "scheduled for two years in the future." Other notices for each property also stated sale dates.

Although the dates on which the sales of the three tracts actually took place were later than the sale dates listed in the notices sent to Price, we fail to see how this amounts to noncompliance with the statute. Arkansas Code Annotated section 26-37-301 only requires that the sale date of the property be included in the notice that is provided to the record owner, which date shall be "no earlier than two (2) years after the land is certified to the

Commissioner of State Lands." *See* Ark. Code Ann. § 26-37-301(b)(2). The notices sent to Price are in compliance with these requirements. The fact that the actual sale of the tracts did not take place until sometime after the sale dates set forth in the notices is not fatal to the sales. In fact, Ark. Code Ann. § 26-37-202(b) (Repl. 1997) provides that, when no bid is received at the sale that is at least equal to the assessed value of the land, the Commissioner is authorized to enter into negotiations for the sale of the land in question, subject to the approval of the Attorney General.

In carrying out the negotiated sales of these three tracts, the Land Commissioner received written offers from prospective purchasers. According to the record, the "Offer to Purchase" received from Rylwell for Tract 1 contained a certification by the State Land Commissioner that the property was "offered for sale but not sold at an auction legally held on 4/8/2003"; the "Offer to Purchase" received from Rylwell for Tract 2 contained a certification that it was "offered for sale but not sold at an auction legally held on 4/17/2002"; and the "Offer to Purchase" received from Pulaski Lands for Tract 3 contained a certification that it was "offered for sale but not sold at an auction legally held on 4/8/2003." The offer for Tract 1 was filed on April 16, 2004, and approved by the Attorney General on June 2, 2004; the offer for Tract 2 was filed on April 24, 2003, and approved by the Attorney General on June 13, 2003; and the offer for Tract 3 was filed on April 13, 2004, and approved by the Attorney General on June 2, 2004.

Here, it is clear from the record that the three tracts in question were offered for sale at public auctions on the dates stated in the notices, but that the tracts did not sell on those dates. Therefore, the tracts were later sold by the Commissioner through negotiated sales that were subsequently approved by the Attorney General. Obviously, when no legally-sufficient bid was received on the public sale date set forth in the notices, a negotiated sale necessarily took place on a later date. We find no error by the trial court in determining that the conveyance of each tract in this case was in conformity with Arkansas law.

In reaching this conclusion, we are mindful of the recent decision by the United States Supreme Court holding that the procedure used by Arkansas's Land Commissioner to give notice of tax forfeiture sales to property owners after the initial notice is returned "Unclaimed," is not sufficient to meet constitutional due-process requirements. *See Jones v. Flowers*, 547 U.S. 220

(2006). However, appellant here does not argue that the Land Commissioner's method of giving notice of the tax forfeiture sales to him was constitutionally inadequate. Appellant argues, rather, that the content of the notices was inadequate to apprise him of when his properties would be sold and that the properties were not sold on the sale dates stated in the notices. Appellant's argument, however, is not supported by the record, which clearly shows that the notices to appellant contained the sale dates, and that the tracts were offered for sale at public auctions on those dates.

Sixty-Day Redemption Period

Price next asserts that the limited warranty deeds issued to Rylwell for Tracts 1 and 2 and the limited warranty deed issued to Pulaski Lands for Tract 3 are void because, at the time the deeds were issued, the sixty-day redemption period following the Attorney General's approval had not yet expired, as required by the "Offer to Purchase" for each tract.[1] We will not address the merits of this argument because the trial court did not rule on this issue. Our supreme court has repeatedly stated that a party's failure to obtain a ruling is a procedural bar to consideration of the issue on appeal. *Cox v. Miller*, 363 Ark. 54, 210 S.W.3d 842 (2005).

Unjust Enrichment

Finally, Price argues that the principles of unjust enrichment should preclude Rylwell and Pulaski Lands from "[preying] on the misfortunate by purchasing property forfeited to the State for nonpayment of taxes and reselling the property to the original owners." Again, Price failed to obtain a ruling on this matter; thus, he is precluded from raising it on appeal. *See Cox, supra.*

For the reasons discussed herein, we hold that the trial court's decision was not clearly erroneous, and we affirm.

Affirmed.

GLOVER and CRABTREE, JJ., agree.

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[1] Arkansas Code Annotated section 26-37-202(e) (Repl. 1997) sets forth the requirements for a record owner's redemption of forfeited property within thirty (30) days after the date of sale. There is no statutory requirement allowing for a sixty-day redemption period.

DEQUEEN SAND & GRAVEL CO.
and St. Paul Mercury Insurance Company *v.*
Clyde COX

CA 05-1239 236 S.W.3d 5

Court of Appeals of Arkansas
Opinion delivered May 17, 2006

Kilpatrick, Williams, & Meeks, L.L.P., by: *Richard A. Smith*, for appellants.

Harrelson, Moore & Giles, L.L.P., by: *Greg Giles*, for appellee.

LARRY D. VAUGHT, Judge. Appellant DeQueen Sand & Gravel (DSG) appeals the decision of the Workers' Com-

pensation Commission that found Cox was permanently and totally disabled due to a compensable injury. On appeal, DSG argues that the Commission's decision was not supported by substantial evidence. We disagree and affirm.

Cox worked as a rock crusher for DSG for twenty years, a position that frequently exposed him to large quantities of silica dust. As a result, Cox was diagnosed with silicosis on October 19, 2000, by Dr. Charles Hiller.[1] Pulmonary function tests performed by Dr. Hiller showed Cox's forced vital capacity maneuver (FVC) to be 89% of predicted levels[2] and his forced expiratory of volume in one second (FEV-1)[3] to be 69%. Cox was referred to Dr. Robert Johnson for treatment of the silicosis, and he added a diagnosis of chronic bronchitis. Cox was told by both doctors that he needed to stay away from silica dust. After requesting a transfer, Cox was relocated to the service station at DSG, where dust levels were lower.

Dr. Johnson testified that he performed breathing tests on Cox in July 2001 that showed that Cox's FEV-1 had decreased to 58%. Cox was tested again on May 30, 2002, and showed no improvement, although Dr. Johnson's nurse reported that Cox gave poor effort on the test. Dr. Johnson noted, however, that Cox's lung functions were deteriorating and therefore, recommended that Cox leave his present place of employment. He was again tested in June 2003, and his FEV-1 was at 52% — worse than his previous two tests. Records indicate that Cox showed good effort on this test.

Although Dr. Johnson initially assessed Cox an impairment rating of 20–30% in August 2002, Dr. Johnson testified that a more appropriate rating was 50% based on Cox's most recent results on the FEV-1 and the American Medical Association's guidelines. Dr. Johnson stated that according to the guidelines, when the FEV-1 is in the 41–59% range, the impairment rating increases to between 26% to 50%, which is in the "moderate" range. Although Dr. Johnson did testify that Cox's symptoms were better and his FVC test results were improving, Dr. Johnson stated that Cox's disabil-

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[1] DSG stipulated that Cox's silicosis was compensable.

[2] Predicted levels are those generated by normal individuals based on age, height, and sex. Therefore, Cox performed in the eighty-ninth percentile for a person of his age, height, and sex.

[3] The higher a person scores on the FEV-1, the better his or her lung capacity.

ity was greater than it had been. Based on his complete examination of Cox, Dr. Johnson assigned Cox an impairment rating of 50%.

Bob White, a vocational specialist, interviewed Cox and evaluated his vocational abilities. White testified that Cox was forty-five years old, had an eighth-grade education, and had "good" and "bad" days with regard to his medical condition. White stated that Cox could do "sedentary" to "light" work, but was required to avoid dust. White testified that Cox's medical condition, combined with his lack of education and age, would likely create a problem for Cox with regard to employment. White stated that Cox would have a better chance to find employment if he was able to secure a high-school equivalency diploma, something that Cox was pursuing. White also testified that Cox had applied for several jobs but had not been extended an offer of employment. White attributed this to the fact that Cox did not have a high-school diploma. White admitted that Cox was a hard worker with a stable job history, but White explained that in the current job market, a person without a high-school diploma or its equivalent had a much more difficult time finding employment.

In reviewing decisions of the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm the decision if it is supported by substantial evidence. *Clairday v. Lilly Co.*, 95 Ark. App. 94, 234 S.W.3d 347 (2006). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Id.* It is the Commission's function to determine witness credibility and the weight to be afforded to any testimony; the Commission must weigh the medical evidence and, if such evidence is conflicting, its resolution is a question of fact for the Commission. *Searcy Indus. Laundry, Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003).

Pursuant to Ark. Code Ann. § 11-9-704(c)(1)(B) (Repl. 2002), any determination of the existence of a physical impairment must be supported by objective and measurable medical findings. Arkansas Code Annotated section 11-9-102(16)(A)(i) (Supp. 2005) further clarifies that "objective findings" are those findings that cannot come under the voluntary control of the patient. In

Emerson Elec. v. Gaston, 75 Ark. App. 232, 236, 58 S.W.3d 848, 851 (2001), the appellant challenged the findings of the Commission because the pulmonary testing was at least, in part, controlled by the effort given by the claimant. Appellant contended that because the claimant had control over part of the test, the results of those tests were not "objective medical findings." We held that "pulmonary-function testing is clearly an objective test due to the objective data the test produces, in spite of the fact that a patient is at least partially able to control his or her breathing."

DSG first argues that the Commission erred in awarding Cox a 50% impairment rating because there was no evidence to justify that rating. However, Dr. Johnson gave detailed testimony as to why he would assign Cox a 50% impairment rating. Based on his medical opinion of Cox's overall health, the results of the breathing tests he performed on Cox, and the AMA guidelines, he assessed that Cox was entitled to a 50% impairment rating. Although there was some evidence to suggest that Cox did not put forth his best effort on every breathing test, the Commission is charged with determining issues of credibility and weighing medical evidence. Additionally, as we stated in *Gaston*, even though pulmonary-function tests can be somewhat controlled by a patient's effort, those tests are still objective medical findings. Based on the testimony of Dr. Johnson and the medical results of Cox's breathing tests, reasonable-minded persons could agree with the finding of the Commission; therefore, we affirm on this point.

DSG's second argument is that the Commission erred in assigning Cox wage-loss benefits of 50%. The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Id.* at 237-38, 58 S.W.3d at 851-52. In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Id.*, 58 S.W.3d at 851-52.

Here, Dr. Johnson's diagnosis required that Cox refrain from working in any environment that would cause him to be exposed to excessive dust. White testified that because Cox had been in his line of work for over twenty years and did not have a high-school diploma or its equivalent, his employment opportunities were limited. Although White was unable to determine how

motivated Cox was to return to work, the Commission felt that the fact that Cox filled out multiple job applications, that he testified that he wanted to work, and that he had been a hard worker for many years as a rock crusher established that Cox was motivated to work. Based on this evidence, we are satisfied that substantial evidence supports the Commission's award of 50% wage loss.

Affirmed.

HART and ROAF, JJ., agree.

Jason BASHAM *v.* STATE of Arkansas

CA CR 04-963 235 S.W.3d 913

Court of Appeals of Arkansas
Opinion delivered May 17, 2006

Dustin D. Dyer, for appellant.

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

KAREN R. BAKER, Judge. Jason Basham was convicted in a Saline County jury trial of first-degree terroristic threatening, second-degree sexual assault, second-degree battery, and rape. He was sentenced to a total of forty-four years' imprisonment in the Arkansas Department of Correction.

Appellant's counsel initially filed a motion to withdraw on the grounds that the appeal was without merit pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Arkansas Rules of the Supreme Court and Court of Appeals. On June 29, 2005, we ordered rebriefing on the grounds that appellant's counsel had not briefed all adversarial rulings. On January 11, 2006, we again ordered rebriefing. The terms "wholly frivolous" and "without merit" are often used interchangeably in the *Anders* brief context. Whichever term is used to describe the conclusion an attorney must reach as to the appeal before requesting to withdraw and our court must reach before granting the request, what is required is a determination that the appeal lacks any basis in law or fact. *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 439 (1998).

Due to our conclusion that an argument on appeal addressing evidence of prior bad acts pursuant to 404(b) would not be wholly frivolous, counsel's motion to withdraw was denied and we ordered rebriefing in adversary form. *Tucker v. State*, 47 Ark. App. 96, 885 S.W.2d 904 (1994). In this adversarial brief, appellant's sole argument is that the trial court erred in allowing evidence of prior bad acts pursuant to Rule 404(b). He asserts that the State's argument that the similarity of the acts showed absence of mistake or accident is inapplicable under the facts of this case. We find that the trial court did not err and affirm.

The admission or rejection of evidence under Rule 404(b) is committed to the sound discretion of the trial court, and we will not reverse absent a showing of manifest abuse. *Medlock v. State*, 79 Ark. App. 447, 89 S.W.3d 357 (2002). The general rule is that evidence of other crimes by the accused, not charged in the indictment or information and not a part of the same transaction, is not admissible at the trial of the accused. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004). The list of exceptions set out in the rule is exemplary and not exhaustive. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986). Testimony is admissible pursuant to Rule 404(b) if it is independently relevant to the main issue, relevant in the sense of tending to prove some material point rather

than merely to prove that the defendant is a criminal or a bad person. *Mosley v. State,* 325 Ark. 469, 929 S.W.2d 693 (1996).

The trial court in this case conducted a hearing on March 9, 2004, to determine the admissibility of the testimony appellant challenges here. The witness testified that approximately three and one-half years before, when she was living with appellant and pregnant with his child, he forced her to have anal sex. She described how when she tried to get away from him and screamed at him to stop, he pushed her down on her stomach and held her down with his body. She stated that appellant eventually ended the painful experience because he became "turned off" by her crying and screaming. This event led to her terminating the relationship.

Appellant's rape conviction on the rape charge arose from appellant anally penetrating his wife with his penis by forcible compulsion while beating her until she could not see, threatening the children, and forcing their young son to witness the attack. The victim testified that appellant first became violent with her when she was pregnant with their first child. The circumstances surrounding the rapes were not identical, but their similarities — that appellant was willing to disregard the wishes of persons with whom he was in intimate relationships and to use force to anally penetrate them — rendered the testimony of the earlier rape admissible.

At trial and on appeal, appellant argued that he and the victim engaged in consensual anal intercourse. However, when appellant's counsel asked appellant whether his wife ever protested in engaging in anal sex, he replied, "Not — not indirect," and then elaborated, "At one point, she said that — at one point she said that, no, she didn't want it that way, at one point[,]" but that he did it that way anyway. On cross-examination, he explained that "she never said no, no, stop that. The only thing she ever said was no, she didn't feel like it[,]" adding "[s]he just said no she didn't feel like anal sex."

This testimony could reasonably be understood to be a claim that appellant mistakenly thought the victim consented. Appellant contends that the plain meaning of the words mistake or accident are inapplicable to this case because no party suggested that appellant had sex with his wife by mistake or accident — he readily admits they had sex. We agree with appellant that the issue was not whether sexual contact occurred. The factual determination to be

made by the fact finder was not whether appellant mistakenly had sex, but whether appellant mistakenly believed the victim had consented to the act.

Although our legislature has not adopted the mistake-of-fact defense to a rape charge, the State of California allows the defense. The case of *People v. Stitely*, 108 P.3d 182 (Cal. 2005) addressed the defense and an examination of the defense aids our analysis. The mistake of fact defense to a rape charge has two components: first, the defendant must have honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse, which involves evidence of equivocal conduct by the victim that the defendant mistook for consent; second, an objective component asks whether the defendant's mistaken belief regarding consent was reasonable under the circumstances. *See id.* at 208.

Therefore, the witness's testimony was relevant to the factual determination of whether appellant honestly and in good faith, albeit mistakenly, believed the victim consented to anal penetration. Accordingly, the trial court did not err in finding the testimony independently relevant to the issue of lack of mistake as to consent.

Affirmed.

ROBBINS, J., agrees.

PITTMAN, C.J., concurs.

Tracy BLAIR *v.* John BLAIR

CA 05-1024 235 S.W.3d 916

Court of Appeals of Arkansas
Opinion delivered May 17, 2006

[Rehearing denied June 21, 2006.]

Cullen & Co., PLLC, by: *Tim Cullen* and *Kami S. Wallace*, for appellants.

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

KAREN R. BAKER, Judge. In this child-custody case, appellant Tracy Blair appeals from an order in which the Benton County Circuit Court found that a material change of circumstances had occurred since its initial child-custody determination and that, as a result, it was in the best interests of the children that appellee John Blair have custody of the parties' children. We agree that the finding of a change of circumstances was in error. Because that threshold requirement was not met, we reverse and remand. *See Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004).

The parties in this case were married for twelve years. During their marriage, three children were born, a son, R.B., born December 2, 1991, a daughter, H. B., born April 8, 1996, and a second son, W.B., born December 31, 1997. The parties separated on October 29, 2003. Following their separation, appellee filed a petition for an absolute divorce and sought custody of the children. Appellant filed a counter-claim to appellee's petition for divorce and also sought custody of the children.

In the course of the divorce proceedings, the trial court was made aware of the fact that appellant was involved in an extramarital affair with Kevin Hanshaw, that the relationship began prior to the parties' divorce, and that, at the time, Mr. Hanshaw was married to another woman. Following the divorce, appellant and her children moved from Rogers, Arkansas, in Benton County to Benton, Arkansas, in Saline County. Although not pregnant at the time of the divorce, appellant subsequently gave birth to a child, fathered by Mr. Hanshaw, out of wedlock.

The change of circumstances arguments focus on the fact that appellant moved from Benton County and the fact that she gave birth to a child out of wedlock. Three provisions of the parties' divorce decree entered on April 23, 2004 are relevant to our analysis. The decree provided that appellant would have custody and appellee's visitation would be determined in accordance with the two following provisions:

> a. [T]hat the [appellee] shall have visitation rights in accordance with the Standard Visitation Schedule attached hereto, except that he shall have overnight visitation on Wednesday evening and shall deliver the children to school the next morning. That, if school is out, he shall deliver them to the [appellant] by 7:00 a.m. That in addition, he shall have additional overnight visitation every Sunday with the children being delivered to school or to the [appellant] by 7:00 a.m. on Monday morning.

b. *That, if the [appellant] moves from the Benton County area,* then the [appellee] shall not have the overnight visitation of Wednesdays and Sundays, but shall have visitation two (2) consecutive weekends from 6:00 p.m. on Friday until 6:00 p.m. on Sunday, the [appellant] shall then have one weekend and [appellee] shall then have an additional two (2) weekends. That said visitation shall continue in such rotation. That the [appellant] shall be required to provide transportation for said children to [appellee's] residence for each visitation.

(Emphasis added.) The decree further provided:

10. That the [appellant] shall be enjoined and restrained from any contact, either by telephone or in person, with any married person with whom she is having a romantic relationship while said children are in her *actual custody.*

(Emphasis added.)

After appellant gave birth to her out-of-wedlock child, appellee filed a petition for a change of custody. At the conclusion of all the testimony, the trial court made several comments, one of which was the following:

> We would not be here today if [appellant] had not continued the relationship with Mr. Hanshaw. It was a major concern for the court and I had to outline several rules that I normally would not do for an adult, such as phone time with him. She was not to introduce him into the kids' lives while he was married. *Having a baby was blatantly wrong* and introduced Mr. Hanshaw into their lives. She may not have intended the pregnancy, but it is a fact.

(Emphasis added.) Her comments also included this pronouncement:

> I don't argue about her decision to keep the baby. My problem is that she kept the relationship at the risk of compromising her role as custodial parent. She should have terminated the relationship until he was divorced. Now, she is not only distracted by this long distance illicit relationship, plus she's got a baby to care for, which adds to her burden, both time-wise and financially. She did claim that Mr. Hanshaw sends money but I don't see any proof of how much money she really gets from him.

Appellee relies upon these statements by the trial court in his argument that the trial court properly found a change of circumstances allowing a modification of the custody order. Regarding

the birth of appellant's new child, he reasons that "evidence of the [a]ppellant's immorality is now present in the [a]ppellant's life twenty-four hours a day, seven days a week, and it would be impossible to avoid the minor children of the parties being exposed to that evidence constantly if left in [a]ppellant's custody."

Determining whether there has been a change of circumstances that materially affects the children's best interest requires a full consideration of the circumstances that existed when the last custody order was entered in comparison to the circumstances at the time the change of custody is considered. *Carver v. May,* 81 Ark. App. 292, 101 S.W.3d 256 (2003). A party seeking to modify custody must prove that a material change of circumstances has occurred since the last order of custody or that material facts existed at the time of the decree that were unknown to the court. *Id.* Custody will not be modified unless it is shown that there are changed conditions demonstrating that a modification is in the best interest of the child. *Vo v. Vo,* 78 Ark. App. 134, 79 S.W.3d 388 (2002). Neither will custody be changed to punish or reward either parent. *See Hobbs v. Hobbs*, 75 Ark. App. 186, 55 S.W.3d 331 (2001). Moreover, our courts refuse to modify custody merely because one parent has more resources or income. *Taylor v. Taylor*, 353 Ark. 69, 110 S.W.3d 731 (2003); *Malone v. Malone*, 4 Ark. App. 366, 631 S.W.2d 318 (1982).

The trial court's findings in this regard will not be reversed unless they are clearly erroneous. *Vo v. Vo, supra.* While custody is always modifiable, appellate courts require a more rigid standard for custody modification than for initial custody determinations in order to promote stability and continuity for the children and to discourage repeated litigation of the same issues. *Id.* There are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carries a greater weight than those involving the custody of minor children, and our deference to the trial judge in matters of credibility is correspondingly greater in such cases. *Id.*

In this case, the original decree anticipated appellant's move in the original visitation schedule. The decree specifically sets forth an alternative visitation schedule in the event that appellant moved from the Benton County area; therefore, the move from the Benton County area cannot be an event or circumstance unknown to, or unanticipated by, the court at the time that the original decree was entered and cannot qualify as a change of circumstance

sufficient to warrant the court's consideration of a custody modification. Even if the decree had no such provision, the trial court failed to apply the analysis established by *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), as appropriate for relocation cases. *See also Benedix v. Romeo*, 94 Ark. App. 412, 232 S.W.3d 493 (2006).

Similarly, the appellant's extramarital sexual relationship with Mr. Hanshaw was known by the trial court at the time of the initial custody decision. Further, the decree anticipates that the relationship would continue except when the children were in appellant's "actual custody."[1] Therefore, the continuing sexual relationship between appellant and Mr. Hanshaw cannot constitute a change of circumstances. The trial court's comments following the hearing on appellee's motion to modify custody suggest that the reason the original decree proscribed contact between appellant and Mr. Hanshaw in the children's presence was to prevent appellant from introducing Mr. Hanshaw into the children's lives while Mr. Hanshaw was married to someone else. The original decree does not articulate this basis for the court's proscription; yet, the judge specifically found a change of circumstances occurred when the birth of the child introduced Mr. Hanshaw into the children's lives.

We do not agree that the birth of the child introduced Mr. Hanshaw into the children's lives. Appellant testified at the hearing that Mr. Hanshaw lives in Ohio. The parties' oldest child testified that he does not see Mr. Hanshaw, that Mr. Hanshaw is not involved with their lives, and that he guessed that Mr. Hanshaw saw his baby brother, Mr. Hanshaw's boy, when he and his other siblings were at his dad's home. It is undisputed that the only time that the children were in the physical presence of Mr. Hanshaw occurred when appellant's mother took the children to appellant's mother's house under the mistaken belief that Mr. Hanshaw had left her house.

Furthermore, appellant testified that, even though she spoke with Mr. Hanshaw every day by phone, she consciously made the effort to talk to him when the children were not present. If he called and one of the children answered, he neither engaged in a conversation nor hung up on the children, but merely asked for

[1] We interpret the phrase "while said children are in her actual custody" as used in paragraph 10 of the decree to mean while the children are physically present.

their mother. If the children were there, she would tell him that she could not talk at that time. While she may have spoken to him after the school day ended, the children would be outside playing. When asked if she had called Mr. Hanshaw after her daughter was accidently hurt, she said that she did not remember calling him, but if she did, it was because she was very upset. Although appellee complained that appellant had called Mr. Hanshaw seventeen times on that day when the parties' daughter had been injured, he admitted that all of the calls were while the children were in school and not in appellant's presence. In addition, appellee agrees that the children are unfamiliar with Mr. Hanshaw and argues on appeal that appellant's having a child fathered by a man the children do not know is an additional concern this court should consider.

Given this evidence and argument, we hold the trial court erred in finding that appellee proved a material change of circumstances in this case. The trial court entered the original decree awarding custody of the children to appellant fully aware of both appellant's intention to move from Benton County and the existence of her sexual relationship with Mr. Hanshaw. A decree awarding the custody of a child is final on the conditions then existing and will not be changed afterwards unless on altered conditions since the decree, or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the children. *Beavers v. Smith*, 223 Ark. 43, 264 S.W.2d 617 (1954); *Smith v. Smith*, 215 Ark. 862, 223 S.W.2d 772 (1949); *Kirby v. Kirby*, 189 Ark. 937, 75 S.W.2d 817 (1934).

Appellee contends that, while the circuit judge was aware of the relationship at the time the initial custody order was entered, the court could not have known that appellant would place a greater value on continuing the relationship with Mr. Hanshaw than on her relationship with her children. However, nothing in the original decree can be construed as a warning that appellant risked losing custody of her children by continuing her existing relationship with Mr. Hanshaw; to the contrary, the original decree anticipates that the relationship will continue outside the presence of the children. Appellee argues further that "at this point, it is impossible for appellant to keep her affair with a married man, or at least the results of that affair, separate from her children." Appellant characterizes the "results" as the birth of a child; however, because the trial judge was aware of the sexual relationship between appellant and Mr. Hanshaw when the origi-

nal decree was entered, such a result could not have been unanticipated and so could not constitute a change of circumstances. *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). Appellee further proposes that "[o]ne can try to lessen the impact by appealing to the better angels of our nature and pointing out that [a]ppellant had the baby and is doing the best she can. However right those choices may be, they do not vitiate the fact that [a]ppellant made a choice, and that choices have consequences."

It appears that the choice that appellee contends constitutes a change of circumstances is the choice to continue her pregnancy and to keep the baby. We respond to this argument by stating emphatically that this court will not endorse a finding that suggests, even by implication, that failure to abort a pregnancy constitutes a change of circumstances for the purpose of custody modification.

Accordingly, we reverse and remand.

BIRD and NEAL, JJ., agree.

Lana BARNES *v.* FORT SMITH PUBLIC SCHOOLS,
Risk Management Resources Division

CA 05-1317 235 S.W.3d 905

Court of Appeals of Arkansas
Opinion delivered May 17, 2006

Tolley & Brooks, P.A., by: *Evelyn E. Brooks*, for appellant.

Lebetter, Cogbill, Arnold & Harrison, LLP, by: *E. Diane Graham*, for appellees.

ANDREE LAYTON ROAF, Judge. Appellant Lana Barnes appeals the Arkansas Workers' Compensation Commission's denial of her request for additional temporary total disability (TTD) and medical benefits on the basis that her claim was barred by both the statute of limitations and the doctrine of res judicata, and in the alternative, was not supported by substantial evidence. We affirm.

On October 5, 2000, Barnes was working as a cook in a school cafeteria when she slipped and fell on a wet floor, suffering a compensable back injury. After some initial medical treatment,

her treating physician released her to return to work with restrictions. Appellees Fort Smith Public Schools and its insurance carrier paid some benefits, but denied Barnes's entitlement to any further compensation benefits in December 2000 upon discovering that Barnes had been untruthful regarding a prior back injury and a prior workers' compensation claim. Barnes requested a hearing on her entitlement to temporary total disability benefits (TTD) beginning October 10, 2000, and continuing through a date yet to be determined. The ALJ found that Barnes had failed to meet her burden of proving by a preponderance of the evidence that she was entitled to TTD benefits. The Commission affirmed and adopted the ALJ's July 9, 2001, opinion. Barnes did not appeal from this decision.

In November 2004, Barnes filed a claim requesting additional TTD benefits beginning February 27, 2002, and continuing through a date yet to be determined and medical treatment subsequent to February 27, 2002. The ALJ found that Barnes's claim was barred by the statute of limitations, and the Commission affirmed and adopted the ALJ's opinion.

As her first point on appeal, Barnes argues that the Commission erred when it found that her claim was barred by the statue of limitations. When reviewing decisions from the Commission, this court views the evidence and all reasonable inferences therefrom in the light most favorable to the Commission's findings and will affirm the decision if the findings are supported by substantial evidence. *Dillard v. Benton Co. Sheriff's Office*, 87 Ark. App. 379, 192 S.W.3d 287 (2004). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

This court must first consider the allowable time for filing a claim for benefits as set out in Ark. Code Ann. § 11-9-702 (Repl. 2002). This statute sets out two types of claims. Subsection (a) covers an initial claim, which must be filed within two years of the date of injury. Ark. Code Ann. § 11-9-702(a)(1). The second type of claim is a claim for additional benefits and is set out in subsection (b) of the statute. In cases where any compensation has been paid, the claim for additional compensation, including disability or medical, will be barred unless filed within one year from the date of the last payment of compensation or two years from the date of the injury, whichever is greater. Ark. Code Ann. § 11-9-702(b)(1). When a claimant files a timely request for additional benefits that is never acted upon, the statute of limitations is tolled.

Eskola v. Little Rock Sch. Dist., 93 Ark. App. 250, 218 S.W.3d 372 (2005); *Dillard, supra*; *Spencer v. Stone Container Corp.*, 72 Ark. App. 450, 38 S.W.3d 309 (2001); *Bledsoe v. Georgia-Pacific Corp.*, 12 Ark. App. 293, 675 S.W.2d 849 (1984).

Here, there is no question that Barnes filed one compensation claim, the initial request[1] filed in 2001, within two years of her injury. Barnes cites *Spencer, supra*, in support of her assertion that this 2001 claim tolled the statute of limitations; however, Barnes's reliance on *Spencer* is misplaced. In *Spencer*, 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. *Spencer, supra*. Here, unlike *Spencer*, Barnes's initial request for additional compensation was acted upon. The issue of TTD was decided in the Commission's July 9, 2001, opinion. Therefore, the statute of limitations was never tolled by the filing of the 2001 claim. Barnes did not file a claim for additional benefits until after November 22, 2004. Two years from the date of the injury would have been October 5, 2002. One year from the last payment of benefits would have been December 6, 2002; this would be the applicable limitations period because it is greater than two years from the date of the compensable injury. Because Barnes did not make another request for compensation until 2004, according to Ark. Code Ann. § 11-9-702(b), Barnes's 2004 claim for additional benefits is barred by the statute of limitations.

Barnes asserts that, because the Commission never dismissed her initial claim for additional benefits pursuant to Ark. Code Ann. § 11-9-702(d), her claim remained open. The statute, however, does not absolutely require that the claim be dismissed in this manner. *See Eskola, supra*. Arkansas Code Annotated section 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.

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[1] Barnes refers to her 2001 claim as her first claim for *additional* benefits. The AR-C form associated with this claim is not in the record, so it is impossible to tell exactly what type of benefits Barnes asked for in this claim. It is apparent from the record, however, that she did at least ask for TTD benefits in this claim.

The statute states that the claim *may* be dismissed upon motion from either party and notice to all parties. Moreover, Ark. Code Ann. § 11-9-702 does not even apply to Barnes's case because Barnes requested and received a hearing on the TTD benefits issue in 2001. Barnes concedes that this claim "met with a hearing and an unfavorable opinion." It was dismissed by the Commission's July 9, 2001, opinion.

Barnes also argues that her claim for additional benefits was timely filed because it was filed within one year from the date of the last payment of compensation. Barnes relies on *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W.2d 253 (1994), for her assertion that Fort Smith School District and its insurance carrier had furnished her medical services until at least 2005. In *Plante, supra*, the claimant suffered a compensable injury on September 12, 1988. After the claimant was released to return to work, he periodically saw his surgeon for post-operative follow-up visits, with the last visit occurring on July 25, 1991. *Id.* The claimant filed a claim for additional benefits on September 11, 1991, more than two years after his date of injury. *Id.* Even though the visits with the surgeon were not billed to the respondent and respondent contended that it had no actual notice of the medical services, the supreme court held that the furnishing of these medical services constituted payments of compensation within the meaning of Ark. Code Ann. § 11-9-702(b) because the respondent had reason to know the medical services would be furnished. *Id.* The claim for additional compensation was therefore filed "within one year from the date of the last payment of compensation." *See id.*

Here, Barnes argues that her claim for additional benefits was within the statute of limitations because she had continued regular medical treatment for her back until at least 2005. However, Barnes found out on December 6, 2000, that Fort Smith School District and its insurance carrier were denying any further medical treatment. She submitted no medical bills to Fort Smith School District or its insurance carrier after this date and had no contact with either party after December 2000. Barnes's medical bills after December 2000 have been paid by other entities. A hearing was held in 2001 on the TTD benefits issue, the very issue Barnes chose to litigate. Unlike *Plante*, Barnes had no surgery, was not under the care of a surgeon, and was not regularly seeing a surgeon for post-surgery follow-up visits included in the payment for surgery. There is no evidence that Fort Smith School District

or its insurance carrier had actual notice or had reason to know that Barnes was receiving further medical treatment. Consequently, Barnes's contention that there was a furnishing of medical services, with knowledge of the appellees, within the statutory period is not supported by the record.

Because we are affirming this case based on the Commission's finding with respect to the statute of limitations, we need not address Barnes's point challenging the Commission's alternative finding that the doctrine of *res judicata* also barred her claim. For the same reason, we need not address Barnes's final point asserting that the Commission's decision that she is not entitled to additional TTD or medical benefits is not supported by substantial evidence.

Affirmed.

HART and VAUGHT, JJ., agree.

MILLWOOD-RAB MARKETING, INC. *v.*
James R. BLACKBURN, *et al*

CA 05-1259 236 S.W.3d 551

Court of Appeals of Arkansas
Opinion delivered May 24, 2006

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

Miller, James, Miller & Hornsby, L.L.P., by: *Troy Hornsby*, for appellees/cross-appellants.

ROBERT J. GLADWIN, Judge. Appellees James R. Blackburn, Dale Booth, Jodie Carroll, David Gregory, Jerry H. Griffin, Bobby Hanson, Larry A. Henry, Harold Kite, Walter E. McCarey, Ricky McDaniel, Gerald S. Smith, Lagafaatasi Tupua, Robert W. Van Hoy, Jon H. Ward, Don A. Washington, Jerry S. Wright, and Kathryn Young filed a complaint in the Little River County Circuit Court against appellant Millwood-RAB Marketing, Inc., d/b/a Millwood Landing Golf and RV Resort (hereafter "Millwood-RAB") as successor in interest to Yarborough Landing Resort, Inc., alleging breach of contract regarding their membership agreements. In an order entered on August 13, 2004, the trial court granted the plaintiffs' motion for partial summary judgment as it pertained to appellees Blackburn, Gregory, McCarey, Tupua, Ward, Washington, and Young but denied the motion as to appellees Booth, Carroll, Griffin, Hanson, Henry, Kite, McDaniel, Smith, Van Hoy, and Wright. In its order, the trial court found that Millwood-RAB had assumed the membership agreements from its predecessors in interest and had materially breached the contracts of the appellees who were granted partial summary judgment. The trial court reserved the issue of damages and an attorney's fee. In its final order entered on July 22, 2005, the trial court granted summary judgment to the remaining appellees based on its finding that Millwood-RAB had breached those contracts as well. The trial court then set forth which appellees were entitled to unlimited and limited free guest green fees and which appellees were entitled to damages representing paid green fees and/or maintenance fees. In addition, the trial court awarded an attorney's fee of $6000. From that final order come this appeal and cross-appeal.

Millwood-RAB raises three points on direct appeal: (1) the governing documents allowed it to amend the rules and regulations of the resort concerning guest fees and to increase maintenance fees; (2) estoppel cannot, as a matter of law, form a basis for recovery; (3) the trial court erred in awarding an attorney's fee.

Appellees filed a cross-appeal, arguing that the trial court erred in awarding only a reduced attorney's fee to them as the prevailing parties and that this court should grant taxation of costs and award an attorney's fee for this appeal. We affirm on direct appeal and cross-appeal and deny appellees' request for taxation of costs and an attorney's fee.

Around 1967, Yarborough Landing Resort, Inc., formed a private country club and R.V. park in Little River County near Ashdown that was commonly referred to as the Millwood Country Club, Millwood Golf Course, and Millwood Landing. From 1986 through 2003, appellees, with the exception of appellee Carroll, either purchased their memberships directly from Yarborough or purchased them from an original member. They purchased either Charter 1 Memberships or Special Memberships, both of which expired after a term of 100 years. Appellees paid an initial membership fee plus annual maintenance fees and thereafter prepaid rent. Pursuant to the Charter 1 and Special memberships, members were entitled to either free green fees with an unlimited number of guests or a limited number of four guests each day. Those membership agreements included the following language:

> SAID Member(s) and their guests who accompany them to the Resort shall be entitled to free green fees at the Resort golf course during the term of their membership.
>
> Or:
>
> SAID Member(s) and their guests (Limited to 4 persons per day), who accompany them to the Resort shall be entitled to free green fees at the Resort golf course during the term of their membership.

Although it was not in writing, appellee Carroll received a Founders Membership, of perpetual duration, around 1986. He had been provided unlimited free green fees for guests since 1979.

Some members received an Assurance Certificate, containing the following language:

> This RIGHT TO USE with all its related privileges may be bequeathed by Grantees to whomever so desired as long as Grantees are in good standing with YARBOROUGH LANDING RESORT and said heirs shall be bound by all obligations of Grantees.

As noted above, certain appellees bought their memberships from original members of the resort. Those contracts contained the following language:

> We . . . agree to accept full responsibility in maintaining all annual dues to Millwood Landing and will abide by all rules and guidelines as set forth by the Resort . . . . Millwood Landing reserves the right to re-assess annual dues at any time and the right to alter rules and guidelines of the resort whenever it is deemed necessary by the resort.

The membership agreements and transferred membership agreements also included such language as:

> This right to use shall be subject to but not limited to the provisions of current YARBOROUGH LANDING RESORT member handbook of Rules and Guidelines; the annual maintenance fee levied by YARBOROUGH LANDING RESORT: and the YARBOROUGH LANDING RESORT Membership Agreement signed by Member(s).

And, under a section entitled Privileges of Membership:

> As long as member is in good standing with Resort, he (she) along with his (her) immediate family residing at home will be entitled to use all existing and future facilities constructed by Resort . . . Member agrees to be bound by all rules and guidelines as set forth in Resort's Member Handbook of Rules and Guidelines, as it now exists and as it may from time to time be reasonably amended by Resort.

The introduction to the YARBOROUGH LANDING RESORT Membership Handbook of Rules and Guidelines contained language as follows:

> THESE RULES AND GUIDELINES ARE SUBJECT TO CHANGE BY YARBOROUGH LANDING RESORT MANAGEMENT FOR THE BENEFIT OF THE MEMBERSHIP AS A WHOLE AND WITHOUT ENDORSEMENT OF INDIVIDUAL MEMBERS.

In addition, the handbook's summary provided:

> As stated above, these rules are subject to change by the Resort Management or the Developer at any time for the benefit of the majority of the members consistent with the purposes or intent of the membership offering . . . .

Thereafter, Millwood Landing Golf & R.V. Resort Rules and Amended Resort Rules for Millwood Landing Golf and R.V. Resort, effective February 1996, provided that, "Members are responsible for any charges, actions, or damages caused by their guests or family members," "Guests may be assessed a fee for certain amenities at the resort. Please inquire at the resort for verification of amenity fees," and "Guests are welcome on a fee basis. See pro shop for current rates."

In April 2002, Millwood Landing, which had since been sold to Cactus Resort Properties III, LLC, was purchased by Millwood-RAB. In addition to assignment and assumption language in the purchase agreement itself, a separate document entitled ASSIGNMENT AND ASSUMPTION OF CONTRACTS, AGREEMENTS AND INTANGIBLES contained the following language:

> In accepting this Assignment, Buyer: (i) expressly assumes and shall perform all obligations of Seller with respect to the Contract Rights: and (ii) agrees to be bound under the Contract Rights to the same extent as Seller was bound by the Contract Rights prior to the Closing Date.

On October 11, 2002, Millwood-RAB suspended appellees' guest privileges and began charging guests for green fees. Appellees filed a complaint alleging breach of contract on September 8, 2003. In April 2004, appellees filed a motion for partial summary judgment to be followed by further fact finding regarding damages and an attorney's fee. In May 2004, Millwood-RAB filed a motion for summary judgment.

In an order entered on August 13, 2004, the trial court granted partial summary judgment to appellees Blackburn, Gregory, McCarey, Tupua, Ward, Washington, and Young. The trial court found that Millwood-RAB had assumed the contracts and concluded that Millwood-RAB could not modify the provision for free guest green fees by changing the rules and guidelines of the resort because that provision was part of the consideration for signing the contracts. The trial court reserved the issue of damages and an attorney's fee.

At a hearing held on April 26, 2005, David Meredith, a lawyer and one of the two owners of Millwood-RAB, testified that he was involved with the acquisition of the company from Cactus Resort. He stated that the deal finally closed at the end of

May 2002, but that Cactus Resort had failed to provide him with complete documentation on the different memberships. Meredith stated that the owners actually took over the resort in mid-June 2002, and they noticed that members were bringing free guests on a frequent basis. Meredith testified that, "It was not going to be financially viable to continue the operation that way." He said that almost immediately Millwood-RAB started the policy of allowing guests to play for free on the day they were there but notifying them that the free-guest policy would not be honored in the future. Meredith stated that, although Millwood-RAB formulated a letter of notification, it was not mailed because the owners had no idea who to notify because of the incomplete documentation on the memberships. Meredith stated that the owners structured the maintenance fees according to the members' use of the golf course because that would be more fair. He stated that the prior maintenance fee was sixty-nine dollars per quarter and that it was increased to $405 per quarter.

In its final order entered on July 22, 2005, the trial court noted its earlier granting of partial summary judgment on liability to seven appellees.[1] The trial court further found that Millwood-RAB was contractually bound to and in material breach of the membership agreements as to the remaining appellees. Specifically, the trial court ruled from the bench that Yarborough Landing, as Millwood-RAB's predecessor in interest, had used the free green fees for guests as a "hook" to get appellees to buy a membership. In its order, the trial court set forth the green fees to which appellees were entitled and provided that certain appellees were entitled to damages representing green fees and maintenance fees they had paid. Finally, the trial court awarded an attorney's fee of $6000.

Direct Appeal

Millwood-RAB argues that the trial court ignored those portions of the membership agreements that incorporated by reference the resort's rules and guidelines and that the four corners of all of the documents taken together clearly indicate that the rules, including those involving fees, were subject to change. Millwood-RAB concedes that it was required to fulfill certain obligations with respect to the members but maintains that, by

[1] McCarey and Young were later dismissed from the action.

virtue of the assignment, it also acquired the right to impose certain obligations upon the members.

Normally, on a summary-judgment appeal, the evidence is viewed in the light most favorable to the party resisting the motion, and any doubts and inferences are resolved against the moving party. *Clarendon Nat'l Ins. Co. v. Roberts*, 82 Ark. App. 515, 120 S.W.3d 141 (2003). When parties file cross-motions for summary judgment, they essentially agree that there are no material facts remaining, and summary judgment is an appropriate means of resolving the case. *Id.* As a general rule, the filing by both parties of opposing motions for summary judgment will not warrant a court's granting either party's motion if indeed there exists a genuine factual dispute concerning a material issue. *Chick-A-Dilly Properties, Inc. v. Hilyard*, 42 Ark. App. 120, 856 S.W.2d 15 (1993) (citing *Schlytter v. Baker*, 580 F.2d 848, 849-50 (5th Cir. 1978)). When the parties proceed on the same legal theory and on the same material facts, however, the basis for the rule disappears. *Id.* Thus, cross-motions may be probative of the non-existence of a factual dispute when, as here, they demonstrate a basic agreement concerning what legal theories and material facts are dispositive. *Id.*

Where the meaning of a contract does not depend on disputed extrinsic evidence, the construction and legal effect of the contract are questions of law. *See Tunnel v. Progressive N. Ins. Co.*, 80 Ark. App. 215, 95 S.W.3d 1 (2003). On appeal from a trial court's determination of a purely legal issue, we must only decide if its interpretation of the law was correct.

The applicable rule of contract construction states that where two provisions of a contract conflict, the specific provision controls over a more general provision, as it is assumed that the specific provision expresses the parties' intent. *American Investors Life Ins. Co. v. Butler*, 76 Ark. App. 355, 65 S.W.3d 472 (2002). We agree with the trial court's interpretation of the membership agreements. It is unlikely that appellees, or the original members of the resort, would have agreed to buy a membership that featured limited or unlimited free green fees for guests if that provision could thereafter be eliminated by simply changing the rules regarding those fees. Both parties to the contract recognized the free green fees for guests as an attractive offer that was likely instrumental in motivating the members to buy a membership at the resort. Millwood-RAB could certainly change the rules and regu-

lations of the resort, but it could not retract a core provision of the membership agreements in doing so.

Next, Millwood-RAB argues that estoppel does not apply. Appellees had argued below that Millwood-RAB was estopped to claim that it was entitled to change the maintenance fees and charge guest fees because it did not immediately notify every member of the change and instead waited two or three months before making changes. Because appellees agree on appeal that estoppel does not apply and because the trial court's order does not indicate that it relied on the theory of estoppel, we will not address this point.

Finally, Millwood-RAB argues that the trial court erred in awarding an attorney's fee and that, alternatively, the fee was excessive. It is well settled that under Arkansas law, attorney's fees are awarded only when expressly authorized by a statute or rule. *Boatmen's Trust Co. of Ark. v. Buchbinder*, 343 Ark. 1, 32 S.W.3d 466 (2000). Arkansas Code Annotated section 16-22-308 (Repl. 1999) provides that the prevailing party in a civil action, including breach of contract, may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs. The decision to award attorney's fees and the amount of an award are discretionary determinations that will be reversed only if there was an abuse of discretion. *Buchbinder, supra.*

This court has often observed that there is no fixed formula in determining reasonable attorney's fees. *Phi Kappa Tau Housing Corp. v. Wengert*, 350 Ark. 335, 86 S.W.3d 856 (2002). However, a court should be guided in that determination by the following long-recognized factors: (1) the experience and ability of the attorney; (2) the time and labor required to perform the service properly; (3) the amount in controversy and the result obtained in the case; (4) the novelty and difficulty of the issues involved; (5) the fee customarily charged for similar services in the local area; (6) whether the fee is fixed or contingent; (7) the time limitations imposed upon the client in the circumstances; (8) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney. *Id.* Due to the trial judge's intimate acquaintance with the record and the quality of service rendered, we recognize the superior perspective of the trial judge in assessing the applicable factors. *Id.*

Here, appellees' attorney, Troy Hornsby, submitted an affidavit wherein he stated that he had been licensed to practice

law in Arkansas since 1995. He charged $150 per hour for his services and fifty dollars per hour for his legal assistant's time. According to Hornsby, his hourly rates were reasonable and customary for legal services in the area. He stated that he had, at that point, expended 83.7 hours in representing appellees, while his legal assistant had spent 2.3 hours, and that he expected to have expended 91.7 hours at the completion of his representation at the trial court level. Therefore, he requested $13,870, plus $100 for reasonable and necessary out-of-pocket expenses. In addition to the affidavit, Hornsby attached a copy of his firm's billing statement reflecting the various charges. Considering the relevant factors, we cannot say that the trial court abused its discretion in awarding a $6000 attorney's fee. Furthermore, we disagree with Millwood-RAB's contention that the fee was excessive given that appellees' total recovery was only $5242.72. As noted, there is no fixed formula in determining what is a reasonable attorney's fee. *See Wengert, supra.*

Millwood-RAB also relies on Ark. R. Civ. P. 54(e) for the proposition that the trial court's award was not proper because there was no stated basis for the award as it pertained to those appellees who received only declaratory relief and because appellees' request for an attorney's fee in its initial complaint cannot provide that basis. Rule 54(e) provides:

> (1) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.
>
> (2) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute or rule entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought.

Millwood-RAB argues that there was no such motion filed by appellees. In *State Auto Property & Cas. Ins. Co. v. Swaim*, 338 Ark. 49, 991 S.W.2d 555 (1999), our supreme court held that Rule 54(e) does not require a written motion for attorney's fees. That court also noted that an award of attorney's fees pursuant to Ark. Code Ann. § 16-22-

308 further obviates the need for a motion to be filed requesting the fees. Although certain appellees received only declaratory relief, the action was commenced as a breach-of-contract claim. Accordingly, the granting of an attorney's fee was proper under Ark. Code Ann. § 16-22-308.

Cross-Appeal

Appellees argue that the trial court erred in awarding a reduced attorney's fee in light of the uncontradicted evidence that their attorney asserted entitlement to a reasonable and necessary attorney's fee of around $13,000. Again, there is no fixed formula in determining what is a reasonable and necessary attorney's fee. *Wengert, supra.* The trial court was able to observe and assess Hornsby's performance at trial, and after considering the affidavit Hornsby submitted, the trial court determined that an attorney's fee of $6000 was warranted. We simply cannot say that the trial court abused its discretion in awarding that amount.

Appellees also request that they receive taxation of costs pursuant to Sup. Ct. R. 6-7(a), (c), and/or (d), and they further request permission to petition this court for an attorney's fee incurred in the appeal of their case. Supreme Court Rule 6-7 provides:

> (a) Affirmance. The appellee may recover brief costs not to exceed $3.00 per page; total costs not to exceed $500.00.
>
> . . . .
>
> (c) Affirmed in part and reversed in part. The Court may assess appeal costs according to the merits of the case.
>
> (d) Imposing or withholding costs. Whether the case be affirmed or reversed, the Court will impose or withhold costs in accordance with Rule 4-2(b).

Appellees supplemented Millwood-RAB's Addendum with the affidavits of both parties' attorneys and the attorneys' billing statements consisting of fourteen pages. We, however, decline to award costs, as appellees would be entitled to such a paltry sum under (a); we fail to

see how the merits of the case would warrant an award of costs under (c); and appellees did not comply with Sup. Ct. R. 4-2(b)[2] to recover costs under (d).

Furthermore, appellees' request for an attorney's fee for this appeal pursuant to Ark. Code Ann. § 16-22-308 is denied. The cases relied upon by appellees are either inapplicable or have been overruled. In a per curiam opinion, our supreme court stated that Ark. Code Ann. § 16-22-308 permits trial courts, but not appellate courts, to assess attorney's fees. *See Mosley Mach. Co., Inc. v. Gray Supply Co.*, 310 Ark. 448, 837 S.W.2d 462 (1992).

Affirmed on direct appeal; affirmed on cross-appeal.

Motion for costs and attorney's fee denied.

GRIFFEN and NEAL, JJ., agree.

A.W. PHILLIPY *v.* Sandra L. O'REILLY

CA 05-1221 236 S.W.3d 548

Court of Appeals of Arkansas
Opinion delivered May 24, 2006

[2] Supreme Court Rule 4-2(b)(1) provides that in seeking an award of costs, counsel must submit a statement showing the cost of the supplemental abstract or Addendum and a certificate of counsel showing the amount of time that was devoted to the preparation of the supplemental abstract or Addendum.

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

Dunham & Faught, P.A., by: *James Dunham*, for appellee.

ROBERT J. GLADWIN, Judge. This is an appeal from an order in which the Yell County Circuit Court appointed appellee Sandra O'Reilly permanent guardian of the person and estate of Harold W. Phillipy. Mr. Phillipy's son, appellant A.W. Phillipy, argues that the trial court's July 22, 2005 order is void and that there was insufficient evidence to support the trial court's finding that his father is incapacitated. We dismiss based upon appellant's lack of standing to bring this appeal.

Appellant and appellee were married at one point in time, but later divorced. Subsequently, appellee was purportedly[1] adopted by her ex-father-in-law, Mr. Phillipy, in the State of Florida in April 2005, specifically for the purpose of giving her legal authority to serve as his guardian. Mr. Phillipy, who was born on June 1, 1916, suffers from numerous medical conditions, including high blood pressure and diabetes, which require six different prescription medications and two types of insulin to

[1] We use the term "purportedly" because the copy of the final judgment of adoption from the Florida proceeding contained in the Addendum is not signed or dated.

maintain his health. He is also reportedly visually and hearing impaired. At the time of this case, Mr. Phillipy had moved to Yell County, Arkansas, and was residing with appellee until appellant "secreted" him away to Montana.

On June 1, 2005, appellee filed a petition in the Yell County Circuit Court for an ex parte temporary appointment of guardian and permanent guardianship of the person and estate of Mr. Phillipy.[2] She contended that the temporary guardianship was necessary to protect Mr. Phillipy, who was "abducted" on May 21, 2005, by appellant, from whom he was allegedly estranged, and "secreted away" in Montana. On June 2, 2005, the trial court entered a temporary order appointing appellee guardian of Mr. Phillipy. On June 28, 2005, attorney Bill Strait entered his appearance as Mr. Phillipy's retained counsel. On July 12, 2005, Mr. Phillipy executed and caused to be filed a consent to guardianship with appellee to serve as his guardian. On July 22, 2005, the trial court conducted a hearing, during which neither testimony nor a report evidencing Mr. Phillipy's alleged incapacity was offered. Mr. Strait advised the trial court that Mr. Phillipy fully consented to the guardianship. The order appointing appellee as permanent guardian was filed on July 22, 2005, and appellant filed a notice of appeal on August 18, 2005.

Guidance on standing is provided by three recent cases from our supreme court that cite *In re $3,166,199*, 337 Ark. 74, 987 S.W.2d 663 (1999). In that case, the supreme court reiterated the general rule regarding standing, "that an appellate court cannot act upon an appeal taken by one not a party to the action below." *Id.* at 79, 987 S.W.2d at 666. Under our rules of civil procedure, party status is generally obtained by initiating an action through filing a complaint or responding to a complaint by answer. *Id.*; *see also Cogburn v. Wolfenbarger*, 85 Ark. App. 206, 148 S.W.3d 787 (2004) (finding standing where an individual was served with notice of a hearing, filed an answer, and appeared at both the temporary and permanent hearings to contest the guardianship). It is also possible to become a party by intervention under Ark. R. Civ. P. 24 (2005), or by joinder under Ark. R. Civ. P. 19 (2005). *In re $3,166,199*, *supra*; *see also Beebe v. Fountain Lake School Dist.*, 365 Ark. 536, 231 S.W.3d 628 (2006) (finding standing based on

[2] At the time appellee filed her original petition, another similar petition, filed by Mr. Phillipy's nephew, Paul Schopbach, was pending in Florida. That petition was later withdrawn.

collective basis related to prior party status, intervention, and constitutionality of a statute). In this case, none of these situations apply to appellant; therefore, he does not have standing as a party to the action to bring this appeal.

Arkansas appellate courts have recognized two other circumstances in which a nonparty may gain standing to pursue appellate review of a trial court's orders. The first occurs when a nonparty seeks relief under Ark. R. Civ. P. 60(k) (2005), which provides that an independent action may be filed to relieve a person from judgment who was not actually served with process. *In re $3,166,199, supra.* Appellant is not seeking this type of relief, as nothing was required of him pursuant to the trial court's order, so this exception is likewise inapplicable.

The final possible scenario would apply in the unique set of facts where any appellant, though not a party, has a pecuniary interest affected by the court's disposition of the matter below. In *Swindle v. Benton County Circuit Court*, 363 Ark. 118, 211 S.W.3d 522 (2005), our supreme court determined that an appellant had standing based upon this "pecuniary interest" exception where he was ordered by the circuit court to reimburse the public defender's office $150 for interpreting services that were provided to his Spanish-speaking client. The trial court had stated that the appellant was privately retained by his client and that it was his responsibility to make sure that the fee was paid. The supreme court addressed the standing issue, although it was not raised by the appellee, and found that because the costs were assessed against the appellant personally, he had standing as a nonparty to request appellate review. Additionally, in *Springdale School Dist. No. 50 v. The Evans Law Firm, P.A.*, 360 Ark. 279, 200 S.W.3d 917 (2005), the supreme court determined that an attorney had standing to bring an appeal related to the circuit court's disposition of his attorney's fee in a case. The supreme court first pointed out that the attorney had specifically intervened with respect to the attorney's fee issues, and that would likely have been sufficient; however, the supreme court also addressed the fact that his direct pecuniary interest gave him standing to bring the appeal with respect to the attorney's fee issue.

Based upon our review of the instant case, appellant has no pecuniary interest in this matter through which to gain standing. Appellant fails to fit into any of the above-described categories. He clearly was neither initially, nor subsequently, a party to the circuit court proceeding. He did not move to

intervene and did not enter an appearance in the case. No judgment was entered against him from which he would be seeking relief. Additionally, he does not appear to have a pecuniary interest in the circuit court's order. Although he did not receive prior notice of the hearing on the petition, he nonetheless was required to pursue any dispute that he might have had with the order at the circuit court level. He failed to do so by any of the available means, including making himself a party to the action, filing a posttrial motion asking for a new trial or a judgment notwithstanding the verdict, or requesting that the appointment be set aside because he failed to receive notice prior to the hearing. Accordingly, this appeal is dismissed for lack of standing.

Appeal dismissed.

GRIFFEN and NEAL, JJ., agree.

Rex M. PABLO *v.* Katie CROWDER

CA 05-1417 236 S.W.3d 559

Court of Appeals of Arkansas
Opinion delivered May 24, 2006

Robert R. White, for appellant.

No response.

JOHN B. ROBBINS, Judge. Appellee Katie Crowder filed a petition for an order of protection against appellant Rex M. Pablo on August 29, 2005, alleging that she was in immediate danger of domestic abuse. On the same day, the trial court entered a temporary order of protection and scheduled a hearing for September 26, 2005. After the hearing, the trial court found that Ms. Crowder proved the allegations in her petition and entered a protection order restraining Mr. Pablo from having any contact with Ms. Crowder for a period of two years. Mr. Pablo now appeals.

Mr. Pablo raises two arguments for reversal. First, he argues that the trial court erred in refusing to allow him to call witnesses on his behalf. Next, Mr. Pablo contends that the evidence presented was insufficient to support the entry of an order of protection. We affirm.

At the hearing, Ms. Crowder testified that she began dating Mr. Pablo in April 2005. She stated that, "I was very serious about Mr. Pablo in the first couple of months," and that, "I even took him to meet my family and I met his family." However, Ms. Crowder indicated that she became concerned about Mr. Pablo's controlling behavior in May 2005, when he would constantly call her at work and call her friends to talk about their relationship.

According to Ms. Crowder, he would also show up at places where she was and demand that she spend time with him instead of her friends.

Ms. Crowder decided that she wanted to end the relationship but that, "I was fearful of calling it off all of a sudden because there were times when I would break plans with him and he would get very angry." In the interest of her safety, Ms. Crowder invited Mr. Pablo to a party on June 17, 2005, where she broke up with him in front of several other people. According to Ms. Crowder, Mr. Pablo grabbed her and tried to kiss her, but she pulled away. Mr. Pablo became very upset and threw a beer bottle that burst behind Ms. Crowder. He also grabbed her arm and screamed obscenities in her face. Although Mr. Pablo did not literally say, "I'm going to hurt you," Ms. Crowder was very afraid for her safety and thought he was going to physically hurt her. She stated that neighbors were turning their lights on and coming outside because the yelling was so loud, and that she told Mr. Pablo to leave. Mr. Pablo left briefly but returned, and resumed yelling in Ms. Crowder's face, when she threatened to call the police. Mr. Pablo left again about a half hour after that.

Ms. Crowder testified that after she terminated the relationship Mr. Pablo was obsessive and continued to come to her apartment and give her gifts and flowers. He also sent her e-mails, the last of which was received on August 25, 2005, when Mr. Pablo expressed anger after he "finally got that I did not want contact with him." Ms. Crowder stated that she received a phone call at 2:30 a.m. on August 29, 2005, and believed it was Mr. Pablo because she recognized his voice. Ms. Crowder stated, "He told me that he was coming over and said some sexually explicit things to me." This caused Ms. Crowder to be "very terrified," and she decided to go to the prosecutor's office and seek a protection order the following day.

Mr. Pablo testified on his own behalf, and he stated that he has not contacted Ms. Crowder since June 19, 2005, although he did send her flowers twice. However, on cross-examination he recanted that testimony and admitted that he continued to contact Ms. Crowder even after she made it clear that she wanted no contact with him, and that the contact continued until August 25, 2005. Mr. Pablo denied making a harassing phone call at 2:30 a.m., and he could not recall yelling in Ms. Crowder's face at the party.

After testifying, Mr. Pablo stated, "I would like to bring up my witness." When asked by the trial court what the witness

would testify to, Mr. Pablo responded, "What happened at the party." The trial court declined to hear any additional witnesses, stating, "We have heard from you and you both have given an account of what happened at this party. I am going to rule that that would be duplicative and simply delay the proceedings."

Mr. Pablo's first argument is that the trial court erred in refusing to allow him to call witnesses on his behalf. He cites Ark. R. Evid. 611(a), which provides:

> *Control by Court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Mr. Pablo asserts that his witnesses would not have needlessly consumed time, and instead would have ensured ascertainment of the truth because they would have rebutted Ms. Crowder's testimony concerning his violent and abusive behavior at the party. Mr. Pablo argues that the trial court's decision on this matter constituted an abuse of discretion.

Mr. Pablo also cites *Gerard v. State*, 235 Ark. 1015, 363 S.W.2d 916 (1963), in support of his first argument. In that case, the trial court revoked the appellant's suspended sentence based on the testimony of seven police officers, while refusing to let the appellant testify on his own behalf or call witnesses. The supreme court reversed and remanded, stating, "[I]rrespective of the offense with which one is charged, and regardless of the testimony against him, a defendant is entitled to call his witnesses — and certainly, — to testify himself." *Gerard v. State*, 235 Ark. at 1019, 363 S.W.2d at 918. In the present case, Mr. Pablo maintains that the protective order is penal in nature given that there is a public record of his abusive or violent conduct and there has been a substantial impact on his personal freedoms. He thus submits that he had the right to present witnesses to rebut the testimony of the complaining party.

Our supreme court has held, and our rules of evidence require, that when challenging the exclusion of testimony, an appellant must make a proffer of the excluded evidence at trial so that we can review the decision, unless the substance of the

evidence is apparent from the context. *Halford v. State*, 342 Ark. 80, 27 S.W.3d 346 (2000); Arkansas Rules of Evidence 103(a)(2). At the trial, Mr. Pablo unsuccessfully tried to call an unidentified witness to testify about what happened at the party. What is critical to our determination of this point is that appellant failed to go forward and make any proffer of what the witness's testimony would have been. *See Halford v. State, supra.* Hence, we can only speculate as to what the witness's testimony would have been and any resulting prejudice. While we agree that the trial court erred in failing to allow Mr. Pablo to call the witness, it has consistently been held that we will not reverse in the absence of a demonstration of prejudice. *See Stivers v. State*, 354 Ark. 140, 118 S.W.3d 558 (2003).

Mr. Pablo's remaining argument is that there was a lack of evidence to support the entry of the protection order. Arkansas Code Annotated section 9-15-103(2) (Supp. 2005) provides:

> (2) "Domestic abuse" means:
>
> (A) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members; or
>
> (B) Any sexual conduct between family or household members, whether minors or adults, which constitutes a crime under the laws of this state[.]

Mr. Pablo contends that the trial court erred in finding that he committed domestic abuse against Ms. Crowder, noting that he never specifically threatened to hurt her. He submits that the incident at the party was an isolated event and that there was no evidence that there was any continuing threat of abuse at the time of the hearing.

Mr. Pablo also challenges whether the relationship between the parties met the definition of "family or household members" under the applicable statute. He cites Arkansas Code Annotated section 9-15-103(3) and (4) (Supp. 2005),[1] which provides:

> (3) "Family or household members" means spouses, former spouses, parents and children, persons related by blood within the

[1] This statute was amended in 2005 to include "persons who are presently or in the past have been in a dating relationship" under the definition of "family or household members." The amendment became effective on August 11, 2005, which was after the July

fourth degree of consanguinity, any children residing in the household, persons who presently or in the past have resided or cohabitated together, persons who have or have had a child in common, and persons who are presently or in the past have been in a dating relationship together; and

(4)(A) "Dating relationship" means a romantic or intimate social relationship between two (2) individuals which shall be determined by examining the following factors:

(i) The length of the relationship;

(ii) The type of the relationship; and

(iii) The frequency of interaction between the two (2) individuals involved in the relationship.

(B) "Dating relationship" shall not include a casual relationship or ordinary fraternization between two (2) individuals in a business or social context.

Mr. Pablo concedes that there was a very short "dating relationship" between the parties, but contends that a dating period of less than two months is not what the legislature was targeting.

The standard of review on appeal from a bench trial is whether the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence *Newton v. Tidd*, 94 Ark. App. 368, 231 S.W.3d 84 (2006). Disputed facts and determinations of credibility of witnesses are within the province of the fact finder. *Id.* We hold that the trial court did not clearly err in finding that Mr. Pablo committed domestic abuse against a family or household member.

Ms. Crowder testified that Mr. Pablo grabbed her, screamed obscenities in her face, and burst a beer bottle behind her at the June 17, 2005, party, causing her to fear for her safety. Over the next couple of months, Mr. Pablo continued to contact Ms.

17, 2005, incident at the party. However, the amendment was in effect when appellant made the harassing telephone call on August 29, 2005, which was the same day the petition for order of protection was filed. Mr. Pablo does not argue that the prior version of the statute applies to this case.

Crowder against her wishes, and Ms. Crowder stated she became very terrified when Mr. Pablo called her early in the morning on August 29, 2005, threatening to come to her apartment. From this testimony the trial court could reasonably find that Mr. Pablo committed domestic abuse under the statute by inflicting fear of imminent physical harm, bodily injury, or assault.

Furthermore, we have no hesitation affirming the trial court's finding that the parties were "family or household members." It is conceded by Mr. Pablo that he and Ms. Crowder were in a dating relationship for a couple of months, which Ms. Crowder characterized as "serious." This clearly comes within the definition of the applicable statute.

Affirmed.

PITTMAN, C.J., and BAKER, J., agree.

Phil WHITE *v.* Alice Ann WHITE

CA 05-1029 236 S.W.3d 540

Court of Appeals of Arkansas
Opinion delivered May 24, 2006

Smith, Maurras, Cohen, Redd, & Horan, PLC, by: *Matthew Horan*, for appellant.

Kelly A. Procter-Pierce, for appellee.

OLLY NEAL, Judge. This appeal involves the calculation of child support for an "S" corporation shareholder and whether the trial court can add back to the shareholder's income expenses incurred by the business and deducted that same year instead of being depreciated over several years. On cross-appeal, issues are raised concerning whether the shareholder would have to share in the expenses of his daughter's extracurricular activities, whether the shareholder could claim the tax deduction for the daughter, whether he could satisfy part of a judgment for child support by purchasing a car for the daughter, and whether he owed any money for obligations imposed by the original divorce decree. We vacate and remand in part and reverse and remand in part on direct appeal. On cross-appeal, we vacate and remand in part, dismiss in part, and affirm in part.

Appellant Phillip White and appellee Alice White were divorced in 1998. In the decree, Phillip was awarded custody of the parties' now-adult son and Alice was awarded custody of the parties' daughter. Phillip was ordered to pay child support of $400 per month. As part of the property division, Phillip agreed to pay

Alice $8,500 as her share of the equity in the parties' marital residence. This payment was to be made to the closing company when Alice purchased a home for herself and her daughter. The decree also provided that, if Phillip sold the marital residence within one year from entry of the decree, Alice would be entitled to half of the sales price, less the real-estate commission, the equity payment, and the current mortgage payments and all payments made by Phillip.

On May 17, 2004, Alice filed a petition seeking to modify the divorce decree to increase Phillip's child-support obligation. The petition alleged that Phillip's income had substantially increased since the entry of the decree. The petition also sought to hold Phillip in contempt for failing to make the $8,500 payment to the closing company. Alice sought judgment for the $8,500. Alice also sought judgment for her half of the proceeds from the sale of the marital residence. Phillip denied the allegations of the petition. In addition, he affirmatively alleged that he had paid the daughter's annual tuition at a private school, paid the daughter's extracurricular expenses, and paid closing costs for Alice, as well as other monies totaling over $8,500. Phillip further alleged that Alice was not due any funds from the sale of the residence because the amounts that he was entitled to deduct exceeded the amount of the proceeds.

David Potts, a certified public accountant, testified as Alice's expert. He stated that he examined Phillip's individual tax returns for the years 2002, 2003, and 2004, as well as the tax returns for Phillip's businesses for those same years. He stated that one of the businesses, General Pallets, purchased, among other items, a 2000 Peterbilt tractor in 2004 for $45,000 and, as authorized by section 179 of the tax code, deducted the entire cost that same year. Phillip owned eighty-one percent of the shares of General Pallets. Potts stated that General Pallets was an "S" corporation and that the income from it and the other business "passed through" to Phillip. He calculated Phillip's income for 2004 as $150,804, prior to any adjustment for the section 179 expense. He decided to arbitrarily charge back to Phillip's income ninety percent of the depreciation expense. He stated that the average for Phillip's income in 2002 and 2003 was $218,869, resulting in a child-support obligation of $2,736 per month. The average for Phillip's income in 2003 and 2004 was $224,139, resulting in a child-support obligation of $2,802 per month. Potts stated that he included a capital gain of $98,766 in Phillip's income for 2003. He also stated that the total

depreciation expenses added back into Phillip's income were $19,283 in 2003 and $46,121 in 2004.

Alice testified that the parties' daughter, Lindsey, was a talented barrel racer and qualified for the Youth World competition the last two years but did not get to participate because she could not afford the expenses, including the entry fees, the cost of transportation for the horse, feed for the horse, gasoline, and expenses for herself and her daughter. She described Lindsey's activities as a means to obtain a scholarship to Oklahoma State University and further her career goal of becoming a veterinarian. Alice asserted that Phillip should be ordered to pay for half of the cost of these activities, adding that she could afford the expenses for activities within a twenty-mile radius but needed financial assistance for other more distant competitions such as those held in Oklahoma, Mississippi, or Tennessee.

Alice testified that she closed on the purchase of a home on September 16, 1999. She stated that, at the time of closing, Phillip paid $5,688.90 and that she was asking for judgment for the difference. Although the closing statement showed a deposit or earnest money of $500, she did not know if Phillip paid that. She also did not recall whether Phillip paid $548 to a bank on October 28, 1999, and added that Phillip has never given her any extra money. She stated that, if Phillip ever made payments on her behalf, he always took it out of other payments he owed. Alice did not agree that Phillip had made significant payments other than the child support on Lindsey's behalf. She also stated that, during the pendency of the divorce, she lost her home, her car, and almost lost her life.

On cross-examination, Alice stated that she was not currently employed and last worked in May 2002. She stated that she was diagnosed and treated for breast cancer and was drawing disability of $925 per month. She stated that she did not claim Lindsey as a deduction on her tax returns. According to Alice, she and Lindsey lived with her sister and her family and she paid her sister to help with the utilities.

Phillip testified that his source of income was the pallet company and other investments. He identified financial statements from the years 2002, 2003, and 2005 but claimed that they did not reflect his personal financial situation because twenty-five to thirty percent belonged to his wife. He stated that the January 2005 statement listed his salary from the pallet company as $253,000 and

rental income of $296,666, which were the figures reflected on his tax return. According to Phillip, the capital gain resulted from the restructuring of the ownership of a building that burned. He said that he retained ownership of the land on which the building had been situated and that his business partner kept the insurance proceeds.

Phillip described Alice as being irresponsible with money. He acknowledged that, although the divorce decree required him to pay $8,500 on Alice's behalf at the time she closed on a house, he only paid approximately $5,600 because that was the only amount that Alice was required to pay at closing. According to Phillip, he also purchased a washer and dryer and some other items for Alice and identified copies of checks for those purchases. Phillip also stated that he purchased a car for Alice for $4,500 but did not have documentation from the sale. He said that the extra payments, including the car, totaled $5,250.

Phillip also asked the court to allow him to claim Lindsey as a tax deduction until she turned eighteen. Alice objected, stating that she had never been placed on notice of this request. Phillip also proposed that he be allowed to buy Lindsey a vehicle and to deduct that cost from the child support, together with an allowance of $200 per month. He stated that he heard David Potts's testimony that child support should be $2,800 per month but stated that he drew a salary of only $3,200 per month. He said that such a payment would cause a real problem with his cash flow. Phillip did not believe that Lindsey needed $2,800 per month but did not dispute that there were times that he gave Alice money and deducted it from child support.

Michael Moser, Phillip's CPA, testified that he reviewed the same financial information that David Potts had used and also listened to Potts's testimony. He calculated Phillip's average income for 2003 and 2004 at $133,842, which would yield a child-support obligation of $1,673 per month. He stated that one of the differences between Potts's calculations and his own is that he did not include the $98,766 capital gain in Phillip's income. He said that adding ninety percent of the section 179 expense "would probably be a proper calculation to make." He said that the business used straight-line depreciation over the life of the asset. Moser stated that he disagreed with Potts's calculation adding back the current section 179 expense. He denied that Phillip was trying

to manipulate the book tax difference by using the section 179 expense. He said that, because of the section 179 expense, Phillip's taxes were much lower in 2004.

In its order, the trial court found that Phillip was entitled to deduct ten percent of the cost of the equipment for depreciation purposes. The trial court also added back to Phillip's income the sum of $98,766 from a capital gain. The court rejected Phillip's argument that he should not have to pay support on this amount because he received the payment in the form of land, not money. The court also declined Phillip's request to deviate from the fifteen-percent amount required by the child-support guidelines, finding that other similar, high-income cases had not deviated from the guideline amount. The trial court calculated Phillip's child-support obligation at $2,847 per month, beginning January 1, 2005. This was based on a finding that Phillip's average income for 2003 and 2004 was $227,772 and applying the fifteen-percent figure provided by the guidelines. Phillip was also ordered to pay child support of $2,761 for the period of May 17, 2004 (the date Alice filed her petition), through December 31, 2004, based on a finding that Phillip's average income for 2002 and 2003 was $220,912. Alice was awarded a net judgment for the amount of the increased child support in the sum of $26,770, to be paid within ninety days. Phillip was to be given credit for half of this sum, or $13,385, if he purchased an automobile for the child within ninety days. The trial court allowed Phillip to claim the tax deduction for the parties' daughter, finding that the benefit to Phillip substantially outweighed the benefit to Alice. The court also found that Phillip had complied with the divorce decree by paying $5,668.90 in closing costs that, together with other sums paid, exceeded the sum of $8,500. Finally, the trial court declined to order Phillip to pay any of the daughter's extracurricular horse-show expenses. This appeal and cross-appeal timely followed.

Child-support cases are reviewed de novo on the record. *Paschal v. Paschal*, 82 Ark. App. 455, 117 S.W.3d 650 (2003). It is the ultimate task of the trial judge to determine the expendable income of a child-support payor. *Cole v. Cole*, 82 Ark. App. 47, 110 S.W.3d 310 (2003). This income may differ from income for tax purposes. *See Brown v. Brown*, 76 Ark. App. 494, 68 S.W.3d 316 (2002). As a rule, when the amount of child support is at issue, the appellate court will not reverse the trial judge absent an abuse of discretion. *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001); *Paschal, supra.*

Phillip raises one point on appeal in which he argues that the trial court erred in adding the capital gains and the entire depreciation expense back to his income. On cross-appeal, Alice argues five points: that the trial court erred in allowing Phillip credit for half of the child-support judgment for his purchase of a vehicle for the parties' daughter; that the trial court erred in allowing Phillip to claim the tax deduction for the parties' daughter; that the trial court erred in not requiring Phillip to pay any expenses for the daughter's horse-show activities; that the trial court erred in not finding that Phillip owed Alice money for the sale of the home; and that the trial court erred in not adding all of the depreciation deduction to Phillip's income.

Phillip's point on appeal is that the trial court erred in adding all of the depreciation expense and in adding the capital gain back into his income and calculating his child-support obligation based on that income. Alice's fifth point on cross-appeal also involves the depreciation issue and will be considered here.

■ It is proper for a trial court to consider whether a depreciation deduction should be allowed in calculating expendable income. *See Stepp v. Gray,* 58 Ark. App. 229, 947 S.W.2d 798 (1997) (*Gray I*) (discussing appellate cases where a depreciation deduction was properly added back in to the support payor's income in arriving at an accurate indicator of expendable income). However, the guidelines *do not* mandate that the court include or exclude a payor's depreciation deduction, nor did this court make that requirement. *Gray v. Gray,* 67 Ark. App. 202, 994 S.W.2d 506 (1999) (*Gray II*). Depreciation is a factor that should be considered, just as property and lifestyle are considered, on a case-by-case basis. *Id.* In its written order, the trial court appears to state that it agrees with Alice's expert that Phillip's income should be calculated by adding back an arbitrary ninety percent of the depreciation expense. However, the trial court's calculations added the entire depreciation expense back to Phillip's income. Because of the apparent inconsistency between the trial court's statements and its calculations, we vacate the child-support award and remand this issue back to the trial court for clarification of its findings and calculations regarding the depreciation expense.

Phillip also argues that the trial court erred in including a capital gain of $98,766 in his income because it was not "income" and he did not "receive" such a payment. The guidelines broadly define gross income, for purposes of child support, as including any

form of payment "regardless of source." Administrative Order Number 10, section II. The guidelines further provide that income includes, but is not limited to, "wages, salaries, commissions, bonuses, workers' compensation, disability, payments pension or retirement program, and interest. . . ." *Id.* It is well established that the definition of income under the guidelines is broadly construed. *McWhorter, supra*; *Davis v. Office of Child Support Enforcement*, 341 Ark. 349, 20 S.W.3d 273 (2000).

A "gain" may occur as a result of an exchange of property, payment of a taxpayer's indebtedness, relief from a liability, or other profit realized from completion of the transaction, and the fact that the gain is a portion of the value of property received by the taxpayer does not negate its realization. *See Helvering v. Brunn*, 309 U.S. 461 (1940). A gain from the sale or exchange of property, when realized, constitutes "profit" and is regarded as "income" that is taxable during such period when it is realized. *See MacLaughlin v. Alliance Ins. Co.*, 286 U.S. 244 (1932). In *Cottage Savings Association v. Commissioner*, 499 U.S. 554, 559 (1991), the Supreme Court provided as follows:

> Rather than assessing tax liability on the basis of annual fluctuations in the value of a taxpayer's property, the Internal Revenue Code defers the tax consequences of a gain or loss in property value until the taxpayer "realizes" the gain or loss. The realization requirement is implicit in 1001(a) of the Code, 26 U.S.C. 1001(a), which defines "[t]he gain [or loss] from the sale or other disposition of property" as the difference between "the amount realized" from the sale or disposition of the property and its "adjusted basis." As this Court has recognized, the concept of realization is "founded on administrative convenience." *Helvering v. Horst*, 311 U.S. 112, 116 (1940). Under an appreciation-based system of taxation, taxpayers and the Commissioner would have to undertake the "cumbersome, abrasive, and unpredictable administrative task" of valuing assets on an annual basis to determine whether the assets had appreciated or depreciated in value. *See* 1 B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts ¶ 5.2, p. 5-16 (2d ed. 1989). In contrast, "[a] change in the form or extent of an investment is easily detected by a taxpayer or an administrative officer." R. Magill, Taxable Income 79 (rev. ed. 1945).
>
> Section 1001(a)'s language provides a straightforward test for realization: to realize a gain or loss in the value of property, the taxpayer must engage in a "sale or other disposition of [the]

> property." The parties agree that the exchange of participation interests in this case cannot be characterized as a "sale" under 1001(a); the issue before us is whether the transaction constitutes a "disposition of property."

In the present case, Phillip has not sold or otherwise disposed of any property. Therefore, he has not realized a gain. It is this lack of sale or disposition that distinguishes this case from *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002), where our supreme court held that one-time income such as an inheritance and the cashing in of a certificate of deposit was "income" within the meaning of the guidelines. Under the facts of this case, we hold that the trial court abused its discretion by including the capital gain in Phillip's income for child-support purposes. We therefore reverse and remand for proper calculation of Phillip's child-support obligation.

In her first point on cross-appeal, Alice argues that the trial court erred in allowing Phillip to receive credit of $13,385 towards the child-support judgment if he purchased the parties' daughter a vehicle within ninety days of entry of the order. We do not address this point because it is not properly before the court due to the conditional nature of the credit. *See Corbit v. State*, 334 Ark. 592, 976 S.W.2d 927 (1998) (holding that a conditional judgment, order, or decree, the finality of which depends upon certain contingencies which may or may not occur, is not final for the purposes of appeal); *Mid-State Homes, Inc. v. Beverly*, 20 Ark. App. 213, 727 S.W.2d 142 (1987) (holding that a decree that grants alternative relief at the election of one of the parties is not appealable). Moreover, we cannot find any evidence in the record that Phillip, in fact, purchased a vehicle for his daughter thereby entitling him to the credit. Therefore, any opinion on this issue would be advisory. It is often said we do not render advisory opinions. *Benton v. Bradley*, 344 Ark. 24, 37 S.W.3d 640 (2001); *McCuen v. McGee*, 315 Ark. 561, 868 S.W.2d 503 (1994). We dismiss this part of Alice's cross-appeal.

Alice next argues that the trial court erred in allowing Phillip to claim the tax deduction for the parties' daughter. Her argument is that she objected to this issue being tried because Phillip did not raise the issue in his pleadings and that the trial court did not make the requisite findings to support the deviation from

the guidelines. We hold that this issue was properly tried with Alice's implied consent due to her having been the first party to broach the subject.

In her testimony, Alice stated that she did not claim her daughter on her tax returns. Later, during his testimony, Phillip asked that he be allowed to claim the parties' daughter as a tax deduction. Alice objected, stating that she was not on notice that this would be an issue. The trial court awarded the deduction to Phillip, finding that the benefit to Phillip substantially outweighed the benefit to Alice. Permitting the introduction of proof on an issue not raised in the pleadings constitutes an implied consent to trial on that issue. *Ison Props., LLC v. Wood*, 85 Ark. App. 443, 156 S.W.3d 742 (2004). We now turn to the merits of Alice's argument.

In *Dumas v. Tucker*, 82 Ark. App. 173, 119 S.W.3d 516 (2003), this court held that an award of a tax exemption to a non-custodial parent results in a deviation from the family-support chart and that the trial court erred in making such an award without providing the findings required by Ark. Code Ann. § 9-12-312(a)(2) (Repl. 2002) and without weighing the benefits to the parties as required by Administrative Order Number 10, section III(f). *See also Fontenot v. Fontenot*, 49 Ark. App. 106, 898 S.W.2d 55 (1995). Here, the trial court performed the required weighing and made the required findings when it stated that the benefit to Phillip substantially outweighed the benefit to Alice. Alice argues that the trial court should have made more specific findings as to why the benefit to Phillip substantially outweighed the benefit to her. A party is not entitled to a direct answer on every specific requested finding if the trial court's findings adequately address the issues. *See Lawson v. Sipple*, 319 Ark. 543, 893 S.W.2d 757 (1995). It does not appear from the abstract that Alice ever requested that the court make such specific findings on why the benefit to Phillip outweighed the benefit to her. By not making such a motion, she waived her right to object to the specificity of the findings that were made. *Glaverbel Societe Anonyme v. Northlake Mktg. & Supply, Inc.*, 45 F.3d 1550 (Fed. Cir. 1995); *Reliance Fin. Corp. v. Miller*, 557 F.2d 674 (9th Cir. 1977); *see also* David Newbern and John Watkins, *Arkansas Civil Practice and Procedure* § 32:8 (4th ed. 2006). We affirm on this point.

For her third point, Alice argues that the trial court erred in not requiring Phillip to pay any expenses for the daugh-

ter's horse-show activities. The trial court refused to award these expenses based on the increase in child support. We find no error.

Section V of the guidelines includes "recreation" as a factor for the trial court to consider in deciding whether to deviate from the presumptive amount obtained from application of the chart. However, we cannot say that the trial court abused its discretion in the present case by refusing to order Phillip to contribute to the child's horse-show expenses. First, Alice did not produce any evidence as to how much she was seeking from Phillip for these activities. Alice, as the party seeking an upward deviation from the presumptive amount of child support, had the burden of presenting evidence sufficient to warrant the deviation. *See Munn v. Munn*, 315 Ark. 494, 868 S.W.2d 478 (1994). Second, she is receiving a substantial judgment ($26,770) for the increased child support back to the date she filed her petition for modification. We affirm on this point.

Alice's fourth point is that the trial court erred in not finding that Phillip owed Alice money for the sale of the home. Alice argues that it was error for the trial court not to award her judgment for the difference between the $8,500 Phillip was ordered to pay and the $5,668.90 he actually paid. Phillip testified that, in addition to the closing costs, he made other payments on Alice's behalf that totaled in excess of the $8,500 required by the decree. Alice disputed that Phillip ever gave her any extra money or made payments on her behalf. Given that the findings of disputed facts and the determination of the credibility of witnesses are within the province of the trial judge who has the opportunity to observe the witnesses during trial, *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998), we cannot say that the trial court erred in finding that Phillip did not owe Alice money under the decree. We affirm on this point.

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

Vacated and remanded in part; dismissed in part; affirmed in part on cross-appeal.

GLADWIN and GRIFFEN, JJ., agree.

Margie LINEBERRY *v.*
RILEY FARMS PROPERTY OWNERS ASS'N

CA 05-399 236 S.W.3d 534

Court of Appeals of Arkansas
Opinion delivered May 24, 2006

Terrence Cain, for appellees.

McCracken Law Firm, by: *JoAnne M. McCracken*, for appellant.

LARRY D. VAUGHT, Judge. Margie Lineberry appeals from a jury verdict finding that she violated two restrictive cov-

enants contained in her residential subdivision's bill of assurance. She also appeals the trial court's award of $22,989.70 in attorneys' fees and $382.75 in costs to appellee Riley Farm Property Owners Association. We affirm.

In April 2004, Lineberry purchased property in the Riley Farm subdivision in Fort Smith, Sebastian County, Arkansas. Prior to Lineberry moving into the subdivision, the developer of Riley Farm filed a bill of assurance with the office of the recorder of Sebastian County. The bill of assurance contained a number of restrictive covenants, two of which are relevant to the instant case. The first covenant prohibited any resident of Riley Farm from keeping "cattle, swine, poultry, fowl, wild animals[,] or exotic animals in the Addition." The second required that "[p]lans for all fencing, whether on lot lines or surrounding patios, pools, barns[,] or other areas of the lot must be submitted to, and approved by, the Architectural Control Committee prior to the construction thereof." This covenant further provided that if the Committee did not approve or disapprove a fence plan within fourteen days of its submission, the plan was deemed approved, and the Association's resolution of the dispute "shall be binding" unless its resolution was arbitrary and capricious.

Shortly after Lineberry moved into the subdivision, members of the Association discovered that she kept a bobcat at her residence in the subdivision. On May 27, 2004, the Association sent Lineberry a certified letter informing her that keeping a bobcat at her residence violated the restrictive covenant's prohibition on wild or exotic animals and that she needed to remove it. Lineberry never retrieved the letter from the post office.

On May 21, 2004, Lineberry faxed a letter and a drawing to Lucy Wilkes, office manager for the Association, requesting approval of a plan to erect a fence around her home. After receiving the fax, Wilkes placed a stamp on Lineberry's letter that read "APPROVED," with two blank lines underneath the word. The blank lines were provided for the approving signatures of two Commission members, which were required for fence construction in the subdivision. In response to the request, on June 1, 2004, Patrick Mickle, the Commission's chairman, made notations on the drawing submitted by Lineberry highlighting aspects of her fence construction plan that did not comply with the Riley Farm covenants. Lineberry's faxed notice never received the requisite signatures.

On June 3, 2004, Wilkes spoke with Lineberry by telephone and informed her that her fence application had not been approved and that Association members wanted her to remove the bobcat from the subdivision. The following day, Wilkes and Lineberry met in person to discuss the fence and the bobcat. During this meeting, Wilkes retrieved a copy of the May 27, 2004, certified letter the Association sent Lineberry, read it to her, and encouraged her to pick up the copy waiting for her at the post office. Lineberry never picked up the letter, continued to house the bobcat, and began building her fence.

On June 15, 2004, Roy Vanderpool, a member of the Committee, visited Lineberry's home and told her that the fence she was building violated the subdivision's restrictive covenants. Lineberry responded that she believed her construction plan had been approved. Vanderpool then contacted Wilkes to clarify the situation. Wilkes confirmed that Lineberry's plan had not been approved. Lineberry indicated that she was willing to work with the Committee to bring her fence into compliance. Vanderpool and another member of the Committee, John Callaher, drafted an agreement stating that Lineberry could build a fence but that the fence had to comply with the "set-back line" provision of the covenants. Vanderpool and Callaher signed off on the agreement, and Lineberry committed to comply with the agreement, but instead, continued to build her fence according to her original construction plan.

On July 23, 2004, the Association filed a complaint in Sebastian County Circuit Court. The complaint sought to have Lineberry remove her bobcat from the subdivision and either remove the fence she had built or bring it into compliance with the covenant. The case was tried before a jury on December 20 and 21, 2004. The jury returned a unanimous verdict in favor of the Association on the question of whether Lineberry's keeping of a bobcat in the subdivision violated the terms of the covenant. By a vote of eleven-to-one, the jury returned a verdict in favor of the Association on the question of whether Lineberry's fence violated the covenants. The trial court entered judgment in favor of Riley Farm on January 3, 2005. On January 6, 2005, the Association filed a motion requesting that Lineberry pay the costs and attorneys' fees it incurred litigating the case in accordance with the fee provision contained in its bill of assurance. On January 20, 2005, the trial

court ordered Lineberry to pay $22,989.70 in attorneys' fees and $382.75 in costs. It is from this judgment and order that Lineberry appeals.

However, after her appeal was lodged with our court, on February 18, 2005, Lineberry sold her home in Riley Farm. At this time Lineberry had not paid the judgment entered against her; therefore, the Association initiated a garnishment proceeding. On April 22, 2005, Lineberry paid the $23,372.45 in fees and costs that the court had ordered her to pay. On April 28, 2005, the Association filed a motion to dismiss Lineberry's appeal claiming that because Lineberry no longer lived in Riley Farm and had voluntarily paid the judgment against her, the issue on appeal was moot. On May 25, 2005, in an 8-4 decision, our court voted to deny the Association's motion to dismiss the appeal. We are mindful of this decision and reach the same conclusion.

If an appellant voluntarily pays a judgment, the appeal from that judgment would be moot, but if the payment is involuntary, an appeal would not be precluded. *DeHaven v. T&D Dev. Inc.*, 50 Ark. App. 193, 901 S.W.2d 30 (1995). We are satisfied that once the writ of garnishment was filed, Lineberry did not "voluntarily" pay the attorneys' fees. Further, because Lineberry's economic interests were impaired, she has standing to pursue the appeal. *Forrest Constr., Inc. v. Milam*, 345 Ark. 1, 43 S.W.3d 140 (2001).

Turning to the merits of appeal, we consider Lineberry's argument that the trial court erred by refusing to give jury instructions that she had proposed, which set out a test for determining whether an animal should be considered wild. The proffered instructions stated:

> An individual animal may be domesticated even where the species of animal is commonly wild. The test to determine whether an individual animal of a species is domesticated is whether:
>
> 1) The individual animal has become personal property, with someone who claims title and full ownership rights.
>
> 2) The owner or keeper has exercised such training and control over the animal that it may be considered tame.
>
> . . . .
>
> An individual animal may be domesticated even where the species of animal is commonly wild. A wild animal is one of an untamed disposition; living in a state of nature.

> A domesticated animal is one which is tamed and is habituated to live in or about the habitations of men, or such as to contribute to the support of a family.

Lineberry argued below, as she does on appeal, that the jury should have been instructed that animals normally living in the wild could be domesticated and wildness should be determined on an individual basis. Lineberry also contends that when the trial court denied the Association's partial-summary-judgment motion, wherein it sought a ruling that a bobcat is a wild animal, the court obligated itself to her individual wildness theory — and the jury instructions she had proffered — because the ruling was in effect a rule of law.

At the outset, we note that the trial court's denial of the Association's summary-judgment motion is not the same as a ruling on the wildness issue. In its consideration of the Association's motion, the trial court made no findings of fact or conclusions of law. The order simply stated that a genuine issue as to a material fact exists. The trial court could, therefore, consider any proposed instructions on the issue. The trial court was presented with two proposed jury instructions regarding the definition of wild and domestic animals — the one outlined above, and an instruction offered by the Association that was based on the *Restatement (Second) of Torts* § 506 (1977)[1] that read:

> Ladies and gentlemen, you are instructed that a wild animal is an animal that is not by custom devoted to the service of mankind at the time and the place in which it is kept. A domestic animal is an animal that is by custom devoted to the service of mankind at the time and in the place in which it is kept.

As a matter of law, litigants are entitled to a jury instruction when it is a correct statement of the law and there is some basis in the evidence to support it. *Barnes v. Everett*, 351 Ark. 479, 95 S.W.3d 740 (2003). However, a trial court's refusal to give a

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[1] The *Restatement (Second) of Torts* § 506 (1977) defines a wild animal as follows:

> (1) A wild animal as the term is used in this Restatement is an animal that is not by custom to the service of mankind at the time and in the place in which it is kept.
>
> (2) A domestic animal as that term is used in this Restatement is an animal that is by custom devoted to the service of mankind at the time and in the place in which it is kept.

proffered instruction will not be reversed unless there was an abuse of discretion. *Barker v. Clark*, 343 Ark. 8, 33 S.W.3d 476 (2000).

Here, the restatement-based instruction given by the court is supported in the law and the evidence presented at trial. *See Cavaliere v. Skelton*, 73 Ark. App. 188, 40 S.W.3d 844 (2001) (holding that a couple keeping Bengal tigers at their residence violated a restrictive covenant that only allowed the keeping of household pets). The Association's expert, Dr. Gwen Reeder (a Fort Smith veterinarian), testified that a bobcat is a wild animal — even if raised in captivity. She further noted that the United States Department of Agriculture, the Arkansas Game and Fish Commission, the American Veterinary Association, dictionaries, and legal scholars all define a bobcat as a wild animal. There was no evidence contradicting Dr. Reeder's assessment. Because Lineberry failed to prove that her instruction was supported by the law or evidence presented at trial, it cannot be said that the trial court abused its discretion in its failure to give the instruction.

Next, Lineberry argues that there was insufficient evidence for the jury to find that the Commission disapproved her request to erect a fence around the front of her home. However, this argument is not preserved for review because Lineberry failed to move for a directed verdict on this issue at the close of all evidence. Ark. R. Civ. P. 50(e). In jury trials, if a party fails to move for a directed verdict at the conclusion of all the evidence because of insufficiency of the evidence, that party waives any question pertaining to the sufficiency of the evidence to support the jury verdict. *Id.* Here, not only did Lineberry fail to move for a directed verdict, she affirmatively stated that she believed that "there was enough of a factual dispute for the fence issue to get to the jury."

Finally, Lineberry argues that the trial court erred in its award of attorneys' fees and costs to the Association as the prevailing party in this matter. An award of attorneys' fees will not be set aside absent an abuse of discretion by the trial court. *Ouachita Trek & Dev. Co. v. Rowe*, 341 Ark. 456, 17 S.W.3d 491 (2000). When reviewing a trial court's decision to award fees, due regard shall be given to the trial court's intimate acquaintance with the record and the quality of service rendered. *Id.*

In its order, the trial court noted that it had considered the fee-award guidance enunciated in *Chrisco v. Sun Industries*, 304 Ark. 227, 800 S.W.2d 717 (1990), and had based its decision on the factors outlined in the case, which include the experience and

ability of the attorney, the time and labor required to properly perform the legal service, the novelty and difficulty of the issue involved, the time involved in the case and the obtained result, the customary fee charged in the locality for similar services, and the time limitation imposed by the client or the circumstances. After considering the so-called "*Chrisco* factors," the trial court awarded a total sum of $22,989.70 in attorneys' fees. The court went on to note that, although the Association asked for costs in the amount of $6,195.16, only $382.75 worth were authorized by Rule 54 of the Arkansas Rules of Civil Procedure — a $100 filing fee, a $50 service fee, $72.75 for subpoena service witness fee and mileage, and $60 in witness fees for two other witnesses.

Here, based on the trial court's specific reference to the *Chrisco* opinion and its consideration of the guiding factors cited in the case, its reliance on Ark. Rule Civ. P. 54 as the basis for its costs award, and the high degree of deference we afford the trial court in the determination of reasonable attorneys' fees, we find no abuse of discretion. We are further satisfied that this case does not present a scenario of the trial court abdicating its responsibility and mechanically awarding fees to the prevailing party.

Affirmed.

HART and ROAF, JJ., agree.

Onie NORMAN *v.* L.J. RANDLE

CA 05-1326 236 S.W.3d 532

Court of Appeals of Arkansas
Opinion delivered May 24, 2006

Joseph P. Mazzanti, III, for appellant.

Brown & McKissic Law Firm, by: *Earnest E. Brown, Jr.*, for appellee.

TERRY CRABTREE, Judge. Appellee L.J. Randle brought an action for unlawful detainer and breach of contract against appellant Onie Norman. Appellant affirmatively pled that appellee's actions were barred by the statute of limitations. By an order filed July 7, 2005, the trial court dismissed the breach-of-contract complaint as barred by the statute of limitations; however, the court found that appellee had complied with the unlawful-detainer statute and was entitled to immediate possession of the property at issue. Appellant asserts on appeal that appellee's unlawful-detainer action also should have been barred by the statute of limitations, and that it was error for the trial court to otherwise find. We find no error and affirm.

Appellee is the owner of L.J. Randle Construction Company in Pine Bluff, Arkansas. His wife, Gloria Randle, is the business manager. Appellant issued a quitclaim deed to Lee and Gloria Randle conveying her interest in the following property: Lot Four [4] in Block One [1] of Waterman's Addition to the City of Dumas, Arkansas. In conjunction with the execution of the deed, the parties entered into a contractual agreement for L.J. Randle Construction Company to build a commercial building on the property to be used as a daycare center. In exchange, appellant executed a promissory note that required her to repay the debt in installment payments.

There was undisputed evidence at the trial in the form of testimony and business records reflecting that appellant stopped making regular payments on the loan sometime in 1997. According to the testimony of Gloria Randle, appellant told her that she "didn't have enough kids" enrolled at the daycare to be able to

make her payments. In an effort to help appellant become current with her balance, appellees sent a letter to appellant dated January 5, 1998, offering to accept four half payments. The letter requested that appellant begin making full payments by April 1998. Appellant did not resume making regular payments. Appellee testified that he and his son had gone to the property on several occasions so that they could talk to appellant about her delinquency. He said that appellant "couldn't be found." He also testified that on two occasions when he and his son went to inspect the property "they wouldn't let us in."

On March 3, 2004, appellant sent a letter to appellee that read:

> Dear Mr. Randle,
>
> The building is up for sale. Two people have inquired. I gave them your telephone number to contact you. Hopefully it will sell soon, to take care of the debt.
>
> Sincerely,
> Onie Norman

Gloria Randle testified that, prior to receiving this letter, appellant had not sought permission to put the building up for sale. On November 9, 2004, pursuant to the requirements of Ark. Code Ann. § 18-60-304 (Repl. 2003), appellee gave notice to appellant to quit and vacate the premises, and on November 11, 2004, appellee initiated this action.

While the trial court found appellee's breach-of-contract lawsuit to be barred by the statute of limitations, it found that appellee was entitled to relief pursuant to the unlawful-detainer statutes. Appellant does not dispute the facts of the case. Her only assertion on appeal is that appellee's unlawful detainer action is outside the applicable statute of limitations and should be barred.

Appellant argues that appellee's action is barred by the provisions of Ark. Code Ann. § 18-61-104 (Repl. 2003), which provides:

> Three (3) years' peaceable and uninterrupted possession of the premises immediately preceding the filing of a complaint for forcible entry and detainer or unlawful detainer may be pleaded by any defendant in bar of the plaintiff's demand for possession.

She asserts that she has been in peaceable and uninterrupted possession of the premises for three years, and therefore, appellee should be barred from an action against her in unlawful detainer. Appellant's argument is similar to the one made by the appellant in *Carter v. Regan et ux.*, 23 Ark. 74 (1861).

In *Carter*, the appellant paid a sum of money to take possession of property belonging to appellee, with the understanding that appellee would resume possession when he and his wife returned from California. Appellant took possession in January 1855, and he remained in possession until appellee and his wife returned from California in October 1858. Appellee demanded possession, and appellant refused to vacate. Appellant contended that, because he had been in peaceable and uninterrupted possession for three years, appellee's action in unlawful detainer was barred by the statute of limitations. The court held that, until appellee demanded the property, appellant held it under him, and for him, and "his possession not being adverse to their claim is not a possession under the statute of Forcible Entry and Detainer, on which he can have the benefit of a plea of peaceable and uninterrupted possession against the plaintiffs." *Id.* at 75. The same is true in the case at bar. Appellant held the property as a tenant of appellee, and the statute of limitations did not begin to run until appellee made a demand for the property, which occurred in November 2004. Because we agree that appellee complied with the unlawful detainer statute and is entitled to a writ of possession, we affirm the decision of the trial court.

Affirmed.

BIRD and GLOVER, JJ., agree.

James LIAROMATIS *v.*
BAXTER COUNTY REGIONAL HOSPITAL,
Risk Management Resources, Second Injury Fund

CA 05-1096 236 S.W.3d 524

Court of Appeals of Arkansas
Opinion delivered May 24, 2006

Frederick S. "Rick" Spencer for appellant.

Walter A. Murray, for appellee.

KAREN R. BAKER, Judge. Appellant James Liaromatis appeals the decision of the Arkansas Workers' Compensation Commission denying him benefits for a low-back injury sustained on July 26, 1999, lifting a patient while working as a paramedic for appellee. He argues that the Commission's finding that he failed to prove the existence of an injury by medical evidence is contrary to the law and not supported by substantial evidence. We find no error and affirm.

Appellant was employed by Baxter County Regional Hospital as a paramedic for approximately fourteen years. On July 26, 1999, appellant was working for appellee when he responded to a call at a gas station where a man had fallen. The injured man had

fallen in an awkward position between two poles, and appellant was not able to use proper back mechanics when he lifted the man. During the lift, he experienced a tearing sensation and a pop in his back. Appellant had a prior history of back problems including two prior injuries to his back in the course of his employment with the same employer.

The Commission, adopting the opinion of the Administrative Law Judge, found appellant's description of his symptom onset to be credible and agreed that the medical records contained objective medical findings supporting the existence of an injury. The medical evidence relied upon by appellant included an MRI showing a small central disk protrusion at L4-5. However, the Commission found it was constrained on the record to find that appellant failed to establish the existence of new objective findings in the medical documentation cited. The Commission relied upon the testimony of Dr. Matt Wilson who reviewed appellant's 1999 MRI performed after the July 26, 1999, incident and a 1996 CT scan of his lumbosacral spine. Dr. Wilson opined that a comparison of the two diagnostics indicated that the findings in 1999 were unchanged from the findings in 1996.

Similarly, Dr. Anthony McBride testified that there was no diagnostic test showing any differences before and after the 1999 alleged injury. While Dr. McBride assigned appellant a three-percent impairment rating for his 1999 injury, he conceded that he based this impairment rating on pain levels, and not on any diagnostic test results because the test results were unchanged before and after the 1999 injury.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark v. Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979); *Crossett Sch. Dist. v. Gourley*, 50 Ark. App. 1, 899 S.W.2d 482 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; even if a preponderance of the evidence might indicate a contrary result, if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *St. Vincent Infirmary Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550

(1996). The Commission is required to weigh the evidence impartially without giving the benefit of the doubt to any party. *Keller v. L.A. Darling Fixtures*, 40 Ark.App. 94, 845 S.W.2d 15 (1992).

The Commission also has the duty of weighing the medical evidence as it does any other evidence. *Roberson v. Waste Management*, 58 Ark. App. 11, 944 S.W.2d 858 (1997). The Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Poulan Weed Eater v. Marshall,* 79 Ark. App. 129, 84 S.W.3d 878 (2002). When the Commission denies benefits upon finding that the claimant failed to meet his burden of proof, the substantial evidence standard of review requires that we affirm if the Commission's decision displays a substantial basis for relief. *Cooper v. Hiland Dairy*, 69 Ark. App. 200, 11 S.W.3d 5 (2000). In addition, the Commission cannot arbitrarily disregard any witness's testimony. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001).

In this case the Commission not only considered, but also accepted, the testimony of appellant regarding the onset of his pain after lifting the patient in July 1999. The onset of pain, however, does not satisfy our statutory criteria for benefits. Test results that are based upon the patient's description of the sensations produced by various stimuli are clearly under the voluntary control of the patient and therefore, by statutory definition, do not constitute objective findings. *Duke v. Regis Hair Stylists*, 55 Ark. 327, 935 S.W.2d 600 (1996). The record in this case was void of any post-July 26, 1999, objective evidence showing that appellant had suffered a new injury. Given the fact Dr. McBride assigned an impairment rating subsequent to the 1999 injury relying solely on test results based upon appellant's pain descriptions, the Commission was constrained from finding that appellant had sustained a compensable injury.

Appellant argues that, in finding that appellant failed to prove a compensable injury, the Commission went beyond the express language of the statute and created a requirement that appellant must not only establish an injury with medical evidence supported by objective findings but must also establish that the objective findings be new and not in existence prior to the occurrence of the injury claimed. He asserts that, while the law requires that the injury be established by medical evidence sup-

ported by objective findings, nothing in the law requires that the injury be established with "new objective findings."

Appellant's assertion relies heavily on the Commission's finding that appellant's description of his onset of pain was credible. From this premise, appellant argues that the statute does not require that a causal connection be established with medical evidence supported by objective findings; therefore, the fact that appellant presented medical evidence that an injury exists satisfied the statutory requirements for a compensable injury.

We agree with appellant that objective medical evidence is not essential to establish the causal relationship between the injury where objective medical evidence establishes the injury's existence, and a preponderance of other non-medical evidence establishes a causal relation to a work-related incident. *See Wal-Mart Stores v. VanWagner,* 337 Ark. 443, 990 S.W.2d 522 (1999); *Wal-Mart Stores v. Leach,* 74 Ark. App. 231, 48 S.W.3d 540 (2001). However, we disagree with appellant's premise that the medical evidence must merely establish the existence of the injury. The question is not whether there are new objective findings, but whether there is a new compensable injury. It is the injury for which appellant seeks benefits that must be proved with objective medical findings.

Therefore, when appellant sought benefits for an alleged injury sustained on July 26, 1999, it was his burden to prove that the injury was caused by the events on that day. This burden necessarily required that he present objective medical findings establishing an injury suffered on that day in addition to his nonmedical evidence offered to establish a causal relation to the work-related incident. *See* Ark. Code Ann. § 11-9-102 (1997 & Supp. 2005). A compensable injury must be established by medical evidence supported by objective findings, and medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. *See Smith-Blair, Inc. v. Jones,* 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. *Id.*

Appellant's failure to present objective medical findings of an injury sustained in July 1999 also precludes recovery for any aggravation of a preexisting condition. An aggravation is a new injury resulting from an independent incident. *Smith-Blair, Inc. v. Jones, supra.* Being a new injury with an independent cause, an aggravation must meet the requirements for a compensable injury. *Id.*

The medical evidence in this case established that the condition of appellant's lumbar spine after the July 1999 incident was virtually unchanged from the condition diagnosed by tests performed in 1996. Therefore, the Commission did not err by finding that appellant had failed to establish a compensable injury, and its requirement that objective medical findings establish an injury occurring on July 26, 1999, did not impose a requirement in addition to our statutory prerequisites for benefits.

Accordingly, we affirm.

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

Ricky N. WILSON *v.* Teresa Wilson BECKETT

CA 05-1267 236 S.W.3d 527

Court of Appeals of Arkansas
Opinion delivered May 24, 2006

Wm. C. Plouffe, Jr., for appellant.

No response.

KAREN R. BAKER, Judge. Appellant Ricky Wilson brings this one-brief appeal from an order of the Union County Circuit Court granting the motion of his former wife, appellee Teresa Wilson Beckett, to dismiss his motion for contempt citation for Teresa's denial of visitation that also sought affirmative relief by requesting a more definite visitation schedule. Ricky raises six points on appeal. Finding no error, we affirm.

The parties were divorced by decree of the trial court entered on November 12, 1996. That decree awarded Teresa custody of the parties' minor child, subject to Ricky's visitation, and ordered Ricky to pay child support of fifty dollars per week. In December, 2003, the State of Arkansas Office of Child Support Enforcement as Intervenor filed a motion to modify child support and properly served Ricky with the summons. A hearing on this motion was held on July 9, 2004, and an agreed order addressing child support was entered as a result. This order increased Ricky's child-support obligation to eighty-seven dollars per week, retro-

active to February 6, 2004. The order found that there were no child-support arrearages as of January 30, 2004.

On the same day as the hearing, July 9, 2004, Ricky filed a motion for a contempt citation alleging that Teresa had remarried about six years earlier and had deprived Ricky of his visitation by moving and refusing to notify him of her address. The motion sought an order directing Teresa to comply with the visitation provisions of the decree, to inform Ricky of her address, and to set out a specific visitation schedule which had not been done in the original decree. The decree merely stated that visitation be "reasonable and seasonable."

Teresa responded with a special appearance and a countermotion, alleging that Missouri was the child's "home state" and requesting dismissal or transfer to a more convenient forum.

On May 17, 2005, Teresa filed a "Motion to Dismiss," alleging that her current husband had adopted the child by a decree entered by a Missouri court. A certified copy of the Missouri adoption decree was attached as an exhibit to the motion. The Missouri decree contained the findings that Ricky had been personally served with the petition for adoption and failed to respond to the petition. Ricky responded to the motion to dismiss, asserting that the Missouri adoption decree was void because he was never served with process in the Missouri adoption proceedings. He further asserted that the Missouri court lacked jurisdiction as the child's "home state" under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) because the Arkansas court granted the divorce and retained jurisdiction. He also asserted that Teresa waived the jurisdictional issue by using the Arkansas court to increase his child-support obligation.

At the hearing on the motion to dismiss, Ricky testified[1] that, after the divorce, he was able to exercise visitation until Teresa married and moved to Monroe, Louisiana, where she lived for a period before returning to Arkansas. He stated that, after Teresa returned to Arkansas, he was again able to visit until Teresa moved to two locations in Illinois before moving to Missouri. He said that Missouri authorities contacted him about the payment of child support but would not divulge Teresa's address to him. Similarly, when he contacted the Arkansas child-support authorities, they also refused to release Teresa's address. He believed that

[1] Teresa did not appear at the hearing.

Teresa knew his address because she obtained it from the child-support authorities. He explained that he did not file suit seeking to enforce his visitation because he did not have the money to do so. He offered that, had he known Teresa's address, he would have attempted to visit.

Ricky described how he learned of the adoption proceedings when Teresa called him and told him to call her attorney in Missouri. He maintained that he was not properly served with process in the adoption case because the process was sent to his parents' address and he had not lived at that address in over five years; however, he acknowledged that his mother read the adoption petition to him over the telephone. He asserted that he did not abandon his child, although he conceded that he did not file an answer in the adoption proceedings.

The trial court entered an order dismissing Ricky's motion for a contempt citation, finding that Teresa and the minor child had lived outside of the State of Arkansas since 1998 and that Ricky has lived in the State of Louisiana for more than five years. Based on these findings, the trial court held that Missouri was the child's "home state" and that Arkansas was an inconvenient forum for a hearing on Ricky's motion, a "child-custody determination" within the meaning of the UCCJEA. The trial court did not rule as to whether Ricky was properly served in the adoption proceedings, but noted Ricky's testimony that service was directed to his parents' home in Arkansas where he had not lived for over five years. Finally, the trial court found that it could not address Ricky's visitation request unless the adoption decree was set aside and that the Missouri court was the appropriate forum to address that issue. Because Missouri was an adjacent state, the court found that it would not be prohibitively expensive for Ricky to travel to Missouri to litigate this matter. This appeal followed.

On appeal, Ricky raises six points for reversal: (1) that the trial court erred when it failed to find that the Missouri court lacked jurisdiction over the termination of his parental rights; (2) that the trial court erred when it failed to find that the Missouri adoption decree was invalid for lack of proper service over him; (3) that the trial court erred in finding that Arkansas would be an inconvenient forum; (4) that the trial court erred in finding that it would not be prohibitive for Ricky to go to Missouri to litigate this matter; (5) that the trial court erred in refusing to apply the doctrine of "unclean hands" in this matter; and (6) that the trial court erred in failing to consider Teresa's violation of the federal

Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (2000). We find the first and third points are interrelated and dispositive; therefore, we do not address the remaining arguments.

In his first point, Ricky argues that the Missouri court lacked jurisdiction because the Arkansas court issued the original divorce decree and Ricky's motion for citation was pending when the Missouri adoption order was entered. In the third point, he argues that the trial court erred when it found that Arkansas would be an inconvenient forum.

A trial court has discretion to decide whether it should decline to exercise its jurisdiction when there is another appropriate forum under the uniform child custody jurisdiction acts or the PKPA, and this court will reverse the trial court's decision only if we find an abuse of discretion. *See Gray v. Gray*, 69 Ark. App. 277, 12 S.W.3d 648 (2000).

This argument is a collateral attack of the adoption decree entered by the Missouri court. In general, a foreign judgment under the full faith and credit clause of the United States Constitution is valid and not subject to collateral attack except for fraud and lack of jurisdiction. *Phillips v. Phillips*, 224 Ark. 225, 272 S.W.2d 433 (1954). Consistent with this principle, an adoption decree entered in excess of a court's authority or jurisdiction is void and subject to collateral attack. *Poe v. Case*, 263 Ark. 488, 565 S.W.2d 612 (1978).

Appellant asked the trial court to find that the Missouri trial court who entered the order of adoption had no authority or jurisdiction to terminate appellant's parental rights, which it specifically terminated in the judgment of adoption. The trial court responded that appellant's motion for citation requested a court order related to visitation with the minor child, and therefore, the request was for a "child-custody determination" as defined by the UCCJEA. It further ruled that Missouri was the child's home state and the appropriate forum for the proceedings. The court also found that Missouri was the proper forum for appellant's challenge to the adoption order and acknowledged that, while the UCCJEA does not govern an adoption proceeding, appellant would not be able to enforce visitation privileges with the minor child until such time as he takes whatever action is necessary to set aside the judgment of adoption issued by the Missouri court. We find no error in the trial court's disposition of this case.

We first acknowledge that Missouri has not adopted the UCCJEA. Instead, it retains the Uniform Child Custody Jurisdiction Act (UCCJA). However, the analysis under the PKPA, the UCCJA, and the UCCJEA are the same on the facts presented in this case as all three acts give priority to the child's "home state." Our supreme court has stated that, under the UCCJA, the predecessor of the UCCJEA, child-custody jurisdiction is a matter of subject-matter jurisdiction. *Moore v. Richardson*, 332 Ark. 255, 964 S.W.2d 377 (1998). The UCCJEA is the exclusive method for determining the proper forum in child-custody proceedings involving other jurisdictions. *Greenhough v. Goforth*, 354 Ark. 502, 126 S.W.3d 345 (2003); *Arkansas Dep't of Human Servs. v. Cox*, 349 Ark. 205, 82 S.W.3d 806 (2002). Where the UCCJEA and PKPA conflict, the federal PKPA controls. *Cox*, *supra*.

Both the UCCJEA and the PKPA define "home state" in part as "the state in which a child lived with a parent or a person acting as a parent for at least six (6) consecutive months immediately before the commencement of a child-custody proceeding." 28 U.S.C. § 1738A(b)(4); Ark. Code Ann. § 9-19-102(7) (Repl. 2002). Under Ark. Code Ann. § 9-19-202(a)(2) (Repl. 2002), an Arkansas court making an initial custody determination has exclusive, continuing jurisdiction until a court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state. The trial court in this case found, as did the Missouri court in the adoption proceeding, that Missouri was the home state of the child. Ricky does not challenge this finding. This finding terminated Arkansas's exclusive, continuing jurisdiction under the UCCJEA and PKPA.

Ricky also argues that Arkansas retained jurisdiction because he filed his motion for contempt in Arkansas prior to the adoption petition being filed in Missouri. The trial court in this case correctly identified the issue as whether Arkansas had exclusive continuing jurisdiction. In reaching that determination, the trial court recognized that appellant's motion for citation not only sought enforcement of the trial court's original order, but also requested a court order establishing a more specific visitation schedule with the minor child of the parties.

The trial court found that pursuant to Arkansas Code Annotated section 9-19-202, Arkansas would be an inconvenient forum to address the visitation issues in that there was no evidence of domestic violence, the child had resided outside the State of

Arkansas for a period of over five years and Missouri, the home state of the child, was an adjoining State so it would not be prohibitive for appellant to pursue whatever remedies he may have in that forum. The trial court further found that, given the nature and location of the evidence required to resolve the pending litigation, the State of Missouri would be the best forum to address visitation.

In reaching its decision, the trial court did not foreclose future enforcement of the court's order; however, it specifically found that Missouri was the appropriate forum for appellant's action to set aside the judgment of adoption issued by the Missouri court. Given that Missouri was the child's home state, we cannot say that the trial court erred in refusing to exercise its jurisdiction to enforce its court order until appellant's challenge to the adoption was resolved. *See Snisky v. Whisenhunt*, 44 Ark. App. 13, 864 S.W.2d 875 (1993) (holding that court's refusal of jurisdiction pursuant to uniform custody acts over custody matter does not affect inherent authority of court to enforce its order).

On the facts of this case, we find no error with the trial court's findings that Missouri was the child's home state and that Arkansas was an inconvenient forum to challenge the validity of the Missouri judgment. Accordingly, we affirm.

Affirmed.

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

[redacted]

Charles BURKETT *v.* Martha BURKETT

CA 05-957 236 S.W.3d 563

Court of Appeals of Arkansas
Opinion delivered May 31, 2006

Tripcony Law Firm, P.A., by: *James L. Tripcony*, for appellant.

Floyd Healy, for appellee.

JOHN B. ROBBINS, Judge. This tort litigation springs from a post-divorce dispute between appellant Charles Burkett and

his former wife, appellee Martha Burkett, over Martha's right to be on the premises of the former marital residence. Charles brings this appeal from a judgment of the Pulaski County Circuit Court, following a bench trial, awarding Martha compensatory damages of $21,600 and punitive damages of $10,000 for the torts of outrage, malicious prosecution, and abuse of process.[1] Charles raises two points: that the trial court should have dismissed Martha's complaint pursuant to Ark. R. Civ. P. 12(b)(6) because she failed to state facts upon which relief could be granted, and that the trial court's award of damages was clearly against the preponderance of the evidence. We affirm.

The parties were divorced after more than thirty years of marriage by a decree entered on February 20, 2002. Among other things, the decree provided that Charles was to have sole possession of the marital house until November 2002, at which time the house was to be listed for sale.

On September 19, 2002, Charles signed an affidavit for a warrant for Martha's arrest, alleging that he had been informed by neighbors that Martha attempted to enter the residence on September 18, 2002, without his permission. The affidavit also stated that Charles did not currently reside in the home. Martha was charged with criminal trespass.

On October 3, 2002, the divorce court entered an order from a hearing held on August 29, 2002, providing that the parties were to list the former marital residence for sale as of September 30, 2002, earlier than originally provided in the decree. The order also provided that Charles was to deliver certain personal property awarded to Martha, with the transfer to take place at the residence on September 7, 2002.

On December 4, 2002, the criminal-trespass charges were dismissed in the District Court of Jacksonville, Arkansas. The records concerning the charges were later expunged and sealed. After the dismissal of the charges, Martha filed the present suit on July 17, 2003, asserting causes of action for abuse of process, malicious prosecution, and outrage or the intentional infliction of emotional distress. The complaint asserted that Charles, in seeking the arrest warrant, withheld material information from the police and the prosecutor in his affidavit and that the criminal charges

[1] The trial court offset a previous award of $500 to Charles, resulting in a net judgment of $31,100. The basis for this setoff is not explained.

were designed to harass her in the divorce action, in retaliation for the divorce court awarding her a part of Charles's retirement and disability benefits, and was done without probable cause. Charles answered, admitting that he signed the affidavit leading to Martha's arrest but denying the remaining allegations of the complaint. He also filed a motion to dismiss the complaint for failure to state facts upon which relief could be granted. After a hearing on the motion in which Charles argued that Martha failed to allege facts showing that she had the right to be on the premises, the trial court denied the motion.

The case was tried to the court without a jury. Martha testified that the divorce decree did not prohibit her from going on the property, adding that Judge Gray told her that she could inspect the home prior to sale. She admitted that, accompanied by a paralegal from her divorce attorney's office, she went to the property but did not attempt to enter the house and did not damage anything. She said that she understood that the divorce decree provided that Charles was to have sole possession of the house and that the October 22 order did not change that but merely shortened the time of sole possession. She stated that, although she never discussed the matter with Charles, he had consistently maintained that she had no right to be on the property on September 18.

On cross-examination, Martha said that she did not know if Judge Gray's statement that she had the right to inspect the property was contained in any order. She also relied on language from the October 2002 order providing that Charles would be responsible for any damage to the house to support her theory that she had the right to be on the property, asking how she would know if there was damage to the house unless she could inspect. Martha said that, pursuant to the October 2002 order, she was allowed to go onto the property to retrieve her personal property but stated that she did not go into the house. She also stated that there was no other language in any order authorizing her to go onto the property after the September 7 date but said that she did not realize that she needed Charles's permission.

Martha further testified that, on September 23, 2002, while at work, she was served with a warrant for her arrest and that she went home to gather her documents before going to the police station. She stated that Charles knew where she lived but sent the police to her work to embarrass her in front of her employer and coworkers and that she was, in fact, embarrassed, scared, angry,

and humiliated and had no idea why she was being arrested for criminal trespass. Martha hired an attorney to represent her on the criminal charges at a cost of $400; the charges were ultimately dismissed. She hired another attorney to have the charges expunged at a cost of $1,200.

Martha stated that Charles's affidavit did not advise the prosecutor that the parties were in the midst of divorce or that she had the right to go on the property to inspect it prior to sale. She described Charles as being upset with Judge Gray's decisions regarding the division of his retirement and disability benefits in the divorce case. She assumed that Charles swore out the warrant in order to embarrass her but added that Charles never told her that he filed charges to harass her or to "get her" in connection with the divorce.

Martha said that, after the charges were filed, she started having problems with her mental and physical conditions in that she was restless, nervous, scared, and had lost sleep over the incident. She stated that she sought professional help with emotional problems and with lack of sleep and was prescribed medication, which did not completely help. She was also prescribed other medications that helped until she made the decision to stop taking them. She said that she had been losing sleep since Charles filed the divorce action. She also said that it was hard to separate the stress in general caused by her relationship with Charles from that resulting from the criminal charges. Other than sleep problems, she said she suffered no other health problems stemming from her arrest. She also stated that she feared that her nursing license was in jeopardy. Martha admitted testifying in her deposition that the emotional distress caused by her arrest was "very embarrassing but not extreme" but disagreed with the accuracy of the statement.

Charles was called as a hostile witness by Martha and denied that there was any animosity toward Judge Gray as a result of her rulings but said that he had appealed the rulings. He said that he spoke with Martha only one time during the divorce, with other communications going through the parties' attorneys. Charles stated that he advised Martha's attorney to call so an appointment could be made if Martha wanted to inspect the property. He also said that he had two or three conversations with neighbors concerning Martha's being on the property, with one neighbor indicating that she attempted to enter the house. He stated that he was concerned because Martha might damage the house prior to

sale and that one neighbor said Martha was destroying property. Charles said that he did not file a contempt motion in the divorce court because he did not see the need to do so. He described Martha's presence at the marital residence as a form of harassment toward him, adding that he had her arrested because she should not have been there. Charles conceded that there was no order from Judge Gray indicating that Martha could not be on the property other than the decree's provision that he had sole possession of the house. On cross-examination, he denied that Judge Gray gave Martha the right to inspect the property prior to the sale.

Although he could not recall an exact date, Charles said that he had personal knowledge that Martha had entered the house because she would not have otherwise known about the replacement of the stove and refrigerator. He said that this was true even though Martha testified that she was told about the appliances. He also gave contradictory testimony concerning whether he had given permission for Martha and a realtor to inspect the house, stating that he had given such permission before stating that he did not give permission. He testified that he instructed the realtor not to let Martha in the house without his permission.

Charles denied feeling anger or hostility towards Martha, expressing concern that she was going to break into the house because she had had Charles's son do it before. He also stated his belief that she was guilty of criminal activity by trespassing onto the property. He denied that there was any other way to keep Martha from entering the property, adding that, even though he discussed Martha's entry on the property with his attorney, the thought of a motion for clarification in the divorce court never crossed his mind.

According to Charles, he did not know where Martha resided in September 2002. He said that he told the prosecutor or sheriff's office that his only method of contacting Martha was through her place of employment. In support of his statement in his affidavit that he informed Martha that she was not to be at the residence, Charles said that he told Martha and her attorney in the courthouse hallway that Martha should not be at the house without his permission. He also denied testifying falsely at the criminal trial. Charles stated that he believed that the divorce decree gave him sole possession of the residence and that this meant Martha had no right to enter the property. He showed the prosecutor the divorce decree, which led to the issuance of the arrest warrant. According to Charles, there was not an order from

the divorce court providing for joint possession of the property after its listing. He said that he did not mention the August 2002 hearing that resulted in modification of the divorce decree to the prosecutor because he did not see the need to do so.

Charles said that he did not want Martha on the property because he had it ready for sale and did not want her to interfere with the steps he had taken. He took other steps to protect the property, such as changing the locks, installing deadbolts, and using an alarm system. He said that he did not have his son arrested when he broke into the house to assist Martha.

C.J. Jacobs, a paralegal for Martha's divorce attorney, said that she accompanied Martha to the marital residence in September 2002. She stated that she was not aware of anything that would have prevented Martha from going on the property for an inspection but denied attempting to enter the home. Jacobs was present when Martha met with her attorney to discuss the criminal charges and described Martha's mental condition as being "completely distraught," adding that Martha was shaking so severely that she could hardly speak. She stated that she spoke with Martha daily and that each conversation involved how traumatized she was by this incident. She also said that Martha's mood did not appear to change.

At the close of Martha's case, Charles made a motion to dismiss for failure to present a *prima facie* case and for insufficient evidence to support a verdict in Martha's favor. After arguments of counsel, the trial court denied the motion.

The trial court ruled from the bench, finding that there was nothing in the divorce court's orders prohibiting Martha from going onto the property. The trial court noted that the proper course of action would have been for Charles to file a motion in the divorce court. The court found that Charles acted to harass, embarrass, and humiliate Martha and that she suffered emotional distress in that she was scared, angry, and humiliated. The court noted the failure of the neighbors, upon whom Charles based his affidavit, to testify. The trial court then awarded Martha $1,600 for her attorney's fees in the criminal case, $20,000 in compensatory damages for emotional distress, and $10,000 in punitive damages. Judgment was entered accordingly, and this appeal timely followed.

For reversal, Charles argues that the trial court erred in not dismissing Martha's complaint for failing to state facts upon which relief could be granted and that the trial court's decision to award

damages is against the preponderance of the evidence. Charles did not make a motion for additional findings of fact. He also does not challenge the trial court's findings as to the amount of damages. Therefore, because we hold that Martha's cause of action for malicious prosecution is affirmable, we will only address that action inasmuch as an affirmance of any one of the causes of action involved in this proceeding will result in an affirmance of the entire judgment. *See Costner v. Adams*, 82 Ark. App. 148, 121 S.W.3d 164 (2003).

In his first point, Charles argues that the trial court erred in not dismissing Martha's complaint pursuant to Ark. R. Civ. P. 12(b)(6). In reviewing the trial court's decision on a motion to dismiss under Ark. R. Civ. P. 12(b)(6), we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *Arkansas Dep't of Envtl. Quality v. Brighton Corp.*, 352 Ark. 396, 102 S.W.3d 458 (2003); *Clayborn v. Bankers Standard Ins. Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002); *Martin v. Equitable Life Assurance Soc'y*, 344 Ark. 177, 40 S.W.3d 733 (2001). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Clayborn, supra.* Our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Id.*; Ark. R. Civ. P. 8(a). We look to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. *Arkansas Dep't of Envtl. Quality v. Brighton Corp., supra.* In the present case, Charles argues that Martha failed to plead facts as to at least one element of each cause of action.

Charles argues that Martha failed to set forth facts showing that he lacked probable cause to institute the criminal charges. In her complaint, Martha alleged that Charles caused her "to be arrested on false criminal charges knowing the charges were false. . . ." In the context of malicious prosecution, probable cause means such a state of facts or credible information which would induce an ordinarily cautious person to believe that the accused is guilty of the crime for which he is charged. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996); *Cordes v. Outdoor Living Ctr., Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989). If Charles knew the charges to be false, then he did not have probable cause to seek Martha's arrest. This is sufficient to plead the lack of probable cause. *Foster v. Pitts*, 63 Ark. 387, 38

S.W. 1114 (1897); *Delgado v. Rivera*, 57 P.2d 1141 (N.M. 1936). We affirm on Charles's first point.

For his second point, Charles argues that the trial court's decision to award Martha judgment is against the preponderance of the evidence. The standard that we apply when reviewing a judgment entered by a circuit court after a bench trial is well established. We do not reverse unless we determine that the circuit court erred as a matter of law or we decide that its findings are clearly against the preponderance of the evidence. *Vereen v. Hargrove*, 80 Ark. App. 385, 96 S.W.3d 762 (2003); *Riffle v. United Gen. Title Ins. Co.*, 64 Ark. App. 185, 984 S.W.2d 47 (1998). Disputed facts and the determination of the credibility of witnesses are within the province of the circuit court, sitting as the trier of fact. *Id.* Charles argues that Martha failed to prove at least one element of each of her three causes of action.

In order to establish a claim for malicious prosecution, a plaintiff must prove the following five elements: (1) a proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the plaintiff; (3) absence of probable cause for the proceeding; (4) malice on the part of the defendant; and (5) damages. *South Ark. Petrol. Co. v. Schiesser*, 343 Ark. 492, 36 S.W.3d 317 (2001); *McLaughlin v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996). Here, Charles challenges only Martha's proof on the probable-cause element, arguing that she offered speculation only as to why he signed the affidavit. The trial court could consider all of the information available to Charles in deciding whether there was probable cause for initiation of the criminal charges. *First Commercial Bank v. Kremer*, 292 Ark. 82, 728 S.W.2d 172 (1987). The trial court indicated that it did not believe that the divorce decree gave Charles exclusive possession of the residence.

The trial court could have also considered Charles's failure to seek clarification in the divorce court as evidence of the lack of probable cause in a fashion similar to a shopkeeper's policy of automatically prosecuting suspected shoplifters without regard to their explanations. *See Wal-Mart Stores, Inc. v. Yarbrough*, 284 Ark. 345, 681 S.W.2d 359 (1984); *Wal-Mart Stores, Inc. v. Williams*, 71 Ark. App. 211, 29 S.W.3d 754 (2000). Further, the trial court could find that Charles failed to make a full and fair disclosure of all the information concerning the divorce case and that this failure also showed a lack of probable cause. *South Ark. Petrol. Co. v.*

Schiesser, supra. Here, Charles admitted that there was information he did not disclose to the prosecutor because he, Charles, did not think it relevant. That information, had it been disclosed, may have caused the prosecutor not to authorize the issuance of the arrest warrant. Because there was evidence from which the trial court could have concluded that probable cause for Martha's arrest was lacking, we affirm on this point.

Affirmed.

GLADWIN and BIRD, JJ., agree.

Dixie GRIFFIN *v.*
ARKANSAS DEPARTMENT of HEALTH
and HUMAN SERVICES

CA 05-967 236 S.W.3d 569

Court of Appeals of Arkansas
Opinion delivered May 31, 2006

DeeNita D. Moak, for appellant.

Gray Allen Turner, Office of Chief Counsel, Dep't of Health and Human Servs., for appellee.

LARRY D. VAUGHT, Judge. Appellant Dixie Griffin appeals from the decision of the Pulaski County Circuit Court terminating her parental rights to her three daughters. She argues on appeal that termination was improper because the children were not being cleared for permanent placement as required by Ark. Code Ann. § 9-27-341(a)(2) (Supp. 2005). We affirm.

Because appellant does not argue on appeal that there was insufficient evidence to support the termination, only a brief review of the facts is necessary. Appellant's three daughters, D.H., age sixteen, M.S., age twelve, and A.G., age six, were first brought into the custody of the Arkansas Department of Health and Human Services (DHHS) in January 2004[1] after appellant was arrested for aggravated robbery and DHHS received reports that her home was a "known prostitution and drug house." At that time, D.H.'s father was deceased, M.S.'s father's whereabouts were unknown, and A.G.'s father, Otis Griffin, was incarcerated following his fourth conviction for DWI. Over the course of this case, appellant was repeatedly incarcerated on charges of aggravated robbery, theft of property, and forgery.

Testimony at the adjudication hearing revealed that appellant was a chronic drug abuser, that appellant frequently allowed prostitutes and drug dealers into her home, that appellant did not provide for or care for her children on a regular basis, and that

[1] About three months prior to taking the children into custody, DHHS had opened a protective services case on the family after receiving reports of inadequate supervision.

appellant often verbally abused the girls. Testimony also revealed that Otis Griffin was an alcoholic and drug abuser who often beat appellant while the girls were present.

Otis Griffin testified that, although he was only the legal father to A.G., he had been like a father to the three girls for twelve years. He asked the court to consider him for the girls' placement. He admitted that he had been recently released from prison after serving eleven months, that he was a convicted sex offender,[2] and that he had a history of domestic battery convictions.

Following the termination hearing, the court found that appellant was an unfit parent who had not remedied the conditions that warranted removal of her children in January 2004. The court found that the children were adoptable and that DHHS had proven by clear and convincing evidence that it was in the children's best interest for appellant's rights to be terminated. Because her mother's rights had been terminated and her father was deceased, the court granted permanent custody of D.H. to Wanda Hailey, a family friend who had been caring for D.H. during the proceedings. The goal for M.S. was adoption.[3] With regard to A.G., the court did not terminate the rights of Otis Griffin. Rather, the court agreed to give Otis more time to work with DHHS toward reunification. The court specifically noted that there was confusion in the record over what services Otis had been and had not been offered. Therefore, the court wanted to extend Otis's time to comply to ensure his rights were protected. Hence, the goal for A.G. was either permanent placement with Otis or adoption if Otis's rights were thereafter terminated.

We review cases involving the termination of parental rights de novo. *Moore v. Ark. Dep't of Human Servs.*, 95 Ark. App. 138, 234 S.W.3d 883 (2006). However, although we review the factual basis for terminating parental rights under a clearly erroneous standard, no deference is given to the trial court's decision with regard to errors of law. *See Sanford v. Sanford,* 355 Ark. 274, 137 S.W.3d 391 (2003). Pursuant to Ark. Code Ann. § 9-27-341, termination is only appropriate in cases where "the department is attempting to clear a juvenile for permanent placement." Arkansas

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[2] Although it is not clear from the record, it appears that his conviction was based upon his having sex with a child (either thirteen or fifteen) when he was twenty-five.

[3] Along with the termination of appellant's rights, the court also terminated the rights of M.S.'s father, Christopher Sanders.

Code Annotated section 9-27-338(c) (Supp. 2005) sets forth the following permanency goals (listed in order of preference) to be considered by the circuit court: (1) return the child to the parent if it is in the child's best interest; (2) authorize a plan for termination of parental rights; (3) authorize a plan for guardianship; (4) authorize a plan for permanent custody; (5) continue the goal of reunification as long as the parent has complied with the case plan and reunification can take place within a reasonable amount of time; (6) authorize a plan for another permanent living arrangement.

Griffin first argues that the trial court erred in terminating her rights to her oldest daughter because the trial court placed D.H. in the permanent custody of Wanda Hailey. Griffin argues that there was no need to terminate her rights to D.H. because D.H. was not adopted by Hailey. Her argument requires us to infer that "permanent placement" as referenced in § 9-27-341(a)(2) only refers to adoption, not permanent custodial arrangements.

■ We decline to so hold. Section 9-27-338(c) clearly anticipates that one of the "goals" can be a plan for permanent custody. Additionally, in our recent case *Moore, supra*, we affirmed a termination where we had reservations that the child was not adoptable — because of severe mental illness and abuse the child had suffered — and would instead need long-term therapeutic foster care. Consequently, although the goal in *Moore* was adoption, the likely outcome was a permanent custodial arrangement with a foster family. We also note that Ark. Code Ann. § 9-27-341 only requires that DHHS be "attempting to clear" the child for permanent placement to initiate termination proceedings. In the present case, DHHS's goal with regard to D.H. was adoption or permanent custody, and DHHS was only pursuing termination in order to clear a pathway for either resolution. Therefore, we affirm on appellant's first point.

■ Appellant also argues that the court erred in terminating her rights to M.S. and A.G. because the court chose to allow possible reunification with Otis.[4] Appellant argues that because the court did not terminate Otis's rights, it had no authority to

[4] In her brief, appellant believes that the court's order allowed for Otis to gain custody of both M.S. and A.G., however, upon reading the oral ruling and the written order, we are satisfied that the court was only referring to Otis earning (possible) custody of A.G., his biological and legal child, not M.S.

terminate her rights. However, this is of no moment because the statute clearly contemplates termination of only a single parent's parental rights. *See* Ark. Code Ann. § 9-27-341(c)(1)(2)(A)(i); *see also Moore, supra.* Therefore, we affirm this case as to M.S. and A.G. on the basis that there is no requirement that both parent's rights be terminated at the same time.

Affirmed.

CRABTREE and BAKER, JJ., agree.

Marvin JONES, et al. *v.* JUANITA S. WOOD FAMILY LIMITED PARTNERSHIP

CA 05-1202 236 S.W.3d 572

Court of Appeals of Arkansas
Opinion delivered May 31, 2006

Rice & Adams, by: *Scott A. Scholl*, for appellants.

Wright, Lindsey & Jennings, LLP, by: *Stephen R. Lancaster* and *Colin R. Jorgensen*, for appellee.

TERRY CRABTREE, Judge. Appellants are homeowners in the Woodmeade Phase II subdivision in Lonoke County. In the summer of 2004, they placed a landscape structure on the eastern end of the subdivision's Edgewood Drive. Appellee, the Juanita S. Wood Family Limited Partnership, owns land adjacent to the subdivision and claimed that the structure blocked its access thereto. On September 2, 2004, appellee asked the trial court to issue an injunction requiring removal of the impediment, and the trial court did so by order entered June 23, 2005. Appellants now appeal from that ruling, asserting numerous points of error. We affirm.

The subdivision was developed by the Wood family in the 1990s. It consists of several large lots on either side of Edgewood Drive, which the developers platted as a sixty-foot easement running west to east for the entire 1286-foot width of the subdivision. To the east lies appellee's property — a large undeveloped tract known as the Turkey Farm. Fred Wood, one of the partners in appellee, testified that, for many years, he used the road that became Edgewood Drive to gain access to the Turkey Farm. In fact, when the road bed was laid and paved in approximately 1995, it extended some forty feet into the Turkey Farm. There was deposition testimony below that school buses and garbage trucks serving the subdivision used the Turkey Farm road extension as a turn-around area.

According to Wood, in 2002, some of the subdivision residents complained that his cattle, which were pastured on the Turkey Farm, were migrating into their neighborhood. As a result, Wood constructed a fence running north and south along the Turkey Farm property line at the eastern edge of the subdivision. The fence did not have a gate or a gap in it, so Wood accessed the Turkey Farm from another road farther east. Additionally, because the fence rendered the turn-around on the Turkey Farm property inaccessible, school buses no longer drove down Edgewood Drive, and garbage trucks had to back down the street. Subdivision residents, concerned by the situation, met with County Judge Charles Troutman in July 2004 and proposed: 1) construction of a new turn-around approximately thirty feet wide (west to east) and sixty feet long (north to south) at the eastern edge of the subdivision; 2) construction of a covered bus shelter in the turn-around area; 3) planting trees or shrubs around the shelter. The residents

asked the county to "relinquish ownership" of the thirty-by-sixty-foot segment of roadway and offered to pay for the improvements. Judge Troutman met with the residents in July 2004, visited the site, and determined that the county would construct the turn-around. He did not expressly approve or disapprove of any further construction.

Thereafter, the judge searched the county records and discovered that Edgewood Drive had not been formally accepted as a county road. He issued an order declaring 1254 feet of Edgewood Drive as part of the county road system. The order did not accept the last thirty-three feet of the dedicated roadway.

After a county road crew began scraping the area for the proposed turn-around, appellants began construction of what the parties call a flower box in the turn-around area. The flower box is made out of landscape timbers, is sixteen to twenty-four feet wide, and contains, at the present time, planting soil and three concrete posts with reflectors. It is located in the thirty-three feet of roadway that the county judge did not formally accept, and it is situated virtually in the middle of the roadway, facing westward.

Fred Wood discovered the flower box on or about August 6, 2004, while its construction was in progress. He immediately removed the landscape timbers and cut a hole in his fence, allowing him renewed access to the Turkey Farm. When appellants continued to construct the flower box, Wood filed suit against them and against Judge Troutman and Lonoke County, seeking an injunction requiring removal of the flower box.

The case was heard by the trial judge on cross-motions for summary judgment. After a hearing, he ruled that Edgewood Drive was a public road; that appellee had a right to use Edgewood Drive for unencumbered access to its farm; and that the flower box was within the public right-of-way. The judge then issued a permanent injunction requiring appellants to remove the flower box within thirty days. Appellants now appeal from that order.

Normally, on a summary-judgment appeal, the evidence is viewed in the light most favorable to the party resisting the motion, and any doubts and inferences are resolved against the moving party. *Tunnel v. Progressive N. Ins. Co.*, 80 Ark. App. 215, 95 S.W.3d 1 (2003). But, in a case where the parties agree on the facts, we simply determine whether the appellee was entitled to judgment as a matter of law. *Id.* When parties file cross-motions for summary judgments, as was done in this case, they essentially agree

that there are no material facts remaining, and summary judgment is an appropriate means of resolving the case. *Id.*

We are also reviewing the issuance of an injunction. Equity matters, including the granting of an injunction, are reviewed de novo on appeal. *Brown v. Seeco, Inc.*, 316 Ark. 336, 871 S.W.2d 580 (1994). However, the granting of an injunction rests within the sound discretion of the trial judge, *id.*, and we will not reverse unless the trial court has abused its discretion. *Doe v. Arkansas Dep't of Human Servs.*, 357 Ark. 413, 182 S.W.3d 107 (2004).

Appellants argue first that the trial court erred in granting relief based on Edgewood Drive's status as a "public road." They contend that, while appellee maintained below that Edgewood was a *county road*, it did not assert that Edgewood was a public road; thus, they claim, the trial court issued the injunction on a theory neither pled nor tried by appellee. *See Coran Auto Sales v. Harris*, 74 Ark. App. 145, 45 S.W.3d 856 (2001) (holding that, where a particular theory is neither pled, tried by the express or implied consent of the parties, nor proven by the evidence, a trial court commits error in awarding judgment on that basis).

■ We find no grounds for reversal on this point. The relief sought by appellee in its complaint did not depend on any particular characterization of Edgewood Drive as a public road or a county road; appellee simply asked that the obstruction in the roadway be removed. Further, the county defendants' motion for summary judgment averred that the last few feet of roadway not accepted by the county remained a public road, and appellee's counsel stated during the summary-judgment hearing that "regardless of whether it's a county road, it was at least a public road," and "this is an access case over at least a public road." Thus, Edgewood's status as a public road was before the trial judge, and he did not err in awarding relief on that basis.

■ Appellants argue next that there was insufficient evidence that Edgewood was a public road. They cite *Craig v. O'Bryan*, 227 Ark. 681, 301 S.W.2d 18 (1957), in which a roadway across private land was deemed not to be public because the evidence did not show seven years of continuous adverse use by the general public and showed only occasional road work by the county. The case before us, however, does not involve an attempt to prove that a drive located on private land has become a public road via a prescriptive easement. *See, e.g., Carson v. Drew County*,

354 Ark. 621, 128 S.W.3d 423 (2003). Rather, the road in this case was conceived as a public road and was dedicated to the county by the subdivision's developer. A dedication is the donation of land or the creation of an easement for public use. *City of Cabot v. Brians*, 93 Ark. App. 77, 216 S.W.3d 627 (2005). Additionally, there was evidence that the county had maintained the road, possibly since 1995, and that the road had been a school-bus and mail route. Such use has been considered significant in determining the public nature of a roadway. *See, e.g., Frazier-Hampton v. Hesterly*, 89 Ark. App. 211, 201 S.W.3d 447 (2005). Given these circumstances, we do not believe that the trial court erred in declaring Edgewood to be a public road.

Next, appellants argue that County Judge Charles Troutman acted within his discretion in making alterations to Edgewood Drive and that appellee had no right to prevent these alterations. They cite *Arkansas State Highway Commission v. Bingham*, 231 Ark. 934, 333 S.W.2d 728 (1960), for the proposition that a landowner may not complain about inconvenient changes in a public road, but that case is distinguishable. There, the issue was whether a landowner could receive just compensation when the Highway Commission changed a roadway and reduced traffic flow to the owner's gas station. Our supreme court held that the landowner had no right to continued traffic flow but emphasized that, by contrast, a landowner's right of ingress and egress via a public road — such as we have in the case at bar — is a compensable "property right." *Id.* at 944-45, 333 S.W.2d at 734. The court thus recognized the importance accorded a landowner's use of a public road to gain access to his property. *See also Wright v. City of Monticello*, 345 Ark. 420, 47 S.W.3d 851 (2001) (ruling that an adjoining landowner who has used a public street for ingress and egress has an independent right to use the street as a means of access, and abandonment of the road by the public entity does not affect that right).[1]

[1] Appellants contend that *Wright* is not applicable because Fred Wood "admitted below that [appellee] held no private right[s] in the roadway beyond those of the general public." Our reading of Wood's testimony shows some confusion surrounding the questions he was asked on this point. In any event, we do not view his testimony as relinquishing appellee's right to use the road for access to its property, which Wood consistently asserted throughout the case.

Next, we address appellants' contention that the trial court's "*sua sponte* designation that Edgewood Drive was a public road had the effect of overruling the County Court's decision and usurping the constitutional exercise of the County Court's authority." We point out first that, as stated earlier, the trial court's determination that Edgewood was a public road was not a *sua sponte* ruling. Secondly, while we recognize that county judges have the authority to operate the system of county roads, *see* Ark. Const. amend. 55, § 3 (Repl. 2004), and that county courts have the power to make changes in county roads, *see* Ark. Code Ann. § 14-298-120 (1987), and *Reding v. Wagner*, 350 Ark. 322, 86 S.W.3d 386 (2002), nothing the trial court did in the present case invaded the county judge's province. The court declared, as it had the authority to do, that appellants could not obstruct a public road and interfere with appellee's access to its property. *See generally Maroney v. City of Malvern*, 320 Ark. 671, 899 S.W.2d 476 (1995).

Finally, we turn to appellants' argument that appellee failed to prove it was entitled to injunctive relief. To establish sufficient grounds for a permanent injunction, the movant must show, *inter alia*, that it is threatened with irreparable harm; that this harm outweighs any injury that granting the injunction will inflict on other parties; and that the public interest favors the injunction. *See United Food & Comm'l Workers Int'l Union v. Wal-Mart Stores, Inc.*, 353 Ark. 902, 120 S.W.3d 89 (2003). Appellants contend that appellee failed to meet the above criteria because it was Fred Wood, not appellants, who blocked access to the Turkey Farm by erecting the fence in 2002; that Fred Wood had an alternative means of accessing the property; and that Fred Wood testified that the flower box was not so wide as to completely restrict his access to the property.

We do not believe that the trial court abused its discretion in issuing the injunction. Appellants' flower box has potential aesthetic value but serves no other discernable purpose. By contrast, the harm caused by the box is worthy of redress. Appellants have placed an obstruction in the middle of a public road; and, while the obstruction does not blockade the road in its entirety, it impedes appellee's recognized property right to use the road as access to its property. *See Wright, supra.* Moreover, we believe that obstructing a public road, especially where it interferes with ingress and egress, constitutes irreparable harm justifying the issuance of an injunction. Money cannot restore the landowner's

property right nor measure the value of using of a public road. *See generally United Food & Comm'l Workers, Int'l Union, supra* (holding that harm is usually considered irreparable when it cannot be adequately compensated by money damages or redressed in a court of law). We further note that appellee's right to use this public road was not diminished by the existence of alternative means of ingress and egress. *See Wright, supra; see also Tweedy v. Counts*, 73 Ark. App. 163, 40 S.W.3d 328 (2001).

In light of the above, we affirm the trial court's decision to grant the injunction.[2]

Affirmed.

VAUGHT and BAKER, JJ., agree.

Shanie Furrow PEREZ *v.* Craig FURROW

CA 05-1253 237 S.W.3d 109

Court of Appeals of Arkansas
Opinion delivered June 14, 2006

[Rehearing denied July 26, 2006.]

[2] We also reject appellants' brief argument that, because appellee constructed a fence that blocked the road in 2002, its entitlement to relief is barred by the unclean-hands doctrine. There is evidence that the fence was built as an accommodation to subdivision residents who were complaining about roaming cattle.

Rice & Adams, by: *Scott A. Scholl*, for appellant.

Hicks & Associates, P.A., by: *Carol Ann Hicks*, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The parties were divorced by a decree entered in April 2003. That decree awarded custody of the parties' children to appellant. Subsequently, appellee moved for a change of custody based largely on alleged interference with visitation. After a July 7, 2005, hearing, the trial court granted the motion and awarded custody of the children to appellee, set minimal temporary child support pending more information regarding appellant's employment, and stated that visitation provisions and a final support award would be made in a subsequent order. On appeal, appellant argues that the order changing custody is not supported by the evidence and unfairly punishes her. Although neither party raised a jurisdictional issue based on the timeliness of the appeal, it is our duty to determine whether this court has jurisdiction. *Haase v. Starnes*, 337 Ark. 193, 987 S.W.2d 704 (1999). We must dismiss this appeal because appellant failed to properly invoke our jurisdiction by filing a timely notice of appeal.

Appellant attempted to appeal from a written order changing custody entered July 7, 2005, that expressly directed the parties' attorneys to "work out the details of the visitation" for

inclusion in a subsequent order. She did so by filing a notice of appeal on August 16, 2005, from the "Order, as supplemented, awarding custody" to appellee. Rule 2(d) of the Arkansas Rules of Appellate Procedure – Civil permits an appeal from any order that is final as to the issue of custody, regardless of whether the order resolves all other issues. Therefore, appellant could have appealed directly from the July 7 order under Rule 2(d) because it was final as to the award of custody. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002). However, appellant's notice of appeal, filed more than thirty days after the order changing custody, was untimely as to that order. *See* Ark. R. App. P. – Civ. 4(a).

Although the July 7 order was a final award of custody, it was only an intermediate order inasmuch as it did not dispose of all other issues in the case. Therefore, appellant also had the option to seek review of the custody issue by taking an appeal from a subsequent order, entered on November 2, 2005, in which the court decided visitation questions and finally set appellant's child-support obligation. *Ford v. Ford, supra.* However, appellant filed no notice of appeal from the November 2 order. Furthermore, while it is true that a notice of appeal filed after the circuit court *announces a decision* but before the entry of the order is treated as having been filed on the day the order was entered pursuant to Ark. R. App. P. – Civ. 4(a), the circuit court did *not* announce its decision on the visitation issue or its final decision on child support either at the hearing or in its July 7 order, but instead reserved judgment. Because no decision on all of the issues was announced until the order of November 2, from which appellant filed no notice of appeal, and because the notice of appeal filed on August 16 was untimely as to the July 7 order, our jurisdiction has not been invoked, and we must therefore dismiss this appeal.

Appeal dismissed.

HART and GRIFFEN, JJ., agree.

David BIER and Marcia Bier *v.*
Norma MILLS

CA 06-28 237 S.W.3d 111

Court of Appeals of Arkansas
Opinion delivered June 14, 2006

Jack & Holly Martin & Associates, P.A., by: *Ed Tarvin*, for appellants.

No response.

ROBERT J. GLADWIN, Judge. This is a one-brief appeal from an order entered by the Washington County Circuit Court denying appellants David and Marcia Bier visitation with respect to their paternal grandson,[1] T.T. (DOB 3/25/96), who is in the custody of his maternal grandmother, appellee Norma Mills. Appellants challenge the sufficiency of the evidence and allege that the trial court's decision that they have no contact with their grandson was an abuse of discretion. We affirm.

T.T.'s mother is deceased, and after various problems with his father, the trial court placed temporary custody of T.T. with

[1] Marcia Bier is the child's biological paternal grandmother, who married David in 2001.

appellants in December 2003. Sometime later in 2004, appellants, who live in Iowa, sent T.T. to live with his father in Eureka Springs, Arkansas, against the orders of the trial court. Upon learning of the situation, the trial court removed T.T. from his father and temporarily placed legal and physical custody of the child with appellee in November 2004. On December 14, 2004, the trial court ordered custody to remain with appellee and further determined that T.T. was to have no contact with his father and only telephone visitation with appellants to be supervised by his counselor Ross Kelly.

Visitation was sporadic, with appellants only talking to T.T. four times prior to his admission to Vista Health Services, where he received inpatient treatment from May 31, 2005, through August 26, 2005. He was diagnosed and treated for mood disorder not otherwise specified, intermittent-explosive disorder, oppositional-defiant disorder, attention-deficit-hyperactivity disorder, asthma, methicillin-resistant-staphylococcus-aureus infection, tooth abscess, problems with primary support group, problems relating to social environment, educational problems, and problems related to interaction with the legal system. He was discharged back into the custody of appellee with medication management consisting of Trileptal and Ritalin, as well as follow-up care from Dr. Richard Lloyd, his attending physician and psychiatrist, and outpatient counseling with Mr. Banyon Patterson.

Appellants filed a petition to establish grandparent visitation with respect to T.T. on March 9, 2005. Appellee was named as the respondent in the petition, and she filed a response to the petition on March 31, 2005. On April 25, 2005, the case was transferred from Circuit Judge Mark Lindsay to Circuit Judge Stacey Zimmerman, who had presided over the two previous juvenile cases involving T.T.' s custodial placement. A hearing was held on the petition on September 16, 2005. Appellants and appellee testified, along with Judith Harvey, the director of social services at Vista Health Services. At the close of the hearing, the trial court denied the petition for visitation and further ordered that appellants have no contact with T.T. The trial court issued a hand-written order at the conclusion of the hearing, and the same order was filed of record on September 20, 2005. Appellants filed a notice of appeal on October 10, 2005.

We review traditional equity cases de novo on the record and will not reverse a finding of fact by the trial judge unless it is clearly against the preponderance of the evidence. *Williams v.*

Williams, 82 Ark. App. 294, 108 S.W.3d 629 (2003). In reviewing the trial judge's findings, we give due deference to the judge's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.* A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 768 (2001).

The Arkansas Legislature passed Act 652 of 2003, § 2, effective March 25, 2003, now codified at Ark. Code Ann. § 9-13-107, which addresses the visitation rights of grandparents when a child is not in the custody of a parent as follows:

> (a) For purposes of this section:
>
> (1) "Child" means a minor under the age of eighteen (18) who is:
>
> (A) The grandchild of the petitioner; or
>
> (B) The great-grandchild of the petitioner; and
>
> (2) "Petitioner" means any individual who may petition for visitation rights under this section.
>
> (b) A grandparent or great-grandparent may petition the circuit court that granted the guardianship or custody of a child for reasonable visitation rights with respect to his or her grandchild or grandchildren or great-grandchild or great-grandchildren under this section if the child is in the custody or under the guardianship of a person other than one (1) or both of his or her natural or adoptive parents.
>
> ***(c) Visitation with the child may be granted only if the court determines that visitation with the petitioner is in the best interest and welfare of the child.***
>
> (d)(1) An order granting or denying visitation rights to grandparents and great-grandparents under this section shall be in writing and shall state any and all factors considered by the court in its decision to grant or deny visitation.
>
> (2)(A) If the court grants visitation to the petitioner under this section, then the visitation shall be exercised in a manner

consistent with all orders regarding custody of or visitation with the child unless the court makes a specific finding otherwise.

(B) If the court finds that the petitioner's visitation should be restricted or limited in any way, then the court shall include the restrictions or limitations in the order granting visitation.

(3) An order granting or denying visitation rights under this section is a final order for purposes of appeal.

(4) After an order granting or denying visitation has been entered under this section, a party may petition the court for the following:

(A) Contempt proceedings if one (1) party to the order fails to comply with the order;

(B) To address the issue of visitation based on a change in circumstances; or

(C) To address the need to add or modify restrictions or limitations to visitation previously awarded under this section.

(Emphasis added.) As a rule, when the setting of visitation is at issue, we will not reverse the court absent an abuse of discretion. *Delacey v. Delacey*, 85 Ark. App. 419, 155 S.W.3d 701 (2004). Abuse of discretion is discretion applied thoughtlessly, without due consideration, or improvidently. *Carlew v. Wright*, 356 Ark. 208, 148 S.W.3d 237 (2004). However, a circuit court's conclusion of law is given no deference on appeal. *Ward v. Doss*, 361 Ark. 153, 205 S.W.3d 767 (2005).

Appellants contend that the evidence presented in this matter does not support the decision of the trial court. Each of the appellants testified that they had maintained significant contact with T.T. throughout his life, including two extended summer visits with them at their home in Iowa. They also pointed out that they had temporary custody of T.T. from December 2003 through November 2004 and that T.T. was active in school, church, and sports activities while under their primary care.

Appellants explained that, at some point during October or November 2004, they allowed T.T. to move in with his father in Eureka Springs, Arkansas, despite the fact that the trial court previously had removed custody from him and placed temporary custody with them. Appellant David Bier admitted that they "sent everything we had accumulated for [T.T.] with him," in response to the trial judge's question to whether it was a "visit" rather than placing him with his father on a more permanent basis. When asked why they made such a decision, appellant David Bier stated that, "[T.T.] is a type of person that you can — and there's been too much of it — you can tell him and tell him and tell him, but until he actually, physically sees the type of situation that he wanted to go to, it's not going to do any good." This decision occurred without appellants seeking permission from the trial court and ultimately cost them custody of T.T. Both appellants testified at the hearing as to their bad judgment call in allowing T.T. to move in with his father, took responsibility for the poor decision, professed an understanding of how crucial compliance with a court order is, and agreed to abide by whatever restrictions and limitations were placed on their visitation time with T.T.

Appellee appeared pro se in the matter, and her participation in the proceeding was limited, especially with respect to questioning other witnesses. Appellee had refused to consent to a meeting between T.T.'s counselors and appellants just prior to the hearing. She testified that she was trying to direct T.T. and that he was at an age that, if not stabilized within the next two years, he would be lost "to the streets." She stated that T.T. did not need any more confusion in his life and that it was going to take T.T. the rest of his life to be able to function properly due to being raised with "[n]o restrictions, R-rated movies, sex, openly." She clarified that she meant that negative behavior occurred during the time he was living with his parents rather than during the time that he was in the custody of appellants. Appellee also testified that she knew T.T. and appellants loved each other and that she would not have a problem with contact between them, as long as it was approved and supervised by his physicians and counselors. She even went so far as to say that she believed T.T. needs contact with appellants at the appropriate time and in an appropriate manner and requested that appellants might allow six more months of letting T.T. stabilize a little bit more. The only other concern she expressed at the hearing was that appellants might dredge up the past with the child, which could be problematic for his continued progress and recovery.

Although not in evidence in this matter, appellee's response to appellants' petition for visitation rights detailed her inability "to locate the child in Iowa [in November 2004] and [the fact that she] searched for him for days." The response also stated that permanent custody was given to her because T.T.'s father is a known "meth" user and in prison for the second time on felony charges, awaiting sentencing related to drug, hot checks, and numerous other charges. The pleading also described an incident on November 2, 2004, after the last hearing in juvenile court, where she unsuccessfully tried to contact appellants at their motel room and on their cell phone for two days to obtain T.T.'s Ritalin and Trileptal medication. She also stated that the no-contact order issued on November 2, 2004, against appellants, with the exception of telephone visits supervised by T.T.'s counselor, came about after appellants began calling her home three to five times per day. She asserted that T.T. had been traumatized after speaking to appellant Marcia Bier and often had trouble sleeping, even with his medication. Finally, she stated in her response that T.T. was doing very well at his current school, after being there only five weeks, whereas he had been failing while in school in Iowa and Eureka Springs. None of these issues were developed through the testimony at trial, where appellee chose to testify but not to question the other witnesses. Her testimony suggested that she was far less adamant about keeping appellants from T.T. by the time the hearing occurred than she was at the time her initial response had been filed.

Judith Harvey testified as to T.T.'s admission, diagnosis, inpatient treatment, condition upon discharge from Vista Health Services, and recommendations for follow-up treatment. She explained that his overall diagnosis upon admission and discharge was the same, except for the methicillin-resistant-staphylococcus-aureus infection, which had been addressed with a twenty-eight day program of antibiotic treatment. She testified that by the time he was discharged, T.T. was able to function outside the inpatient status and had reached his maximum benefit of treatment during his three-month stay. T.T.'s discharge summary from Vista Health Services was admitted into the record without objection. The discharge summary also included a psychiatric summary that detailed: a history of aggression; defiant behavior; verbal and physical threats to his grandmother (appellee) and peers; physical abuse toward appellee, peers, and animals. The prognosis "for ongoing control of presenting symptoms [was listed as] fair . . . in part dependent upon [T.T.'s] willingness and ability to participate in

treatment, to comply with treatment recommendations, and take medication as prescribed . . . [as well as] the willingness and ability of [T.T.'s] family to participate in treatment and to comply with treatment recommendations."

The trial judge questioned the witnesses, and while she explored the issue of appellants allowing T.T. to move in with his father to some extent, it is clear that she relied heavily on what had occurred in the other two proceedings related to T.T.'s custody (case numbers J2003-885 and J2005-390) in making her decision regarding visitation for appellants. The trial judge even referred back to specific testimony from appellant Marcia Bier from the November 2, 2004 hearing regarding disparaging remarks made by T.T. toward her.

The applicable statute, Ark. Code Ann. § 9-13-107(c), is extremely discretionary in its language, stating that visitation with the child may be granted only if the court determines that visitation with the petitioner is in the best interest and welfare of the child. That said, the trial judge interjected a great deal during the hearing and relied on evidence outside the record in this matter, referring back to very specific details and testimony from the previous two cases that are not part of the record in this case. Our supreme court has stated that "judicial notice may not be taken of the record in a separate case," *see Smith v. State*, 307 Ark. 223, 818 S.W.2d 945 (1991), and the trial judge has most certainly done that in this case. However, the trial judge also indicated that there may come a time when T.T.'s condition stabilizes and that he might need to see appellants, leaving the door open for them to seek visitation in the future. Based upon our de novo review of the record in this matter, we cannot say that it was clearly erroneous or an abuse of discretion for the trial court to determine that visitation between appellants and T.T., at that point in time, was not in the best interest and welfare of the child. Accordingly, we affirm.

Affirmed.

ROBBINS and BIRD, JJ., agree.

Chico CHILDS *v.* STATE of Arkansas

CA CR 05-1245 237 S.W.3d 116

Court of Appeals of Arkansas
Opinion delivered June 14, 2006

Dwain Oliver, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Chico Childs was convicted in a jury trial of possession of cocaine with intent to deliver and fleeing. He was sentenced to fifteen years in prison and fined $50. On appeal, Mr. Childs argues that, by denying his peremptory challenges during jury voir dire, the trial court violated his right to a fair and impartial jury as guaranteed by the Sixth Amendment and Article 2, section 10 of the Arkansas Constitution. We affirm.

During voir dire, the prosecutor objected to defense counsel's use of all eight of his peremptory challenges to exclude white jurors. Defense counsel responded, "Well, your honor, we have to remember that we have dealt with this panel on several occasions, in depth on two capital murder cases in another trial area, so I'm going off previous questions of these witnesses, I mean of these jurors also. They may not have responded today, but I've dealt with this crowd three times already." The trial court found that the State made a prima facie case of purposeful discriminatory intent and asked defense counsel to give race-neutral explanations for each strike.

Appellant's counsel gave the following reasons for each of the peremptory strikes:

> *Mr. Cannatella*: I just had a bad feeling about Mr. Cannatella. . . . We struck him on the, I think the capital murder case. I remember he didn't seem to be a pick then. I remember we struck him, so I felt like I'd do it this time, too. I can't remember all the details, but it wasn't for a racial basis, it was just a fact that I think we struck him back then. He was just kind of, not pro-defense, if I remember correctly. But it definitely wasn't for any racial reason.
>
> *Mr. Norris and Mr. Morphis*: [Mr. Norris] told me that he would definitely lean more toward law enforcement than a regular person. . . . Morphis and Norris both said that they would definitely be more apt to lean toward a law enforcement person than a regular person.
>
> *Ms. McNemar*: I just picked her because I had a bad feeling about her. She doesn't look like she really wants to be here. I thought, well, she's going to be the one who's more prone to wanting to punish somebody for the trial. . . . She just looks like somebody who'd be more of a strict nature to me.
>
> *Mr. Conte*: Mr. Conte was, his comment about drugs being a cancer on society and this being a drug case, I immediately thought

> to strike him right then when I heard that. He has strong beliefs as to the drug business, I guess.
>
> *Ms. Miller*: I can't recall her specific answers. I just, again, it was one where I had a bad feeling of her. It had nothing to do with race. I just didn't feel the feedback was what I wanted to hear.
>
> *Ms. Beavers*: She's had Bob Graham, one of the witnesses, over to her house on many social occasions. . . . I feel more comfortable not having her there because she's going to be more prone to law enforcement because she's friends with law enforcement.
>
> *Mr. Hayes*: I just remember from the capital murder case we didn't care for his responses either. And I just remember that based on that he just looks familiar and we didn't want him before. So the way I recall it, I wouldn't want him now.

At the conclusion of appellant's counsel's explanations, the trial court announced, "Based upon the responses made by defense counsel, I would allow the following strikes. . . . These are the ones I will allow to be excused based on responses. Norris, Morphis, Beavers. . . . And I will not remove the others." Over appellant's objection that none of his peremptory challenges were based on race, the jury was empaneled. Ms. Miller was not seated on the jury. However, Mr. Cannatella, Ms. McNemar, Mr. Conte, and Mr. Hayes were seated as jurors, and it is the trial court's refusal to allow appellant to strike these jurors that is at issue on appeal.

For reversal of the trial court's ruling, Mr. Childs cites Ark. Code Ann. § 16-33-305(b) (Repl. 1999), which provides:

> The defendant shall be entitled to twelve (12) peremptory challenges in prosecutions for capital murder, to eight (8) peremptory challenges in prosecutions for all other felonies, and to three (3) peremptory challenges in prosecutions for misdemeanors.

Because Mr. Childs was being prosecuted for a felony other than capital murder, he was entitled to eight peremptory challenges. While peremptory challenges are not guaranteed by the Constitution, Mr. Childs cites *Cannon v. Lockhart*, 850 F.2d 437 (8th Cir. 1988), where the Eighth Circuit Court of Appeals held that the ability to use peremptory challenges, once granted by statute, falls within the mandate of the Sixth Amendment that a defendant be tried by a fair

and impartial jury. Mr. Childs submits that there was no evidence presented that his challenges were on the basis of race, and asserts that this case must be reversed because he was denied the full use of his peremptory strikes.

The State counters that the trial court's ruling should be affirmed pursuant to its finding that the challenges were made on the basis of race. In *Batson v. Kentucky*, 476 U.S. 79 (1986), which was not cited in appellant's brief, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the State from striking a juror as a result of racially discriminatory intent. Similarly, a criminal defendant may not exercise peremptory challenges based on the race of the juror or racial stereotypes. *Holder v. State*, 354 Ark. 364, 124 S.W.3d 439 (2003).

In *Hinkston v. State*, 340 Ark. 530, 10 S.W.3d 906 (2000), our supreme court stated of *Batson* challenges:

> We have delineated a three-step process to be used in the case of Batson challenges. *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998). First, the strike's opponent must present facts to raise an inference of purposeful discrimination; that is, the opponent must present a *prima facie* case of racial discrimination. *Id.* Second, once the strike's opponent has made a *prima facie* case, the burden shifts to the proponent of the strike to present a race-neutral explanation for the strike. *Id.* If a race-neutral explanation is given, the inquiry proceeds to the third step, wherein the trial court must decide whether the strike's opponent has proven purposeful discrimination. *Id.* Here, the strike's opponent must persuade the trial court that the expressed motive of the striking party is not genuine but, rather, is the product of discriminatory intent. *Id.*

Id. at 538-39, 10 S.W.3d at 911-12.

We will reverse a trial court's ruling on a *Batson* challenge only when its findings are clearly against the preponderance of the evidence. *Green v. State*, 330 Ark. 458, 956 S.W.2d 849 (1997). Contrary to the State's argument, the trial court in this case made an error under *Batson*.

When the State made its *Batson* challenge below, the trial court found, under step one of the three-step process, that the State made a *prima facie* case of racial discrimination. The burden then shifted to Mr. Childs to present race-neutral explanations for his strikes. After appellant's counsel gave his explanations regarding each strike, the trial court found that a race-neutral reason was

not given for any of the four strikes now at issue. Thus, the trial court never passed on the third step of the analysis, where the strike's opponent attempts to prove purposeful discrimination. This was error.

As our supreme court stated in *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004), the race-neutral explanation must be more than a mere denial of racial discrimination, but need not be persuasive or even plausible, and, indeed, may even be silly or superstitious. Here, appellant's counsel's explanations went beyond a mere denial of racial discrimination and he offered race-neutral factors such as a juror being "not pro-defense," a juror having strong beliefs against the drug business, and a juror who appeared unhappy to be there and who might want to punish the defendant as a result. While these reasons may not be persuasive, they are indeed race-neutral. Therefore, the proper procedure was for the trial court to proceed to step three and consider whether the State could persuade it that the expressed motive of the striking party was not genuine, but rather the product of discriminatory intent. The trial court failed to do this, and its decision to uphold the *Batson* challenges at issue was clearly against the preponderance of the evidence.

Nevertheless, we agree with the State's alternate argument that we are constrained to affirm because, in his brief, Mr. Childs fails to make the proper argument. Mr. Childs correctly asserts that he was entitled to peremptory challenges in his criminal prosecution. However, he fails to acknowledge the exception to that rule under *Batson*, which was specifically relied on by the trial court in reaching its decision. The only statement in appellant's brief that relates to the pertinent inquiry on appeal is an assertion in his statement of facts that there was no evidence to support the prosecution's challenge that the peremptory strikes were based on race. However, an argument consisting of one statement is insignificant to mount the issue on appeal. *See Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004). Moreover, we will not consider arguments that are unsupported by convincing argument or sufficient citation to legal authority. *Kelly v. State*, 350 Ark. 238, 85 S.W.3d 893 (2003). As it is not the duty of this court to make appellant's argument for him, we must affirm.

Affirmed.

GLADWIN and BIRD, JJ., agree.

John H. BROWN *v.* STATE of Arkansas

CA CR 05-33 237 S.W.3d 95

Court of Appeals of Arkansas
Opinion delivered June 14, 2006

David O. Bowden, for appellant.

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

SAM BIRD, Judge. John H. Brown was charged in the Circuit Court of Saline County with one count of first-degree sexual assault under Ark. Code Ann. § 5-14-124 (Supp. 2001). The charge was based upon a complaint by Brown's fifteen-year-old niece by marriage, who went with her parents to the Saline County Sheriff's office on August 4, 2003, to make the allegation against him. Brown was found guilty in a jury trial and was sentenced to twenty-five years in the Arkansas Department of Correction. Brown filed a motion for a new trial in which he asserted that, due to actions of the prosecuting attorney and certain rulings of the trial court, Brown had been deprived of fundamental fairness and due process of law and of his right to a fair and impartial trial.

Brown appeals his conviction and motion for new trial, which was deemed denied by the trial court. He raises five points: 1) that no substantial evidence supports the verdict, absent passion, prejudice, and speculation; 2) that the trial court erred by failing to require proper discovery and by failing to enforce its own discovery order; 3) that he was denied the right to a full, fair, and public trial; 4) that he was denied the right to a recognized defense and to a full and fair trial; and 5) that the State engaged in a prolonged, blatant, and repeated pattern of misconduct in order to inflame the passions of the jury against him. We find merit in the second point. Therefore, the case is reversed and remanded to the trial court.

The sufficiency of the evidence

As his first point on appeal, Brown contends that "there was no substantial competent evidence from which a rational finder of fact could find guilt beyond a reasonable doubt absent passion, prejudice and speculation." We do not reach the merits of this point because it is not preserved for our review.

The State's case-in-chief included testimony by Brown's niece, H.M., and by Dr. Jerry Jones, who examined her in July

2004. H.M. testified that in July 2003 she stayed with Brown and her aunt (Brown's wife) while H.M.'s parents relocated their home from Texas to Virginia, where her father took a job as a youth pastor. She stated that the sexual assault occurred on July 8, 2003. She said that at 3:56 a.m., as shown by a digital clock with a lighted dial, she awoke to feel Brown's hand in her pajama pants and his finger in her vagina. She stated that she had been sleeping on the couch in a zipped sleeping bag but that the bag had been pulled down to mid-thigh. She said that she told a friend about the incident, the friend told a second friend, and the second friend told her parents around three days later.

H.M. further testified that her parents took her to local authorities in Arkansas on August 4, 2003, where they made their complaint and were advised to have H.M. undergo a medical examination. She testified that she did not get the exam and that the family left Arkansas the next day. Dr. Jones testified that the findings of an examination he performed on H.M. at Arkansas Children's Hospital on July 7, 2004, were consistent with a history of suspected sexual abuse.

Brown moved for a directed verdict at the close of the State's case. The pertinent part of his motion was as follows:

> That brings us down to the word of [H.M.]. Your Honor, the time line and her mannerisms, her demeanor the entire — the confusion as to dates, the fact that, at least even if unwittingly, the prosecution has given her the language and vocabulary for her testimony. All these things add up to testimony that's incredible and unworthy of belief.
>
> I do not believe that they have made the elements of the crime and we would ask, therefore, for a directed verdict because a finder of fact, a reasonable finder of fact, could not find beyond a reasonable doubt based on the testimony that we have heard that this occurred in the way that they have alleged.

The trial court denied the motion, ruling that the basic elements of the offense "were set out by the witness and it really comes down to a credibility issue." At the close of all the evidence, Brown renewed his motion on the same grounds as previously alleged, and the trial court again denied the motion.

Brown argues on appeal that his conviction was based on "the word of a confused and contradictory complaining witness, a minor who had been coached by her family, the prosecution team

and the inept questioning of the investigating team of the investigating officers." He asserts that no rational finders of fact, without resorting to speculation and without having had their passion inflamed so as to overbear their logic, could find beyond a reasonable doubt that the events described by the victim actually happened.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Martin v. State*, 354 Ark. 289, 119 S.W.3d 504 (2003). On appeal, the evidence is viewed in the light most favorable to the State, considering only the evidence that supports the verdict. *Id.* The testimony of the victim alone may constitute substantial evidence to support a conviction for sexual assault. *E.g.*, *id.* The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.* It is well-settled that it is the job of the jury, as fact finder, to weigh inconsistent evidence and to make determinations in credibility. *Warner v. State*, 93 Ark. App. 233, 218 S.W.3d 330 (2005).

Brown's motions for directed verdict asserted that the victim's testimony was incredible and that the State had not "made the elements of the crime." The appellate court will not review a motion for a directed verdict if it merely asserts that the State has failed to prove the elements of the crime and does not specify the missing element. *E.g.*, *Miller v. State*, 328 Ark. 121, 132, 942 S.W.2d 825, 831 (1997). Arguments regarding witnesses' credibility provide no basis for the appellate court to reverse a trial court's denial of a motion for a directed verdict. *See Weber v. State*, 326 Ark. 564, 933 S.W.2d 370 (1996) (rejecting arguments based upon inconsistencies in witnesses' statements as a reason to reverse the trial court's refusal to grant the defendant's motion for a directed verdict). Thus, the first point on appeal is not preserved for our review and we will not address it.

Discovery

As his second point on appeal, Brown contends that the trial court erred by failing to require that discovery be properly made and by failing to enforce the court's own discovery order. Specifically, he contends that the State should have revealed to him a

calendar that was used to help the victim remember events of the summer in which the alleged assault took place. He points to the requirement of Rule 17.1(d) of Ark. R. Crim. P. (2006), that the prosecutor shall, promptly upon discovering the matter, disclose to defense counsel any material and information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged. The calendar was not revealed to Brown in discovery. When the victim testified at trial that the calendar indeed existed and Brown asked that he be allowed to see it, the trial court denied his request on the basis that it was the prosecutor's work product.

Brown maintains that information he obtained in the course of his investigation caused him to believe that the victim had formulated a diary, journal, or some sort of similar document "that would be related to days and dates of occurrences." He notes that the State's amended information, filed on August 9, 2004, alleged that the assault occurred on or about July 1-15, 2003, but the date given in the original information, filed on November 17, 2003, was July 15, 2003. He also points to contradictions within the victim's trial testimony about the date of the assault. He asserts on appeal, as he did in the trial court, that the establishment of a time line was crucial to his defense because the date that was first alleged could not be reconciled with the summer schedule of the victim's family and was during a time that Brown was hospitalized.

Various motions and responses between the parties followed the filing of the original information. On June 29, 2004, the State wrote in response to a discovery motion by Brown:

> 1. The defendant produced an order requesting the State to produce documents the defense claims [are] crucial to his case. Specifically, the defendant request[s] from the victim, diaries, journals, notebooks, letter, photographs, drawings, notes, memoranda or any other document or writing written by her relating to the facts of this case between the dates of July 1, 2003, to August 1, 2003.
>
> . . . .
>
> 3. *There is no proof that the items the defendant request[s] are in existence. If they exist, they are not part of the State's file and the State has not sought to include them.*
>
> 4. *Considering of course the items the defendant requests exist, the State is under no obligation to produce them.*

(Emphasis added.)

The trial court found on June 30, 2004, that Brown's motion "to cause certain witnesses for the State and those associated with them to provide documents crucial to his case" was well-taken. The court stated in its written order:

> The complaining witness, H.M., is hereby ordered to provide to the Defense any diary, journals, notebooks, letters, photographs, drawings, notes, memoranda or any other document or writing composed by H.M. relating to the facts of this case or to Defendant John H. Brown between the dates of July 1, 2003, and August 1, 2003 that she may have in her possession.

The case went to trial on September 1, 2004. H.M. testified on cross-examination that she, Brown, and his wife had spent the night at another person's house on July 4, 2003, where there was a party. The State objected that testimony about July 4 was not relevant to what happened on July 8. Defense counsel responded that he was trying to establish a time line, and the court allowed the testimony to continue.

H.M. again testified that she had gone to a party in Arkansas on July 4, 2003, adding that she did not remember if the date had been a Friday. She said that she had left for Texas on a Sunday, that she did not remember if it was July 6, and that she had gone to Texas from Virginia rather than from Arkansas. Reiterating that she had been in Arkansas on July 4, she stated that she did not remember what she had done on July 5. She testified that, in order to remember if she had left for Texas on July 6, she "would have to look at a calendar, the calendar that my mom wrote down all her notes from." H.M. said that Ms. Bush, the prosecutor, would have the calendar. The parties approached the bench, and the following colloquy ensued between Ms. Bush, the court, and Brown's attorney, David Bowden:

> MR. BOWDEN: Your Honor, they have a —
>
> THE COURT: Do you have that calendar?
>
> MS. BUSH: I have a calendar. It's our work product.
>
> MR. BOWDEN: No, she just stated that her mother made it and, Your Honor, we had asked for all materials and this has not been provided.

Ms. Bush: It's not part of our case file. This was made in preparation. It's our notes and her notes of just their recollections of when they moved.

Mr. Bowden: This was made in preparation for her daughter to be able to review it.

Ms. Bush: That's exactly right and it's our work product and you don't get my notes either.

Mr. Bowden: She didn't create it for purposes of litigation.

Ms. Bush: Yes, she did.

The Court: That's what it sounds like. Mr Bowden, do you have a motion or anything?

Mr. Bowden: Yes. Your Honor, I would move that we get a mistrial based on the fact that there has not been produced in accordance with Rule 17.1 of the Arkansas Rules of Criminal Procedure the materials that we have a right to expect and have asked for.

Ms. Bush: Your Honor, just like he doesn't get my notes from talking to the witness, he doesn't get my notes that were made specifically in preparation for examining this witness, and that is work product. It is not part of the case file.

The Court: I'm going to rule that it was work product. However, he's got a right to look at it if she relies upon it.

Ms. Bush: She has not relied upon it. She testified it was the 8th.

Mr. Bowden: She just testified she would have to look at it to remember.

Ms. Bush: That's right.

The Court: As a result of your asking her a question about it. I'll note your objection. I'm going to deny your motion.

MR. BOWDEN: Your Honor, may we have a copy of it to review?

MS. BUSH: No.

MR. BOWDEN: With a short recess to do so?

MS. BUSH: It's our work product, Your Honor. He's not entitled to that.

MR. BOWDEN: She stated that her mother completed this. We don't have anything other than the State's word that it's their work product.

MS. BUSH: Her mother is a potential witness as well, Your Honor. It was all done in preparation for trial.

THE COURT: Well, I'm ruling that it's work product at this time, Mr. Bowden. Let's move on.

On re-direct examination, H.M. testified, "My mother helped me construct a calendar of where I was in July and August of 2003. That was a very confusing time for my family during the course of a cross-country move." She further explained, "I was in several states at different times of that period of time. My mother apart from me and my father apart from me at certain times. It was hard for me to remember exactly where we were."

H.M.'s mother later testified, "I had a calendar that I had written out, a calendar of events that I had written out a week before we came down here in July." She denied ever sitting down with H.M. to go over anything or getting together with her on dates.

We now address the discovery violation alleged by Brown.[1] Our decision is governed by Rules 17.1(d) and 17.5 of Ark. R. Crim. P. (2006). Rule 17.1(d) states the following:

> Subject to the provisions of Rule 19.4, the prosecuting attorney shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge, posses-

[1] Although the State conceded at oral argument that the calendar was not a work product, its concession does not prohibit our own examination of the question.

> sion, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.

Rule 17.5, which governs matters not subject to disclosure under Rule 17.1, states:

> Work product. Except as provided in Rule 17.1(a)(i) and (iv), disclosure shall not be required of research or of records, correspondence, reports or memoranda to the extent that they contain the *opinions, theories or conclusions of the prosecuting attorney or members of his staff or other state agents.*

(Emphasis added.)

Brown argues that the work-product exception of Rule 17.5 does not apply because the calendar was apparently prepared by the complainant's mother and the complainant, who were not members of the prosecutor's staff. He asserts that the calendar was clearly important for the witnesses' impeachment, that the State knew of the calendar's existence and had it under the State's control at some point, and that the prosecution misrepresented this in response to Brown's motion to provide documents. He asserts that the calendar was "a potentially exculpatory written statement" by the complainant and that the State's denial of access to the calendar prejudiced his ability to present his case.

The State contends that the issue of a discovery violation is not preserved for our review because Brown failed to obtain a ruling regarding the calendar, or, alternatively, because he failed to demonstrate prejudice in its nondisclosure. The State argues that Brown did not ask to have the calendar examined *in camera* to enable the court to determine whether it was discoverable, that it was Brown's responsibility to request relief sufficient to preserve his objection for appellate review, and that the absence of the document itself prevents a meaningful review on appeal even if the document was discoverable. We find no merit to these arguments.

In response to Brown's pre-trial discovery request for exculpatory information, the State answered that no such items were in the State's file and that, if they did exist, the State did not seek to include them in the file and had no obligation to produce them. However, when the victim's trial testimony revealed the existence of the calendar that would help her remember the date that she left Arkansas, the State informed the court that it had the calendar but

that it was the prosecutor's work product. Brown moved for a mistrial based upon the fact that the calendar had not been produced in accordance with Rule 17.1. The court denied the motion, ruling that the calendar was a work product prepared in anticipation of litigation. Brown requested a copy of the calendar to review, noting H.M.'s statement "that her mother completed this" and arguing that nothing other than the State's word showed it to be their work product. The State responded that H.M.'s mother was a potential witness and that "it was all done in preparation for trial." In response to Brown's request to have a short recess to see a copy of the calendar, the court again ruled that it was a work product and instructed Brown's counsel to "move on."

First of all, we hold that the trial court erred in ruling at trial that the calendar was a work product. The victim testified that, in order to remember if she had been in Texas or Arkansas on a particular date, she would have to look at the calendar that her mother helped her to construct. Thus, the calendar represents a statement of the witness's belief about dates and does not fall within the work-product exception of Ark. R. Crim. P. 17.5, which applies only to the prosecution and its staff. Brown was not allowed to see how dates on the calendar corresponded with dates that he was hospitalized or that the victim's family was in another state. Thus, he was precluded from establishing a time line and making his argument that testimony of the State's key witnesses was not credible. The trial court erred in not finding the calendar discoverable under Rule 17.1 as exculpatory information regarding the offense charged.

We do not agree with the State's assertion that Brown failed to obtain a ruling sufficient to preserve this point on appeal. After the trial court denied his motion for a mistrial based upon the prosecutor's failure to disclose the calendar, Brown asked to examine it. The court's directive that he "move on," as shown in the colloquy printed above, operated as a denial of Brown's request to examine the undisclosed exculpatory document. We know of nothing further that the court was required to do to make clear its ruling that the calendar was the State's work product, to which Brown would be denied access.

The State asserts that the absence of the calendar in the record prevents our meaningful review of this point. While we do agree that the calendar is not in the record and, therefore, is

unavailable for our examination, Brown's inability to place the document into the record resulted from a combination of the State's failure to provide it to him before trial in compliance with the court's discovery order, the trial court's erroneous ruling at trial that the calendar was a work product, and the court's refusal to order the State to allow Brown to examine the calendar during a recess so that he could determine whether to proffer it for the record. We also know from the testimony presented that the calendar could have contained information possibly exculpatory to Brown. Therefore, we hold that the absence of the details of the information on the calendar does not prevent our review of this point on appeal.

The key to determining if a reversible discovery violation exists is whether an appellant was prejudiced by the prosecutor's failure to disclose. *Scroggins v. State*, 312 Ark. 106, 116, 848 S.W.2d 400, 405 (1993).[2] We note that the right of cross-examination includes the right to show that testimony is unbelievable, because such evidence can make the difference between conviction and acquittal. *Winfrey v. State*, 293 Ark. 342, 738 S.W.2d 391 (1987). Here, the calendar was important to Brown's attempts to establish a time line and to impeach the complainant and her mother. This information was not available to Brown otherwise. We hold that Brown was prejudiced by the prosecutor's failure to disclose the calendar. Therefore, the conviction is reversed and this case is remanded to the trial court for a new trial.

A full, fair, and public trial

Brown contends that the exclusion of family members from the courtroom during the victim's testimony denied his right to a

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[2] The dissent, focusing on the date that the calendar was created, incorrectly states that the discovery order "directed the State to produce documents written by the victim between the dates of July 1, 2003, to August 1, 2003." We again note the actual wording of the order, which was filed June 30, 2004:

> The complaining witness, H.M., is hereby ordered to provide to the Defense any diary, journals, notebooks, letters, photographs, drawings, notes, memoranda or any other document or writing composed by H.M. *relating to the facts of this case or to Defendant John H. Brown between the dates of July 1, 2003 and August 1, 2003* that she may have in her possession.

(Emphasis added.)

full, fair, and public trial. He asserts that he was supported at trial by his in-laws, whom he characterizes as the people who knew H.M. best, who did not believe her allegations, and who wanted to hear her testimony.

Both the United States and Arkansas Constitutions provide that a criminal defendant "shall enjoy the right to a speedy and public trial." U.S. Const., amend. 6; Ark. Const., art. 2, § 10 (1984). When a defendant's right to a public trial has been violated over his timely objection, prejudice need not be shown for reversal. *Taylor v. State*, 284 Ark. 103, 679 S.W.2d 797 (1984); *Sirratt v. State*, 240 Ark. 47, 398 S.W.2d 63 (1966). In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury. *Waller v. Georgia*, 467 U.S. 39, 46 (1984). In *Sirratt v. State*, *supra*, the supreme court set forth these purposes of a public trial:

> The guaranty of public trial has always been recognized as a safeguard against any attempt to employ the courts as instruments of persecution. And the common-law right had already, at the time of the Sixth Amendment's adoption, come to be regarded as an essential guaranty for this purpose. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power, not only as to gross abuses, but also minor ones, such as indolence or petty arbitrariness. Other benefits of publicity have been cited, however; for example, it has been suggested that witnesses may testify more truthfully because of the greater risk that false testimony might be exposed.

240 Ark. 47, 52, 398 S.W.2d 63, 66 (citing 21 Am. Jur. 2d 298, § 258).

Before H.M. took the stand at trial, the State requested the exclusion from the courtroom of two or three of her family members (specifically, a great-uncle and a grandmother) because the victim did not want to testify in front of them. Brown resisted the motion, noting that the victim's family were also his in-laws and that he had a right to an open trial before the public. He argued that there was no authority to exclude them and that H.M. might not want to "tell an untruth in front of her family members." The trial court granted the State's motion, noting that it had authority to insure that a witness testified free of intimidation and observing

"this is not intimidation of the sort that a witness would be afraid but it is intimidation of a different sort."

The State contends that exclusion of family members was permissible as a narrowly drawn, partial closure of the trial. It argues that Brown acquiesced in the court's ruling, and that witnesses, including children, should be able to testify in an atmosphere free from potential humiliation or intimidation. The State cites *Gadberry v. State*, 46 Ark. App. 121, 129, 877 S.W.2d 941, 945-46 (1994) and its summary of cases demonstrating special consideration of child victims who testify in court. We find little guidance from the facts in those cases, such as a very young child being allowed to sit on a relative's lap while testifying.

A defendant cannot agree with a trial court's ruling and later attack the ruling on appeal. *See, e.g.*, *Banks v. State*, 354 Ark. 404, 410, 125 S.W.3d 147, 151 (2003). Brown initially resisted the State's motion to exclude certain family members; when the trial court ruled in the State's favor, however, Brown stated, "Then I want the entire family excluded, Your Honor." Because Brown acquiesced in this exclusion of family members, and perhaps even invited it, we will not entertain his contention on appeal that the ruling was in error.

A recognized defense and a full and fair trial

As his fourth point, Brown contends that the rulings of the trial court denied his right to a recognized defense and to a full and fair trial. He complains that the trial court ruled as irrelevant and inadmissible all evidence that would have supported his defense of "a general denial based on a reckless and/or vindictive prosecution." He asserts that he was never allowed to ask questions about a rift within the family that preceded the alleged crime. He complains that the police interview of H.M., which occurred three weeks after the alleged crime, lasted only eighteen minutes; that the questioning was unprofessional; and that at least one experienced police officer thought that "her affect and demeanor, as well as that of her parents, was inappropriate" under the circumstances.

Brown points to the denial of his motion *in limine* to allow testimony by Lt. Earnest Whitten, head of the Internal Affairs Division of the Little Rock Department, as an expert witness in investigation and interrogation in cases of sexual abuse against children. The trial court ruled that the police investigation of the crime was not an issue, and it noted that it would not allow the

State's witnesses to testify regarding the alleged victim's credibility. Brown complains that the court "backpedaled" from its ruling, repeatedly allowing the State to make the point that Brown would not have been arrested had deputies not believed H.M. He asserts that the investigating officers were allowed to give their own self-serving versions and that he was at a disadvantage by having no witness to challenge their sloppy methods and conclusions.

The decision of whether to admit relevant opinion evidence rests in the sound discretion of the trial court, and its ruling will not be reversed absent an abuse of discretion. *Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998). Furthermore, there was no proffer of the testimony to be given by Whitten. We hold that the trial court did not abuse its discretion in denying the motion *in limine* to allow the testimony of Lt. Whitten as an expert witness.

Prosecutorial Misconduct

Brown contends as his fifth point on appeal that "the State engaged in prolonged, blatant, and repeated pattern of misconduct that it knew or should have known to be such as [would] inflame the passions of the jury against the defendant." Brown asserts that the prosecutor utilized H.M. as a political pawn and, further, that "what was probably intended to simply embarrass and harrass [Brown] turned into a witch hunt on the part of the prosecutor." He asserts that political revenge was behind the filing of charges and that the prosecutor's tactics rendered the proceeding a "trial ritual" rather than a fair contest.

The background of this case, as set forth under this point in appellant's brief, includes Brown's 1996 political race as the Republican nominee for Saline County Sheriff against his former boss, Sheriff Judy Pridgen. We here attempt to highlight the allegations he presents. Pridgen forced Brown's resignation as her chief deputy because of his desire to further investigate "the boys-on-the-track murder." Her attorney, George "Bucky" Ellis, threatened in 1996 to call Brown's integrity into question in court because Brown threatened a defamation suit against Pridgen; Ellis did so in the present case when he testified unfavorably about Brown's reputation. During the pre-trial period, a website that was maintained by Robert Herzfeld, the prosecuting attorney of Saline County, contained "press releases" with articles publicizing the

sexual assault charge against Brown and linking him with the antics of his wife, the former city treasurer of Shannon Hills, who pled guilty to embezzling city funds, was convicted of writing hot checks in Sherwood, and ultimately served time in the Arkansas Department of Correction. The website invited the general public to contact the prosecutor for more information.

Brown asserts that fraud was committed upon the court and the defense by the prosecutor's initial denial of the calendar's existence and its later claim of "work product." Further, he complains that a demonstrative aid manufactured by the State falsely summarized evidence and attempted to make him "look like an inveterate liar" because he claimed a longer career in law enforcement than was shown on CLEST (Commission on Law Enforcement Standards) forms. He asserts that the complainant had been coached beyond the allowable limits of witness preparation; that he and his witnesses were ridiculed, and witness Sheriff Phil Mask was wrongly investigated for giving testimony favorable to Brown; that police officers who testified for the State were wrongly allowed to testify that they arrested only people who were considered to be guilty; and that elicitation from the complaining witness about her belief that lying is a sin was an "appeal to religion" prohibited by Ark. R. Evid. 610.

Brown cites *Jackson v. Virginia*, 443 U.S. 307 (1979), for the proposition that prosecutorial misconduct exists when the denial of due process is so great "as to shock the conscience and turn the trial from a fair tribunal into a 'trial ritual.' " Brown asserts both that any of the violations he has raised require reversal and a new trial, and that the entire proceeding amounted to a denial of substantive and procedural due process under the federal and state constitutions. In its response to Brown's motion for a new trial, the State asserted that there was no prosecutorial misconduct at trial and that the constitutional claims were unfounded accusations that did not give rise to a new trial. The State essentially takes the same position on appeal.

It is rare that a prosecutor's appeal to the juror's passions is so great as to require reversal. *E.g., Muldrew v. State*, 331 Ark. 519, 522, 963 S.W.2d 580, 582 (1998). In considering grounds for a new trial, powers of the trial court are great and the latitude of discretion is broad. *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977). The circuit court has the discretion to grant new trials where it has reason to believe that the verdict resulted from excitement, passion, prejudice, or any factor other than a calm

consideration of the facts in evidence. *Id.* We will not reverse the trial court's decision on appeal unless there has been an abuse of discretion. *Id.*

Brown asks us to consider the politics that allegedly served as a background of this case, but we are unable to examine this issue without further research or citations to authority. Nor does Brown refer this court to any part of the record showing that defense witness Sheriff Mask was investigated for stating his favorable opinion of Brown. Therefore, we will not address those parts of his argument. *Kelly v. State*, 350 Ark. 238, 85 S.W.3d 893 (2002).

Regarding Brown's assertion that the prosecutor improperly used his website with "press releases" about Brown and his wife, the State correctly notes that a prosecutor has a duty to keep the public informed. Brown also asserts that the prosecutor's office stonewalled his request for any e-mails generated by the prosecutor's inviting the public to contact his office for further information regarding this case. However, over the State's objection, the trial court received into evidence Brown's faxed copy of an e-mail purportedly sent from the prosecutor's office. Upon hearing the court's denial of his request that other e-mails be produced, Brown said, "That's fine, Your Honor. We'll be asking via FOIA anyway." A party who received the relief requested has no basis for appeal. *Jones v. State*, 326 Ark. 61, 931 S.W.2d 83 (1996).

As for Brown's allegations that a demonstrative aid prepared by the State was inaccurate and improperly attacked his testimony, we will not address the merits of an argument where it is not shown that prejudice occurred. *Robinson v. State*, 348 Ark. 280, 72 S.W.3d 827 (2002). Brown was able to clarify through his own testimony why there were discrepancies in the forms that related to his employment in law enforcement. Furthermore, the trial court admonished the jury that the aid was prepared by the State, was used for demonstrative purposes only, and was not to be considered as evidence.

We do not condone all the actions of the prosecution in this case. However, we conclude that the instances summarized above, whether considered individually or collectively, do not arise to a level of misconduct such as to inflame the passions of the jury against the defendant. Furthermore, despite our holding in the second point that a discovery violation occurred when the pros-

ecutor failed to disclose the calendar, we do not agree with Brown that the failure to disclose constituted prosecutorial misconduct.

Reversed and remanded.

GRIFFEN and NEAL, JJ., agree.

PITTMAN, C.J., concurs.

BAKER and ROAF, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. I dissent from the majority's decision that appellant was prejudiced by the prosecutor's failure to disclose the calendar, and its holding that this failure requires that the conviction be reversed and the case remanded for trial. With this decision, the majority establishes a new standard of review for cases of alleged discovery violations: Prejudice is presumed when the evidence is unavailable for review due to a defendant's failure to proffer it.

As the majority correctly states, "[T]he key to determining if a reversible discovery violation exists is whether an appellant was prejudiced by the prosecutor's failure to disclose." *Scroggins v. State*, 312 Ark. 106, 116, 848 S.W.2d 400, 405 (1993). The majority then finds that the calendar was important to Brown's attempts to establish a time line and to impeach the complainant and her mother. However, the majority does not explain how the establishment of a time line, based on this calendar, would have been exculpatory or would have tended to negate guilt. As our supreme court has noted exact dates are not critical particularly where, as here, appellant's defense is denial.

> Generally, the time a crime is alleged to have occurred is not of critical significance, unless the date is material to the offense. *See* Ark. Code Ann. § 16-85-405(d) (1987); *Wilson v. State*, 320 Ark. 707, 898 S.W.2d 469 (1995); *Harris v. State*, 320 Ark. 677, 899 S.W.2d 459 (1995); *Fry v. State*, 309 Ark. 316, 829 S.W.2d 415 (1992). "That is particularly true with sexual crimes against children and infants." Id. at 317, 829 S.W.2d at 416. Any discrepancies in the evidence concerning the date of the offense are for the jury to resolve. *Wilson*, 320 Ark. 707, 898 S.W.2d 469 (citing *Yates v. State*, 301 Ark. 424, 785 S.W.2d 199 (1990)). In cases of rape, the evidence is sufficient if the victim gave a full and detailed accounting of the defendant's actions. *Id.* Moreover, where the defense is that the sexual acts never occurred and were entirely fabricated, the

> lack of exact dates are not prejudicial to the defendant. *See Harris*, 320 Ark. 677, 899 S.W.2d 459; *Fry*, 309 Ark. 316, 829 S.W.2d 415.

Martin v. State, 354 Ark. 289, 295-96, 119 S.W.3d 504, 508 (2003).

The majority's failure to explain why the establishment of a time line was relevant to appellant's defense or would have impeached the credibility of the complainant or her mother is understandable given that the calendar is not in the record for our review. Our supreme court has explained this difficulty in evaluating evidence not in the record:

> [T]he fact remains that this court cannot begin to review the merits of Appellant's argument on this point without having any clue regarding the nature of the [] evidence. It is well settled that it is Appellant's burden to bring forth a record that demonstrates error. *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567 (2003); *Lukach v. State*, 310 Ark. 38, 834 S.W.2d 642 (1992). In the absence of the controverted evidence, we simply cannot ascertain whether Appellant was prejudiced by the trial court's ruling. It is axiomatic that this court will not presume prejudice where the appellant offers no proof of it. *Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001); *Tucker v. State*, 336 Ark. 244, 983 S.W.2d 956 (1999).

Rollins v. State, 362 Ark. 279, 208 S.W.3d 215 (2005).

We have never presumed prejudice. The majority offers that the establishment of a time line would have helped impeach the victim and her mother. According to the majority, the denial to the defense of access to the calendar requires a new trial. While we do not know much about the calendar, we do know that: First, it was prepared the week before trial preparation in July 2004; Second, it was written by the victim's mother. Although the majority appears to accept appellant's argument that the trial court's discovery order was violated; in fact, the discovery order directed the State to produce documents written by the victim between the dates of July 1, 2003, to August 1, 2003[1]. I cannot fathom how the failure to produce a calendar with notes written by the victim's mother approximately a year after the events alleged in

[1] The majority reiterates the wording of the discovery order in a footnote contending that reading "between" in its adverbial form modifying "composed" is incorrect. Even

the felony information violates the court's order to produce documents written by the victim one year earlier contemporaneously with those events. Nor can I understand how notes prepared a year after the events would have been exculpatory or would have tended to negate appellant's guilt. Therefore, although I agree that the calendar was not the prosecutor's work product, I cannot agree that the State was required to provide the calendar pursuant to Rule 17.1(d) of the Ark. R. Crim. P. (2005).

The implication, and inference is required because the prejudice is never stated by the majority or the appellant, is that the non-contemporaneous notes on the calendar would allow appellant to impeach the victim and her mother as to the accuracy of the date of the events and that any discrepancy of the dates would bring into question the credibility of the witnesses. The problem with that premise is that the discrepancy of the date was evident in the two informations filed by the State. The first identified the date of the assault as July 15, 2003, while the second, filed in August 2004 after the July 2004 trial preparation and the creation of the calendar, identified the date of the assault as on or about July 1-15, 2003. Contradictions within the victim's trial testimony about the date of the assault were evident at the time of the trial. Appellant's counsel cross-examined both the victim and her mother about the creation of the calendar. Appellant moved for a mistrial because the State had not provided him with the calendar prior to trial, yet appellant never asked the court to review the calendar or proffered the calendar for appellate review. Nothing in the record, appellant's argument, nor the majority's opinion, identifies how a more detailed two-week time line would be exculpatory to the defendant. The majority's presumption that appellant was prejudiced because the creation of a two-week time line based upon a review of the calendar would allow appellant to impeach the witnesses' credibility concerning discrepancies, cannot support a finding of prejudice when the information and testimony identifying the discrepancies were before the jury.

In this case, appellant does not argue, and the majority does not explain, the prejudice appellant suffered by the alleged discovery violation. Appellant never asked the court to make the calendar a part of the record for appellate review, yet the majority finds that

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reading the phrase to mean writings telling about events or describing appellant between those dates, I still cannot see how this calendar with its notes could result in exculpatory evidence.

the omission of the non-contemporaneous calendar requires reversal. While I do not believe it is this court's role to engage in speculation as to the contents of the calendar, were I to engage in such speculation I still cannot conceive of a plausible situation where the contents of the calendar would be exculpatory or material to appellant's defense in this case.

I would affirm on all points.

ROAF, J., joins.

HOLLAND GROUP, INC.
and Royal & SunAlliance Insurance Company *v.*
Brenda HUGHES and Travelers Insurance Company

CA 05-1376 237 S.W.3d 120

Court of Appeals of Arkansas
Opinion delivered June 14, 2006

Anderson, Murphy & Hopkins, L.L.P., by: *Randy P. Murphy*, for appellants.

Kenneth E. Buckner, for appellee Brenda Hughes.

Phillip Cuffman, for appellee Travelers Ins. Co.

OLLY NEAL, Judge. In this appeal from the Arkansas Workers' Compensation Commission (Commission), appellants, Holland Group Incorporated and Royal & Sunalliance Insurance Company, argue that the Commission's decision to award appellee Brenda Hughes benefits was not supported by substantial evidence because her ulnar-neuropathy injury was not the major cause of her disability or need for treatment nor was it caused by rapid repetitive motion. In the alternative they argue that, even if the injury was compensable, it was the result of an aggravation of the June 21, 1999, injury rather than a recurrence. Appellees Brenda Hughes and Travelers Insurance Company maintain that the Commission's decision is supported by substantial evidence; however, Hughes has filed a cross appeal in which she asserts that the Commission's denial of her claim for a cervical injury was not supported by substantial evidence. We reverse and remand on direct appeal and affirm on cross appeal.

Hughes has been employed at Holland (formerly Binkley Industries) for over nine years. Her job entails working on a seat-rise jig, which is used to build small tractor-trailer parts. On June 21, 1999, Hughes sustained a compensable left-hand-carpal-tunnel injury and underwent surgery that was performed by Dr. P.B. Simpson, Jr. After a six-week recovery period, Hughes returned to Holland. She testified that, once she returned to the seat-rise jig, she began to experience pain again in her left arm and hand. The pain, she explained, was in her left arm and wrist and then went "all the way into my neck and shoulder." Thereafter, she sought treatment and an additional award of benefits.

At the hearing before the administrative law judge (ALJ), Hughes claimed that she sustained a compensable injury on February 28, 2003, for which she is entitled to reasonably necessary

medical treatment and temporary-total-disability benefits. Appellants maintained that Hughes did not sustain a compensable injury but argued in the alternative that, if she did, appellee Travelers Insurance Company rather than they would be liable for compensability because the February 28 incident would constitute a recurrence of the June 21, 1999, injury. Travelers responded that the new injury was an aggravation or a new injury; therefore, liability would rest with appellants. The ALJ determined that Hughes's February 28, 2003, injury was a recurrence for which Travelers was responsible and that Hughes was entitled to additional treatment and temporary-total-disability benefits. Travelers appealed to the Commission. After its de novo review, the Commission reversed the decision of the ALJ, instead finding that Hughes sustained a compensable ulnar nerve injury which became manifest while appellants were "on the risk"; that appellants were liable for reasonably necessary medical treatment; that Hughes did not sustain a compensable neck injury; and that Hughes did not prove she was entitled to temporary-total-disability benefits. It is from this decision that appellants and appellee/cross-appellant Hughes appeal.

In appeals involving claims for workers' compensation, our court views the evidence in a light most favorable to the Commission's decision and affirms the decision if it is supported by substantial evidence. *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 225 S.W.3d 361 (2006). Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Foster v. Express Personnel Servs.*, 93 Ark. App. 496, 222 S.W.3d 218 (2006). 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. *See Fayetteville Sch. Dist. v. Kunzelman*, 93 Ark. App. 160, 217 S.W.3d 149 (2005). Where the Commission denies a claim because of the claimant's failure to meet his burden of proof, the substantial evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Wallace, supra.* The Commission is not required to believe any witness, and it may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Brotherton v. White River Area Agency*, 93 Ark. App. 432, 220 S.W.3d 219 (2005). The Commission may accept or reject medical opinions and determine their medical soundness and probative force. *Id.*

Appellants argue first that the Commission's decision was not supported by substantial evidence because Hughes's injury was neither the major cause of her disability nor the result of rapid repetitive motion. In the alternative, appellants contend that, if the injury was compensable, it was an aggravation of appellee's old injury, for which appellee Travelers would ultimately be liable. We need not reach appellants' argument as to whether or not Hughes's injury was the major cause of her disability or whether it was an aggravation or a recurrence because we hold that the Commission's decision that her injury was the result of both rapid and repetitive motion is not supported by substantial evidence.

Arkansas Code Annotated section 11-9-102(4)(A) (Repl. 2002) defines a compensable injury as:

> (i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence;
>
> (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:
>
> > (a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition;
> >
> > (b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2002). A claimant seeking workers' compensation benefits for a gradual-onset injury must prove by a preponderance of the evidence that (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and (3) the injury was a major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(4)(A)(ii) and (E)(ii) (Repl. 2002).

In analyzing whether an injury is caused by rapid repetitive motion, the standard as set out in *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W.2d 644 (1988), is a two-pronged test: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. As a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. *Westside High Sch. v. Patterson*, 79 Ark. App. 281, 86 S.W.3d 412 (2002). Arguably, even repetitive tasks and rapid work, standing alone, do not satisfy the definition; the repetitive tasks must be completed rapidly. *Id.* The issue of whether an injury meets the rapid repetitive motion requirement will ordinarily be a question of fact, not one of law; however, although a question of fact, the Commission must apply the appropriate law to the evidence to reach a conclusion. *Id.*

Here, the Commission's finding of rapid and repetitive motion was based partly on evidence from Dr. Frazier that Hughes's duties included "assembly line" work involving "repetitive grasping or lifting activities," which she might elect to leave for a "less repetitive type activity." The Commission also relied on Hughes's credible and extensive testimony concerning her duties as a welder. Hughes testified that:

> When working on the seat-rise jig, we have two side plates. We put the bottom plate in the jig, then take two side plates and I tack them in, and I've got two wire pads that I put one in the front and one in the back. I then take and mash the jig together, then I take the hammer and beat it until I know its right, and then I take the welding machine and tack one, two, three, one on each side and the bottom on the front and back. I do all this with my hands. I then turn the jig around and tack the back part, then when I turn it back around, I take it out. There are different sizes of jigs. The heaviest size is 0-8's which I assume would weigh approximately five to ten pounds. I do this kind of work all day, every day.

In determining whether a worker's injury was the result of repetitive and rapid motion, the appellate courts have required some showing of how rapidly the repetitive actions were performed. *See Hapney v. Rheem Mfg. Co.*, 342 Ark. 11, 26 S.W.3d 777 (2000) (Commission's denial of benefits reversed where movements repeated every twenty seconds); *Parker v. Atlantic Research Corp.*, 87 Ark. App. 145, 189 S.W.3d 449 (2004) (where the Commission found that appellant's job duties fell within the meaning of rapid repetitive motion, considering the multiple tasks that she was required to perform at high volume and with quick

and fast movements in a repetitive nature over the course of a sometimes ten-to-twelve hour shift, six to seven days a week, there was substantial evidence to support the Commission's finding that appellant's job duties required rapid repetitive motion); *Boyd v. Dana Corp.*, 62 Ark. App. 78, 966 S.W.2d 946 (1998) (a series of repetitive motions, performed 115 to 120 times per day separated by periods of only 1.5 minutes, constituted rapid motion within the meaning of the statute); *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998) (movements repeated every fifteen seconds found to be sufficiently "rapid").

In the instant case, although Hughes's testimony undoubtedly evidences that her work activities were repetitive, there is no evidence in this record to indicate that these activities were performed rapidly. Therefore, as reasonable minds could not reach the decision of the Commission, substantial evidence does not support its decision, and we are compelled to reverse and remand.

On cross appeal, Hughes argues that the Commission erred in determining that her neck injury was not compensable. She argues that her neck injury was the result of the specific incident that occurred on February 28, 2003. In the alternative, however, Hughes argues that her neck injury was the result of rapid and repetitive motion, an exception to the requirement of specific time and place. There is no merit in either of these assertions.

Hughes's own testimony reflected that, on February 28, 2003, every time she would get ready to put a part in the jig, she would experience pain shooting up her arm. The pain, according to Hughes, was different that day because it traveled up to her neck and shoulders. This testimony did not identify a specific incident occurring nor did Hughes tell her treating physician that her pain was associated with any particular, specific incident. Thus, her own words belie the argument that the injury was caused by a specific, identifiable incident. Furthermore, because we have determined that there is no evidence that Hughes's work activities were rapid, her neck injury did not result from a gradual-onset injury.

Reversed and remanded on direct appeal; affirmed on cross appeal.

GLOVER and ROAF, JJ., agree.

Ricky MASTERS *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 05-915 237 S.W.3d 125

Court of Appeals of Arkansas
Opinion delivered June 14, 2006

Glen Hoggard, for appellant.

Gray Allen Turner, Office of Chief Counsel, Ark. Dep't of Human Servs., for appellee.

ANDREE LAYTON ROAF, Judge. Ricky Masters appeals the trial court's order adjudicating his son D.M. as dependent-neglected. On appeal, he argues (1) that the trial court erred in denying his motion to dismiss the case because of an untimely probable cause hearing and (2) that the trial court's finding that he posed a danger to D.M. was not supported by sufficient evidence. The appellee, Arkansas Department of Human Services (DHS), has supplemented the record in this case with a subsequent order terminating Ricky's parental rights to D.M. on grounds that were not the

basis of either the probable cause determination or adjudication order. Because Ricky has not appealed from the termination order, we dismiss this appeal as moot.

Because we are dismissing the appeal, a detailed recitation of the facts is not necessary. DHS initiated a dependency-neglect case in February 2005 regarding B.E. and D.M., Jennifer and Ricky Masters' two children, after Ricky was accused of sexually abusing B.E., Jennifer's daughter by a previous marriage. D.M. is the Masters' son. A probable cause hearing was held on March 1, 2005. Ricky moved for a dismissal because the probable cause hearing was held one day outside the required five business days after the emergency order was signed. The trial court denied the motion to dismiss. At the conclusion of the hearing, the trial court found probable cause for DHS to take custody of both children. On March 8, there was a hearing on DHS's motion to stop Ricky's visitation with D.M. because he had confessed to molesting B.E. The trial court noted that it was dealing with a "confessed sexual offender" and that it wanted to protect D.M. until it could confirm that he could be safe. The trial court allowed supervised visitation at DHS.

At the dependency-neglect hearing on April 24, 2005, Ricky renewed his motion to dismiss on the basis that the probable cause hearing was not held within the statutorily-mandated time frame. The trial court again denied the motion. At the conclusion of the hearing, the trial court ordered that placement of D.M. and B.E. continue with the maternal grandparents and adjudicated both children dependent-neglected.

Ricky appeals only from the April 28, 2005 adjudication order. However, after the case was filed with this court, DHS moved to supplement the record and to dismiss the appeal as moot. This court granted the motion to supplement the record with an order terminating Ricky's parental rights to D.M. that was filed on September 8, 2005. In this regard, DHS asserts that a decision in the present case would not change the legal standing of the parties because the termination of Ricky's parental rights was not based on D.M. previously being found dependent-neglected at the adjudication hearing. We agree.

A case is moot when any decision rendered by this court will have no practical legal effect on an existing legal controversy. *Richardson v. Ark. Dep't of Human Servs.*, 86 Ark. App. 142, 165 S.W.3d 127 (2004). Here, the trial court issued an order terminat-

ing Ricky's parental rights to D.M. based on the finding that Ricky had been sentenced in a criminal proceeding to a term of imprisonment that constituted a substantial period of D.M.'s life. Ricky did not appeal from this order; therefore, any decision that this court makes in the instant appeal regarding the timeliness of the probable cause hearing would have no legal effect on an existing controversy.

Ricky argues that the issue is not moot because the juvenile code's structure and sequence requires a dependent-neglected adjudication as a prerequisite for the termination of parental rights and that the juvenile code expressly sets a dependent-neglected adjudication as a necessary condition for the termination grounds pled by DHS in this case.[1] Ricky, however, has not appealed the termination order. A reversal of the adjudication order based on the fact that the probable cause hearing was held one day late would not change the findings of fact in this case regarding the termination decision. Moreover, it is not the adjudication order that Ricky takes issue with, it is the probable cause hearing, and probable cause orders are not appealable. Ricky's appeal, therefore, is moot.

Appeal dismissed.

GLOVER and NEAL, JJ., agree.

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[1] Arkansas Code Annotated section 9-27-341(b)(3)(B)(viii) was amended in 2005 so that the adjudication requirement was removed from this ground for termination, which is that the parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the juvenile's life. There is no longer a requirement that other conditions in either (b)(3)(B)(i) or (ii) be met along with this condition. The 2005 amendment took effect on August 12, 2005, before the termination order was entered in this case on September 8, 2005. Therefore, the 2005 version of this statute governs this case and Ricky's assertion that a dependent-neglected adjudication is required by § 9-27-341(b)(3)(B)(viii) is wrong. *See Moore v. Ark. Dep't of Human Servs.*, 333 Ark. 288, 969 S.W.2d 186 (1998) (holding that the statute in effect at the time the termination order is entered is controlling).

Ann C. DONOVAN *v.* STATE of Arkansas

CA 05-655 237 S.W.3d 484

Court of Appeals of Arkansas
Opinion delivered June 21, 2006

Doug Norwood and *Susan Lusby*, for appellant.

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

SAM BIRD, Judge. This appeal involves two orders of contempt against attorney Ann Donovan for failing to appear on behalf of her client in the Madison County Circuit Court. In the first order, entered on November 18, 2004, the circuit court sen-

tenced Donovan to one day in jail and a $50.00 fine, both suspended "conditioned on her not having any similar occurrences." In an order entered on March 11, 2005, the court found Donovan guilty of contempt based upon a second failure to appear. She was sentenced to another day in jail and another $50.00 fine, and her 2004 suspended sentence was revoked. She was ordered to report to the Madison County sheriff to serve her two days in jail and pay her two $50.00 fines. Donovan filed a motion for new trial, which was deemed denied by the trial court on April 14, 2005.

Although Donovan does not appeal the contempt order of November 18, 2004, she appeals the order of March 11, 2005, and the denial of her motion for new trial. She raises two points, contending that the trial court erred 1) in executing her suspended sentence for the court's prior finding that she was in contempt, and 2) in finding her guilty of criminal contempt of court without advising her of her due process rights under the United States and Arkansas Constitutions.

The State responds that Donovan's arguments are moot because, in the absence of a stay or a request for a stay, the new trial she seeks will not undo the penalty she has apparently already endured. Alternatively, the State responds that the points now raised are not preserved for review. We do not agree that Donovan's arguments are moot. The propriety of a contempt order is not moot when it is not apparent from the record that a fine has been paid. *Taylor v. State*, 76 Ark. App. 279, 64 S.W.3d 278 (2001) (citing *Central Emergency Med. Serv., Inc. v. State*, 332 Ark. 592, 966 S.W.2d 257 (1998), and *Minge v. Minge*, 226 Ark. 262, 289 S.W.2d 189 (1956)). It is not apparent from the record before us that Donovan's fine has been paid; therefore, her case is not considered moot.

For the reasons explained herein, we hold that the first point on appeal can now be raised but the second point is not preserved for our review. We reverse on the first point because the trial court erred in executing Donovan's suspended sentence.

Procedural History

On November 9, 2004, Donovan appeared pro se at a show-cause hearing to determine whether she should be held in contempt of court for failure to appear at her client's criminal trial on October 12, 2004. The trial court's subsequent order of November 18, 2004, reflected the court's finding that Donovan

was in contempt as well as the court's sentence to the $50.00 fine and the day in jail, both suspended.

Donovan appeared pro se before the trial court at a second contempt hearing on March 8, 2005. This hearing was conducted to determine whether she should be held in contempt of court for failing to appear for a trial date in her client's behalf on January 11, 2005. Donovan testified to the court as follows:

> [O]n the fourteenth of December I called the court and asked because the crime lab was still not in, that this matter be continued[.] I was told it would be continued to January, to the January setting[.] I didn't know what date it was and I don't believe the Court did at that point in time. On the — I talked to my client on the fourteenth. . . . I was never apprised of the January 11 date by my client.

Donovan further testified that she had no actual knowledge of the January 11 court date, that she would have made arrangements to attend had she known of the specific date, and that her client knew of the January 11 date because he had kept in touch with a co-defendant.

The trial court, ruling from the bench, found Donovan in contempt of court. Noting her testimony that she had practiced before the court for many years, the court found that she was aware of the pattern of moving cases to the next court date, which was regularly the second Tuesday of the following month. The court's subsequent order of March 11, 2005, reflects the following:

> Based on the Court records which show that [Donovan] and her client, Cheyenne B. Evans, Sr. had notice of the January 11, 2005, trial date, Defendant Cheyenne B. Evans, Sr. appeared at the appropriate time but the Respondent Ann Donovan did not appear, nor did she contact this Court. Also in the recent past, Ms. Donovan has on more than one occasion failed to be in Court or have a valid reason for her absence.
>
> This Court finds that Attorney Ann Donovan is in contempt of this Court by failing to appear for her client's trial, and orders her to pay a $50 fine and to serve one (1) day in the Madison County Jail, and revokes the previous suspended sentence in the Order of November 9, 2004, that on March 12, 2005, at 8:00 a.m. she shall turn herself in to Madison Sheriff's Office to serve her Two (2) day jail sentence and pay her $100.00 fine.

1. *Whether the trial court erred in executing a suspended sentence for a prior finding that Donovan was in contempt of court*

In her first point, Donovan contends that the trial court erred in executing the suspended sentence it had imposed in the November 2004 order. The State responds that this issue is not preserved for appellate review because Donovan did not object below. In her reply brief, Donovan answers that the point can be raised because it involves an illegal sentence, an issue that can be raised for the first time on appeal. We agree that the execution of the suspended sentence was illegal and therefore can now be raised.

Citing *J.M. Harrison v. Terry Dairy Products Co., Inc.*, 225 Ark. 953, 287 S.W.2d 472 (1956), Donovan argues that the execution of her suspended sentence should be reversed as a matter of law. She asserts that a sentence is remitted when a court imposes a suspended sentence upon one whom it has just found guilty of contempt of court, and the court may not later revoke the suspended sentence as it can in an ordinary criminal case.

Our supreme court has noted the apparent lack of authority for a trial court to indefinitely suspend sentences in contempt cases. *Id.* (citing *Stewart v. State*, 221 Ark. 496, 254 S.W.2d 55 (1953)). Here, jail time and a fine were assessed and suspended by the trial court's order of November 18, 2004, but no time period was given for the suspension. We hold that the trial court erred in ordering this indefinite suspension.

Furthermore, Donovan's one-day suspended sentence, entered by the trial court's order of November 18, 2004, expired on November 19, 2004. A sentence is imposed when a court pronounces a fixed term of imprisonment as opposed to simply specifying a definite period of probation, and the probationer can be required to serve only the remainder of the time imposed. *Lyons v. State*, 35 Ark. App. 29, 813 S.W.2d 262 (1991); *Gautreaux v. State*, 22 Ark. App. 130, 736 S.W.2d 23 (1987); *see also* Ark. Code Ann. § 5-4-307 (Repl. 2006). Thus, on March 11, 2005, there was no remainder of the jail time previously imposed, and the trial court erred as a matter of law in executing the suspended sentence on that date.

We reverse and dismiss the execution of Donovan's suspended sentence for the one-day sentence to jail and the $50.00 fine that had been imposed on November 18, 2004.

2. *Whether the trial court erred in finding Donovan guilty of criminal contempt without advising her of her due process rights under the United States and Arkansas Constitutions*

In this point on appeal, Donovan requests that we reverse and dismiss the trial court's second order of contempt, entered on March 11, 2005. Donovan contends that she was not advised of her due process rights under the United States and Arkansas Constitutions, including the rights to notice of the charge against her, to a jury trial, to the presumption of innocence, and to assistance of counsel. She acknowledges being served with an order to show cause and notice, but she argues that it was not specific about why she was being charged with contempt. She asserts that she was not informed about any of her constitutional rights or potential penalties for the charge, nor of her right to an attorney and to the appointment of an attorney should she not be able to afford one. She also asserts that she was put in the position of having to show the court why it should not find her in contempt rather than having the State prove that she was guilty of contempt beyond a reasonable doubt. Finally, Donovan asks that our supreme court "reconsider and expand its own rulings regarding the right to a jury trial for purposes of determining the applicability of the constitutional right to a jury trial under the Arkansas Constitution."

Criminal penalties may not be imposed on an alleged contemnor who has not been afforded the protections that the Constitution requires of criminal proceedings. *Fitzhugh v. State*, 296 Ark. 137, 752 S.W.2d 275 (1988). The Due Process Clause, as applied in criminal proceedings, requires that an alleged contemnor be notified that a charge of contempt is pending against him and be informed of the specific nature of that charge. *Id.* If the failure to comply with a judge's order is indirect contempt, that is, outside of the trial judge's presence, the alleged contemnor is entitled to the due process protections of notification of the accusation and a reasonable time to make a defense. *Ivy v. Keith*, 351 Ark. 269, 92 S.W.3d 671 (2002). Before a person can be held in contempt for violating a court order, the order must be definite in its terms, clear as to what duties it imposes, and express in its commands. *Id.* In *Perroni v. State*, 358 Ark. 17, 186 S.W.3d 206 (2004), our supreme court noted, "[T]o date, this court has only held that due process requires, in criminal contempt proceedings, that an alleged contemnor be notified that a charge of contempt is

pending against him and be informed of the specific nature of that charge." *Id.* at 29, 186 S.W.3d at 214 (citing *Fitzhugh v. State*, *supra*).

Our supreme court has repeatedly observed that an objection first made in a motion for new trial is untimely. *Lee v. Daniel*, 350 Ark. 466, 91 S.W.3d 464 (2002). The *Lee* court explained:

> First, we point out that, when a motion for new trial has been deemed denied in accordance with Ark. R. App. P.—Civ. 4(b)(1), the only appealable matter is the original judgment or order. *See Monk v. Farmers Ins. Co.*, 290 Ark. 38, 716 S.W.2d 201 (1986). This court has also repeatedly held that an objection first made in a motion for new trial is not timely. For example, in *Warnock v. Warnock*, 336 Ark. 506, 988 S.W.2d 7 (1999), this court declined to reach an equal protection argument, holding that it would not address a constitutional issue if it was not brought to the trial court's attention for a ruling during trial or at some point prior to the entry of final judgment. In *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978), this court noted that the reason for requiring an objection before the trial court is to discourage "sandbagging" on the part of lawyers who might otherwise take a chance on a favorable result, and subsequently raise a constitutional claim if the gamble did not pay off. *Selph*, 264 Ark. at 204, 570 S.W.2d 256. *See also Wilson v. Wilson*, 270 Ark. 485, 606 S.W.2d 56 (1980); *Hodges v. State*, 27 Ark. App. 154, 767 S.W.2d 541 (1989) (allowing a party to raise an objection for the first time in a motion for new trial would give them "license to lie behind the log," waiting to see if they obtain an adverse verdict before complaining about any alleged irregularities).

Lee, 350 Ark. at 476–77, 91 S.W.3d at 470–71. *See also Ivy v. Keith*, 351 Ark. at 282, 92 S.W.3d at 679 (refusing to consider constitutional claims not raised to the trial court that an attorney found in criminal contempt was deprived of due-process rights to counsel and a jury trial and that the burden was impermissibly shifted); *Hodges v. Gray*, 321 Ark. 7, 18, 901 S.W.2d 1, 6 (1995) (refusing to consider lack-of-notice and opportunity-to-defend claims in a contempt appeal when they were not raised below).

Here, the contempt order of March 11, 2005, made no mention of constitutional issues, nor, insofar as shown in the abstract, were any constitutional arguments raised to the trial court. It was only in the motion for a new trial, filed on March 15, 2005, that Donovan claimed that she had been denied her consti-

tutional rights with regard to the contempt proceeding. Because her claims were not raised to the trial court until being presented in the motion for new trial, they are not preserved for appellate review. We therefore affirm the second conviction of contempt, entered on March 11, 2005.

Reversed in part and affirmed in part.

NEAL and BAKER, JJ., agree.

Bradley Ray WILSON *v.* STATE of Arkansas

CA CR 05-1013 237 S.W.3d 473

Court of Appeals of Arkansas
Opinion delivered June 21, 2006

Stanley D. Christopher, for appellant.

Mike Beebe, Att'y Gen., by: *Nicana Corinne Sherman*, Ass't Att'y Gen., for appellee.

OLLY NEAL, Judge. On February 14, 2005, appellant Bradley Wilson entered a conditional plea of guilty admitting guilt to two counts of residential burglary, one count of theft of property valued in excess of $2500, and one count of theft of property valued in excess of $500. Appellant also admitted that he was a habitual offender with two or more felonies. He was sentenced to serve fifty years in the Arkansas Department of Correction. Pursuant to Rule 24.3 of the Arkansas Rules of Criminal Procedure, appellant preserved his right to appeal the trial court's denial of his motions to suppress the evidence against him. On appeal, appellant argues that the trial court erred in denying his motion to suppress evidence obtained as a result of involuntary statements made by appellant after he was informed that he was not entitled to an attorney. He also argues that the trial court erred in denying his motion to suppress evidence obtained as a product of involuntary statements made by appellant based upon false promises of leniency by law enforcement personnel. We affirm.

The facts of this case are as follows. On August 17, 2004, the Saline County Sheriff's Department took appellant into custody for a parole violation. While in custody, appellant was advised of his *Miranda* rights and he signed a consent form. A detective attempted to interview appellant; however, appellant refused to speak to the detective until after the tape in the detective's recorder ran out. Appellant then indicated that he had knowledge

concerning several burglaries that had occurred in Grant, Pulaski, and Saline Counties. Appellant indicated that he would cooperate in exchange for a deal.

The detective arranged a meeting for the following day with John McQuary, who was Saline County chief deputy prosecutor at the time. Appellant's mother, Shirley Beard, and two detectives were also present at the meeting. During the meeting, McQuary informed appellant that he would not make any deals or promises but that he would take into consideration any help appellant could provide in recovering the stolen property. McQuary also indicated that he would inform the Grant and Pulaski County prosecuting attorneys that appellant was cooperating. When McQuary refused to put an agreement in writing, Ms. Beard inquired about obtaining an attorney for appellant. In response to Ms. Beard's inquiry, McQuary allegedly replied that appellant had yet to be charged with anything and that appellant could not be appointed an attorney until after he was charged. Thereafter, appellant assisted all three counties with their resulting burglary investigations.

Appellant pleaded guilty to burglary charges in both Pulaski and Saline counties. On September 27, 2004, appellant was charged, in Grant County, with two counts of residential burglary, theft of property with a value in excess of $2500, theft of property with a value in excess of $500, and being a habitual offender with two or more felonies. Appellant moved to suppress the evidence against him. He argued that the trial court should suppress any evidence that was obtained as a result of involuntary statements made after promises of leniency. Appellant also argued that the trial court should suppress any evidence that was obtained as a result of involuntary statements made after he was informed that he was not entitled to an attorney. The trial court denied appellant's motion, finding that appellant never invoked his right to counsel and that appellant was in no way coerced by promises of leniency. From that decision, appellant now brings this appeal.

In reviewing a trial court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Swan v. State*, 94 Ark. App. 115, 226 S.W.3d 6 (2006). The credibility of witnesses who testify at a suppression hearing about the circumstances surrounding the appellant's custodial statement is for the trial judge to determine, and we defer to

the superior position of the trial judge in matters of credibility. *See Otis v. State*, 364 Ark. 151, 217 S.W.3d 839 (2005).

In his first argument on appeal, appellant asserts that the trial court erred when it failed to suppress evidence obtained as a result of involuntary statements made by appellant after being informed that he was not entitled to an attorney. A custodial statement is presumptively involuntary; it is the State's burden to prove by a preponderance of the evidence that a custodial statement was given voluntarily and was knowingly and intelligently made. *Knight v. State*, 62 Ark. App. 230, 971 S.W.2d 272 (1998). In determining whether a statement is voluntary, the reviewing court makes an independent review of the totality of the circumstances and will not reverse unless the trial court's findings are clearly against the preponderance of the evidence. *Stephens v. State*, 328 Ark. 81, 941 S.W.2d 411 (1997). There are two components to the totality of the circumstances test for determining the voluntariness of a custodial statement. *Id.* First, the statements of the interrogating officers are examined. *Id.* Second, the vulnerability of the defendant is considered, weighing such factors as age, education, intelligence, repeated or prolonged nature of questioning, delay between receiving *Miranda* warnings and giving a confession, length of detention, use of physical punishment, and the defendant's physical and emotional condition. *Id.*

In the case at bar, the testimony at the suppression hearing established the following. Detective Randy Gibbons of the Saline County Sheriff's Department testified that appellant was taken into custody on August 17, 2004. He said that appellant was informed of his *Miranda* rights and that appellant signed a consent form. While attempting to interview appellant, Detective Gibbons learned that appellant was a suspect in several burglaries. When appellant indicated that he wanted a deal in exchange for his cooperation, Detective Gibbons arranged for appellant to meet with McQuary. Detective Gibbon testified that, during his interview with appellant, appellant never asked for an attorney. He recalled that, during the meeting with McQuary, appellant's mother requested an attorney on his behalf and that McQuary informed them that "when he was charged with anything he would go to court and he could be appointed an attorney or she could get him an attorney if he wanted an attorney."

Shirley Beard, appellant's mother, testified that, during the meeting with McQuary, she requested an attorney for her son. She

said that McQuary informed her that appellant had not been charged with anything and that he could not get an attorney appointed until after he was charged.

Appellant testified that, during his lifetime, he had been interviewed by the police approximately four to six times and that, as a result, he had signed *Miranda* warnings four to six times. He stated that he basically understood his *Miranda* rights. Appellant also testified that he had been to prison three times. Appellant said that he asked Detective Gibbons for an attorney during the first three days of his being taken into custody. He said that, during the meeting with McQuary, his mother requested an attorney for him. He said that they were told he could not have an attorney because he had yet to be charged with anything.

John McQuary testified that, in August 2004, he was the Chief Deputy Prosecuting Attorney for Saline County. He recalled meeting with appellant and Ms. Beard on August 18. He said that, at the time, appellant was being held on a parole hold and that appellant had not been arrested on any breaking or entering charges. During his testimony, McQuary stated:

> I do not remember his mother requesting an attorney at all. I remember speaking to his mother after we had spoken with [appellant]. This was outside. And I don't remember the full conversation at all on it. But I do know I do not remember her requesting an attorney for her son at all. Number one, it would have caused me enough hesitancy that I think that I would have remembered that even though she's not the one that would need to request an attorney in that situation.

He stated that, during the meeting, appellant did not appear to have any mental infirmities that would keep him from making decisions regarding his own welfare.

We conclude that, although appellant testified that he first requested an attorney during the first couple of days of his being taken into custody, the trial court was not required to believe appellant's testimony. It has been said on numerous occasions that the trial judge is not required to believe the testimony of any witness, particularly that of the accused since he or she is the person most interested in the outcome of the proceedings. *Bunch v. State*, 346 Ark. 33, 57 S.W.3d 124 (2001).

As to what occurred during the meeting with McQuary, Ms. Beard and McQuary gave conflicting testimony regarding whether

or not Ms. Beard asked for an attorney on her son's behalf. The trial court found that appellant never personally invoked his right to counsel. It is well settled that we defer to the credibility determinations made by the trial judge. *See Swan v. State*, *supra*. Furthermore, the right to an attorney is a personal right. *Scott v. State*, 298 Ark. 214, 766 S.W.2d 428 (1989); *Suire v. State*, 18 Ark. App. 166, 712 S.W.2d 317 (1986). A third party may not invoke a defendant's personal right to an attorney. *See U.S. v. Scarpa*, 897 F.2d 63 (2d Cir. 1990) (holding that once a defendant waived his constitutional rights, those rights could not be invoked by a third party).

Appellant also argues that the trial court erred when it failed to suppress evidence obtained that was the result of involuntary statements made by appellant following false promises of leniency. A statement induced by a false promise of reward or leniency is not a voluntary statement. *Pilcher v. State*, 355 Ark. 369, 136 S.W.3d 766 (2003). When a police officer makes a false promise that misleads a prisoner, and the prisoner gives a confession because of that false promise, then the confession has not been made voluntarily, knowingly, and intelligently. *Roberts v. State*, 352 Ark. 489, 102 S.W.3d 482 (2003). In deciding whether there has been a misleading promise of reward or leniency, we view the totality of the circumstances and examine, first, the officer's statement and, second, the vulnerability of the defendant. *Id.*

If, during the first step, we decide that the officer's statements are unambiguous false promises of leniency, there is no need to proceed to the second step because the defendant's statement is clearly not voluntary. *Winston v. State*, 355 Ark. 11, 131 S.W.3d 333 (2003). If, however, the officer's statement is ambiguous, making it difficult for us to determine if it was truly a false promise of leniency, we must proceed to the second step of examining the vulnerability of the defendant. *Id.* Factors to be considered in determining vulnerability include: 1) the age, education, and intelligence of the accused; 2) how long it took to obtain the statement; 3) the defendant's experience, if any, with the criminal-justice system; and 4) the delay between *Miranda* warnings and the confession. *Id.*

Detective Gibbons testified that each time appellant was interviewed he was reminded of his *Miranda* rights. He said that, when appellant indicated he wanted a deal, he told appellant he would "help him as much as I can." He said that, when he informed McQuary that appellant wanted a deal, McQuary in-

formed appellant that he would not make any deals or promises and that he would only take into consideration any help appellant could provide in recovering the stolen property. Detective Gibbons recalled McQuary telling appellant that he would let the prosecutors in the other counties know that appellant was cooperating and that he would talk to the other prosecutors to "see if they could lump them all together." He said that McQuary was not specific in what he would do in exchange for appellant's cooperation. He stated that McQuary did lay out what appellant could be tried for and his possible sentence if found guilty.

Detective Robert Byrd of the Grant County Sheriff's Department testified that he came in contact with appellant on August 18 at the Saline County Criminal Investigation Division. He said that, prior to talking to appellant, he confirmed that appellant had been advised of his *Miranda* rights. He said that, during his talk with appellant, he informed appellant that he was a suspect in several burglaries in Grant County. He said that appellant indicated that he had knowledge about the burglaries but did not admit that he had any involvement in the burglaries. Detective Byrd testified that he did not employ threats or coercion to get appellant to talk. He said that he talked with appellant again on August 20. He said that, prior to having appellant identify the homes he had burglarized, he confirmed that appellant had been made aware of his *Miranda* rights. Detective Byrd denied making any promises of leniency in exchange for appellant's cooperation. He also denied employing any threats.

Ms. Beard testified that appellant was thirty years old, able to read and write, and able to make his own decisions. She recalled asking what would occur if appellant cooperated and that one of the detectives replied that appellant would get a better deal. She said that she asked McQuary to put something down on paper but that he refused and said that appellant would spend less time incarcerated.

Appellant testified that he understood that he did not have to talk to the police officers. He said that, during his meeting with McQuary, McQuary informed him how much time he could receive and said that, if appellant cooperated, he would receive less time. He also said that McQuary informed him that, if he cooperated with the surrounding counties, he could serve his time concurrently. Appellant testified that McQuary refused to put anything in writing, but he believed that they reached an agreement where, in exchange for appellant's cooperation, McQuary

would see that appellant served one sentence and that McQuary would talk to the prosecuting attorneys in Grant and Pulaski counties. He believed that an agreement between him and Saline County would also bind Grant County. Appellant did not remember Detective Byrd making any promises of leniency.

During his testimony, John McQuary stated the following:

> I think he was well aware of which avenues are available to defendants. Otherwise, he wouldn't have known to say, hey, I want a prosecutor down here, you know, right now because only defendants that have been through that before know that it's the prosecutor is [sic] the only one that can, you know, lay it on the line and it's held to. So yeah, I mean, [appellant] had spent most of his time in prison or I think he also had some juvenile as well. So he knows the judicial system and knows law enforcement.

McQuary further testified that, when he was notified that appellant wanted a deal, he informed the officers that "I don't make any kind of deals whatsoever on the front end." He said that he never indicated to appellant that he had the authority to bind any other district. He testified that he told appellant the following:

> I told him . . . that I knew Eddy Easley and I also knew Larry Jegley, and that if, in fact, he assisted all different [sic] law enforcement agencies that I would contact both Eddy Easley, Larry Jegley, and, at the time I was still working down in Saline [C]ounty, and that we would see if we could not wrap everything up for him before he went down to the pen so that once he went to the pen, because I told him, I said, you know you're going to the pen. And I said the best that we can do is try to wrap everything up in all three counties so that when you do go down there it's all behind you. Once you finish up you're done, you're out. But I couldn't make him any promises as to whether that would occur or not.

McQuary testified that he, in fact, contacted the prosecuting attorneys for Pulaski and Grant Counties.

Here, the statements made to appellant were rather ambiguous; therefore, we must consider whether appellant was particularly vulnerable. Appellant was thirty years old and had been in and out of the criminal-justice system for several years. Plus, each time appellant was questioned, he was reminded of his *Miranda* rights. Furthermore, it appears that appellant's sole pur-

pose in requesting McQuary's presence was so that he could cut a deal with the State. Under the totality of the circumstances, we cannot say that false promises of leniency were made to appellant. Accordingly, the trial court did not err when it denied his motion to suppress his statements made to law enforcement officers.

Affirmed.

PITTMAN, C.J., and GLADWIN, ROBBINS, BAKER, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. Today, the majority announces that a prosecutor can either misstate or deceive an accused regarding whether the accused has the right to have counsel present during the custodial interrogation portion of a criminal prosecution and that doing so does not constitute prejudicial error. In affirming, the majority 1) endorses the State's misconduct and its effect of negating appellant's *Miranda* rights by misinforming him that he did not have the right to an attorney during the interrogation unless his mother paid for an attorney; and 2) punishes appellant, who did not request an attorney after being told by the prosecutor that he did *not* possess the right to an attorney at that point in the proceedings.

I agree with the majority that appellant's mother could not assert his right to an attorney. I defer to the trial court's credibility finding that appellant did not assert his right to an attorney. I also agree that appellant's confession was not swayed by false promises of leniency. However, the majority misapprehends the dispositive issue in this case as well as my reason for recommending reversal: regardless of who asked for an attorney, it is undisputed that appellant confessed only after Prosecutor Jack McQuary responded to the request by falsely informing appellant that he had no right to an attorney until he was charged, unless appellant's mother paid for the attorney.

Presumably because appellant failed to request an attorney, the majority wholly fails to analyze the effect of McQuary's misstatement. However, to affirm simply because appellant did not invoke his right to counsel ignores the governing law concerning such misstatements. The majority decision also begs the question of *whether appellant was misled to believe that he had no right to counsel and whether the prosecutorial misrepresentation affected his subsequent decision to provide incriminating evidence to the police.* The fact that appellant

believed he understood his *Miranda* rights but did not invoke his right to counsel does not mean, *ipso facto*, that any statement made during his custodial interrogation was necessarily the product of a free and deliberate choice. Thus, the fundamental issue is whether appellant's failure to invoke his right to an attorney was the result of intimidation, coercion, or deception by the State. The record clearly shows that it was; therefore, I would reverse.

The majority correctly cites the standard of review governing custodial statements, but fails to mention that in order to determine whether a waiver of *Miranda* rights is voluntary, knowing, and intelligent, the appellate court looks to see if the statement was the product of free and deliberate choice rather than intimidation, coercion, or deception. *Miranda v. Arizona,* 384 U.S. 436 (1966); *Conner v. State*, 334 Ark. 457, 982 S.W.2d 655 (1998); *Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998). In this case, an examination of the totality of the circumstances surrounding the giving of appellant's inculpatory statements requires an examination of appellant's rights pursuant to *Miranda*, his rights as stated in the rights form that he signed, and his rights as subsequently negated by the prosecutor's misstatements.

A defendant's Fifth Amendment right to an attorney prior to and during custodial interrogation has been succinctly explained by the United States Supreme Court in *Miranda* as follows:

> Accordingly we hold that an individual held for interrogation must be clearly informed that he has the *right to consult with a lawyer and to have the lawyer with him during interrogation* under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, *this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead.*

384 U.S. at 471-72 (emphasis added).

The very purpose of the *Miranda* warnings is to inhibit misconduct by State authorities. *See id*; *Landrum v. State,* 326 Ark. 994, 936 S.W.2d 505 (1996). Further, the interest protected by the *Miranda* warnings is the suspect's "desire to deal with the police *only through counsel.*" *Edwards v. Arizona,* 451 U.S. 477, 484 (1981) (emphasis added). Thus, *Miranda* requires that "if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will

be provided for him *prior to any interrogation.*" *Miranda, supra* at 474 (emphasis added). Additionally, the Fifth Amendment privilege protected by *Miranda* comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present *during any questioning* if the defendant so desires. *Miranda, supra* at 470.

Even if appellant did not invoke his right to an attorney, that does not end the voluntariness inquiry because the question of voluntariness and the question of a knowing and intelligent waiver are separate inquiries. *See Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997). Appellant's inculpatory statements in this case, made without benefit of counsel, were elicited in violation of his *Miranda* rights because they were the involuntary product of the prosecutor's false statement that appellant had no right to an attorney until he was charged, unless his mother paid for an attorney.

The majority does not and cannot dispute that appellant was entitled to an attorney. After all, appellant clearly was being custodially interrogated. *See Davis v. State*, 330 Ark. 76, 953 S.W.2d 559 (1997). He was taken into custody on a parole violation on August 17, 2004, and remained in custody when he confessed on August 20, 2004. Therefore, his Fifth Amendment right to an attorney under *Miranda* attached on August 17, when the custodial interrogation began.

The form that appellant signed in this case stated in relevant part:

> 3. Do you understand that you have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during the questioning?
>
> 4. Do you understand that if you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish, at no cost to you?
>
> 5. Do you understand that if you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time? You also have the right to stop answering at any time until you talk to a lawyer.

The words, "Yes, Sir" and appellant's initials appear after these questions. Thus, this form clearly informed appellant that he had the right to an attorney before and during the questioning regarding the burglaries.

Despite the majority's implication, there is no credibility issue regarding whether Prosecutor McQuary subsequently misinformed appellant regarding his right to an attorney during questioning. The prosecutor's misleading statement that followed appellant's signing of the rights form was not merely "alleged" and was not merely directed to the mother, as the majority asserts. Rather, it is undisputed that Detective Gibbons, who was present during the interview, testified that Prosecutor McQuary "said that if and when he [appellant] was charged with anything he would go to court and he could be appointed an attorney or she [his mother] could get him an attorney if she wanted an attorney. That if he wanted an attorney that everything would stop." It is also undisputed that both appellant and his mother were present and heard McQuary's misrepresentation of appellant's rights.

McQuary clearly misstated the law. His statement directly contradicted appellant's *Miranda* rights and the *Miranda* form signed by appellant. Essentially, McQuary told appellant *that he had no right to an attorney during the interrogation unless his mother paid for one. See Mayfield v. State*, 293 Ark. 216, 736 S.W.2d 12 (1987) (reversing because the *Miranda* warning provided to the defendant did not convey to the defendant that he could have a lawyer appointed free of charge); *Reed v. State*, 255 Ark. 63, 498 S.W.2d 877 (1973) (holding that *Miranda* warnings were inadequate where, although the written *Miranda* waiver informed the defendant that he had the right to an attorney before making any statement or answering any question, the police officer indicated to the defendant that if he did not have an attorney before he went to trial the court would appoint an attorney for him).

Nonetheless, it is true that a misstatement of fact by an officer, standing alone, does not invalidate a subsequent confession. *Pyles v. State*, 329 Ark. 73, 947 S.W.2d 754 (1997). For a statement to be involuntary, the confession must have been induced or influenced by the police officer's statements. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). Here, after McQuary's misrepresentation, appellant decided to cooperate with Pulaski, Saline, and Grant County detectives. In particular, on August 20, appellant confessed to the two burglaries in Grant County that are the subject of this appeal. Appellant testified that but for McQuary's promise to speak to the other prosecutors, he (appellant) would have not spoken to the Grant County police officers.

Although ignored by the majority, the effect of McQuary's incorrect and misleading statement that appellant was not entitled to an attorney until he was charged with a crime was to undermine or negate appellant's understanding of his rights and thus, to negate the over-all effectiveness of the *Miranda* warnings. *See, e.g., contra, Tasby v. U.S.*, 451 F.2d 394 (8th Cir. 1971) (affirming *Miranda* warnings where the defendant was told that he would be appointed an attorney "at the proper time" because that statement did *not* negate the overall effectiveness of the *Miranda* warnings). Further, it is clear that McQuary's statement, made in appellant's presence and in response to an inquiry about an attorney, directly affected appellant's capacity to comprehend and knowingly relinquish his constitutional right "to deal with the police only through counsel." *See Edwards, supra* at 484. The majority must concede that appellant's initial understanding that he had a right to an attorney during questioning was subsequently vitiated when McQuary misinformed him to the contrary, his experience with the legal system notwithstanding.

Thus, it cannot be said that McQuary's statement did not induce appellant's decision to thereafter confess. McQuary made it clear to appellant that *despite what appellant believed his rights to be*, he had no right to an appointed attorney *until* he was charged. The majority does not explain how appellant can somehow be held to have freely relinquished a right that he was told he did not have. I do not understand how the majority can conclude that appellant's statements were made without coercion, deception, or intimidation when appellant was incorrectly told that he had no right to an attorney until he was charged, when appellant was told that if he cooperated (in other words, incriminated himself), McQuary would contact the other prosecutors to see if they could "wrap up" all of his charges at one time, and appellant shortly thereafter decided to cooperate with the police without benefit of an attorney during his custodial interrogation.

Miranda warnings may be sufficient where a defendant is correctly informed that an attorney will be appointed when he goes to court but the warnings do not otherwise negate the defendant's right to counsel *during interrogation. See Duckworth v. Eagan*, 492 U.S. 195 (1989); *Williams v. State*, 321 Ark. 344, 902 S.W.2d 767 (1995). However, the United States Supreme Court has recognized a difference in those cases in which the effect of the warnings is to link an accused's right to an appointed counsel to a point in time *following* the police interrogation. *See California v.*

Prysock, 453 U.S. 355 (1981). The *Prysock* court upheld *Miranda* warnings in which the accused was informed, prior to and during his interrogation, of his right to have an attorney present prior to and during interrogation at no cost if he could not afford an attorney.

However, in so holding, that Court found that "nothing in the warnings given [to the accused] suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right to a lawyer" before and during questioning. *Id.* at 361. In particular, the Court noted the contrast between *Prysock* and other cases in which "the reference to the right to appointed counsel was linked with some future point in time after the police interrogation." *Id.* at 360.

The *Prysock* rationale applies here because McQuary's comment effectively negated appellant's right to an attorney during interrogation and linked his right to an attorney to a time point following interrogation, unless his mother paid for an attorney. This case is similar to *Reed*, *supra*, in which the Arkansas Supreme Court held that *Miranda* warnings were inadequate where, although the written *Miranda* waiver informed the defendant that he had the right to an attorney before making any statement or answering any question, the police officer indicated to the defendant that if he did not have an attorney before he went to trial the court would appoint an attorney for him. The *Reed* court explained: "The officer's statement of Reed's rights was fatally defective in that it failed to inform Reed that he was entitled to the services of an appointed attorney *at the time of the interrogation.*" *Id.* at 64 (emphasis added). *See also Moore v. State*, 251 Ark. 436, 472 S.W.2d 940, 442-43 (1971) (holding that *Miranda* warnings were insufficient as to an indigent defendant where the written form explaining *Miranda* rights stated that an attorney "will be appointed for you, if you wish, if and when you go to court"). The effect of the prosecutor's statement in the instant case similarly operated to misinform appellant that he had no right to an attorney during the interrogation unless his mother provided one.

Finally, while appellant generally confessed to committing some burglaries and requested a deal *before* McQuary misinformed him concerning his right to an attorney, appellant's initial request for a deal should not preclude a finding that his statement was involuntary based on McQuary's subsequent misrepresentation regarding his right to an attorney. By volunteering information or

asking for a deal, a defendant does not forever waive his right to an attorney or necessarily evince an intent to *accept* the bargain without an attorney. Moreover, appellant's general confession in no way duplicated the detailed, incriminating information that he gave the police following McQuary's misinformation and promise to contact the other prosecutors in exchange for appellant's cooperation. Thus, it cannot be said that the error in admitting the evidence was harmless because appellant's confessions were cumulative to any statements he made prior to McQuary's misrepresentation.

Because appellant's confession was induced by the prosecutor's misstatement concerning his right to an attorney, I would reverse the trial court's denial of appellant's motion to suppress. Unfortunately, I suspect that today's holding will do nothing to induce prosecutors to be accurate in their dealings with accused persons during custodial interrogations. If anything, the result announced today appears to signal that prosecutorial misrepresentations and deceptions concerning *Miranda* rights are judicially excused. Respectfully, I must dissent.

Walter DESHAZO *v.* STATE of Arkansas

CA CR 04-1001 237 S.W.3d 493

Court of Appeals of Arkansas
Opinion delivered June 21, 2006

Kathy L. Hall, for appellant.

Mike Beebe, Att'y Gen., by: *Nicana Corinne Sherman*, Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. Appellant Walter "Tony" Deshazo appeals his conviction following a jury trial in Sevier County Circuit Court for possession of drug paraphernalia with intent to manufacture methamphetamine and possession of a controlled substance (methamphetamine). He was sentenced to eight years in prison on the paraphernalia charge with a fine of $15,000 and five years in prison on the possession of a controlled substance charge with a fine of $10,000, sentences to run consecutively. He argues on appeal that the trial court erred in denying his motion to suppress because the sheriff did not have probable cause to enter his home without a search warrant; that there was insufficient evidence to prove he was in possession of the drug paraphernalia with the requisite intent; and that there was insufficient evidence to prove that the amount of methamphetamine found was a "usable" amount. We find no error and affirm.

This case involves the search of a house and property owned by the estate of Marjorie Persson that was rented to appellant. Randall Wright, attorney for the estate, testified that appellant received a notice to vacate the premises on May 31, 2002. Mr. Wright then filed a complaint and notice of intent to issue a writ of possession against appellant on June 14, 2002. Mr. Wright stated

that he had a conversation with appellant on June 24, 2002, in which appellant indicated that he wanted to purchase the property from the estate. Mr. Wright stated that he sent several letters to appellant following this conversation; however, appellant never responded. Mr. Wright testified that on June 27, 2002, he requested that an Order for Immediate Possession and a Writ of Possession be issued and served on appellant.

Laurie Green, Circuit Clerk of Sevier County, testified regarding the civil filings in the unlawful detainer suit against appellant. She stated that an Order for Immediate Possession and a Writ of Possession were filed on June 27, 2002, but just the order was sent to appellant's house. She admitted that she did not have a copy of a return of service for the Writ of Possession.

On September 20, 2002, deputies from the Sevier County Sheriff's Office served an Order of Immediate Possession on appellant. Appellant responded by telling the officers that he hoped they did not have to return and drag him off the property. The Order of Immediate Possession stated that it was filed on June 27, 2002, that appellant had "failed to appear or file any objections to the issuance of a writ of immediate possession," and that "the Plaintiff [was] entitled to immediate possession of the premises; that the Clerk is directed to issue a writ of possession as directed by Ark. Code Ann. Sec. 18-60-307 (1987)." The officers told appellant that he had a week to vacate before they came to claim the premises.

On September 27, 2002, the officers returned to claim possession of the property. The doors were locked, and no one answered their knocks. Sheriff John Partain was in the process of contacting Mr. Wright regarding whether the officers should force entry into the house or wait on a key when Cindee Roberts appeared at the door. She told the officers that she had been asleep and had not heard their knocking. She then told the officers that appellant was not there, and she did not know where he was. Sheriff Partain told Cindee that she needed to find appellant. After she left, Sheriff Partain told his deputies to do a "protective sweep" outside of the house to make sure that appellant was not there. During this sweep, the officers discovered appellant's truck parked behind the house. Sheriff Partain then asked the officers to continue looking for appellant in the house, the basement, and outside. Sheriff Partain testified that he believed appellant had a violent history, wanted to secure any weapons that appellant could

get to, and needed to determine what type of possessions appellant had in the home for removal purposes. During this second sweep, the officers found weapons and what appeared to be drug paraphernalia in the house. Sheriff Partain immediately halted the search and sent for a warrant. The warrant was issued — based on the preliminary items found during the search of the house — and this evidence was used to convict appellant.

Preservation of appellant's right against double jeopardy requires that we consider appellant's challenge to the sufficiency of the evidence first even though it was not listed as his first point on appeal. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). In this case, appellant moved for directed verdict at the close of the State's case and then at the close of his case. Ordinarily, this would be sufficient to preserve the issue of sufficiency of the evidence for appellate purposes. However, as the State points out in its brief, appellant failed to renew his directed-verdict motion after the State's rebuttal testimony. Our procedure rules require that a motion for a directed verdict be brought at the "conclusion of the evidence presented by the prosecution and again at the close of the case . . . ." Ark. R. Crim. P. 33.1. In *King v. State*, 338 Ark. 591, 999 S.W.2d 183 (1999), our supreme court stated that "[c]lose of the case means close of the whole case, in other words, after the last piece of evidence has been received." *Id.* at 595, 999 S.W.2d at 185. "Even if a defendant renews his motion at the close of his case-in-chief, the requirement of the rule to renew the motion at the 'close of the case' obligates the defendant to renew the motion again at the close of any rebuttal case that the State may present in order to preserve the sufficiency issue for appeal." *Id.* at 595, 999 S.W.2d at 185 (citing *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 347 (1997)). Because appellant did not renew his directed-verdict motion following the State's rebuttal testimony, his sufficiency arguments are not preserved for appeal and we will not reach the merits of his argument.

When reviewing the denial of a motion to suppress, 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 a 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).

Pursuant to Ark. Code Ann. § 18-60-307(a) (Repl. 2003), a landowner who seeks to have another party removed from property must file a complaint in circuit court and direct the sheriff to serve upon the named defendant a notice in the following form:

> "NOTICE OF INTENTION TO ISSUE
> WRIT OF POSSESSION"
>
> You are hereby notified that the attached complaint in the above styled cause claims that you have been guilty of . . . [unlawful detainer] . . . and seeks to have a writ of possession directing the sheriff to deliver possession of the lands, tenements, or other possessions described in the complaint delivered to plaintiff. If, within five (5) days, excluding Sundays and legal holidays, from the date of service of this notice, you have not filed in the office of the circuit clerk of this county a written objection to the claims made against you by the plaintiff . . ., then a writ of possession shall forthwith issue from this office directed to the sheriff of this county and ordering him to remove you from possession of the property . . . . If you should file a written objection . . . within five (5) days, excluding Sundays and legal holidays, from the date of service of this notice, a hearing will be scheduled by the circuit court of this county to determine whether or not the writ of possession should issue as sought by the plaintiff.

The statute goes on to explain that if the defendant does not file an objection within the five-day period, the clerk of the circuit court "shall immediately issue a writ of possession directed to the sheriff commanding him or her to cause the possession of the property . . . to be delivered to the plaintiff without delay, which the sheriff shall thereupon execute in the manner described in § 18-60-310." Ark. Code Ann. § 18-60-307(b). Arkansas Code Annotated section 18-60-310 (Repl. 2003) requires the sheriff to notify the defendant of the writ by delivering a copy to the defendant or any person authorized to receive summons on behalf of the defendant. If within eight hours of receipt of the Writ of Possession, the sheriff cannot locate such a person at their normal place of residence, the sheriff may serve the writ by posting a copy conspicuously on the front door of the property described in the complaint. After twenty-four hours from either face-to-face delivery or door delivery, if the defendant remains in possession of the property, the sheriff "shall notify the plaintiff or his or her attorney of that fact and shall be provided with all labor and assistance required by him or her in removing the possessions and

belongings of the defendants from the affected property to a place of storage . . . ." Ark. Code Ann. § 18-60-310(c)(1).

In this case, the law enforcement officers never served appellant with a *Writ* of Possession as required by the statute. Instead, they served him with an *Order* for Immediate Possession. It is apparent from the statute, testimony, and documents themselves that there is a difference between an "order" and a "writ." The circuit clerk testified that, based on court records, an Order of Immediate Possession was signed by the judge and filed on June 27, 2002, and a Writ of Possession was also filed on that same day. The order was served on appellant on September 20, 2002, but the writ never was. The documents themselves illustrate that the judge issues the Order of Immediate Possession granting the property owner the right to repossess the property and that the order directs the court clerk to issue a writ. Therefore, for all practical purposes, the Order of Immediate Possession and the Writ of Possession accomplish the same thing — entitling the plaintiff to possession of the land.

In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court recognized the good-faith exception to the exclusionary rule, a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights. Noting that the purpose of the exclusionary rule was to deter police misconduct, the Court observed that:

> where the officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.

Leon, 468 U.S. at 919–20 (quoting *Stone v. Powell*, 428 U.S. 465 (1976) (White, J., dissenting)). At issue in *Leon* was a defective search warrant, but the Court has since extended the good-faith exception to a warrantless search permitted by a state statute that was later ruled unconstitutional, *Illinois v. Krull*, 480 U.S. 340 (1987), and to a search incident to an arrest that was based on erroneous information, *Arizona v. Evans*, 514 U.S. 1 (1995). In these decisions, the Court has emphasized that the exclusionary rule should be applied only where the goal of deterrence can be achieved. Moreover, when a law enforcement officer inadvertently discovers evidence of a crime while

acting in his capacity as an officer in a civil action, he cannot be said to have conducted an illegal search and seizure. *Poage v. State*, 27 Ark. App. 108, 766 S.W.2d 622 (1989).

We hold that the trial court did not clearly err in finding that the sheriff in this case acted in good-faith reliance on a facially valid court order in executing the Order of Immediate Possession. The sheriff, relying upon a mandate from the court, executed an order granting immediate possession to the plaintiff. He was of the understanding that he had complied with the statutory requirements, and when he returned on September 27, 2002, he believed he had the legal right to repossess the property for the plaintiff. Moreover, the sheriff's actions in giving appellant a week to comply with the order — six days longer than the time period statutorily required — and in immediately halting the search once evidence of a criminal nature was found so as to secure a proper search warrant are illustrative of the sheriff's good-faith effort to comply with the order. Furthermore, based on the totality of the circumstances, we do not believe that suppressing the evidence in this case would serve the remedial purposes of the exclusionary rule.

Affirmed.

CRABTREE and BAKER, JJ., agree.

Ted RIAL, Clarence Wells, Nancy Myers, William Cook, The Lone Sassafras Cemetery Association, Roger Boykin, Ronald Boykin, and Kathy Boykin *v.* Betty BOYKIN, Individually and as Guardian of Anthony Boykin

CA 05-995 237 S.W.3d 489

Court of Appeals of Arkansas
Opinion delivered June 21, 2006

John F. Gibson, Jr., for appellants.

Johnson Law Office, LLC, by: *B. Kenneth Johnson*, for appellee.

ANDREE LAYTON ROAF, Judge. This appeal concerns a dispute over fifteen grave sites located in the Lone Sassafras Cemetery in Drew County. The trial court ruled that appellee Betty Boykin owned the sites, having purchased them for $100 apiece in 2001 and 2004. Appellants Ted Rial, Clarence Wells, Nancy Myers, and William Cook, who are members of the Lone Sassafras Cemetery Association Board, and appellants Roger, Ronald, and Kathy Boykin, who assert ownership of the sites, appeal and argue that the trial court erred in placing ownership in Betty. We agree, and we reverse and remand.

The ten-acre Lone Sassafras Cemetery has been in existence since approximately 1865, and it is managed by the Lone Sassafras Cemetery Association. Prior to 1999, those who wished to reserve burial spaces at the cemetery simply staked out the area that they wanted, free of charge. Appellants' witnesses testified that, in accordance with this informal practice, the late Franklin Boykin — brother of appellants Roger and Ronald — marked off a plot in the 1970s that was large enough to accommodate three rows of ten graves each. Franklin designated the area, which we will refer to hereafter as the Boykin plot, with crude markers, which were replaced in the mid-1990s by four corner stones bearing the letter "B."

Appellee Betty Boykin was married to Roger until 1976 and continued to live with him until 2000. In 1996 and 1997, the couple lost two sons in separate tragedies — Kerry as the result of a homicide, and Andy as the result of an automobile accident that also claimed the lives of his wife Susan and two of their children. Betty testified that, when Kerry died in 1996, Franklin insisted that he be buried in the Boykin plot. Eventually, all of the deceased were buried in three grave sites located in the middle of the plot.[1]

In 1999, the Cemetery Association Board began charging $100 per grave site in an effort to generate revenue. According to Betty, she wished to purchase grave sites for herself and her surviving grandchildren, including grandson Anthony Boykin, over whom she was guardian. In October 2001, she went to Elvin Funderberg, the secretary/treasurer of the Cemetery Association, and purchased nine sites adjacent to those where Kerry, Andy, and Susan were buried. Mr. Funderberg told Betty that he could not give her a deed to the sites, but he advised her to have a plat drawn up in order to pinpoint the sites' location in the cemetery. Betty then went to Chuck Dearman of the Stephenson-Dearman Funeral Home, who drew up a plat designating Kerry, Andy, and Susan's graves as numbers 3, 4, and 5, and designating the graves purchased by Betty as follows: numbers 1 and 2 to the left of those (that is, to the south); number 6 to the right of them; and numbers 7 through 12 directly below them. The plat contained the following language:

[1] Each of the young children killed in the automobile accident was buried with a parent, thus necessitating only three graves.

> This is to certify that Betty Boykin and Anthony Boykin are the owners of the following grave spaces in Lone Sasafras [sic] Cemetery and that the grave spaces have been paid in full.

After the plat was prepared, Betty took it to Mr. Funderberg, who signed it and gave her a receipt.

On January 19, 2004, Betty purchased an additional six grave sites on the row directly above Sites 1 though 6. This sale was executed by Mary Funderberg, who was the Cemetery Association's secretary/treasurer at that time. Mrs. Funderberg drew up a plat that reflected all fifteen spaces that Betty had purchased and signed it as a "Cemetery Official." According to Betty, she was unaware of any markers around the spaces she purchased, and neither of the Funderbergs mentioned that anyone else held a claim to the spaces. However, Betty acknowledged that, around the time of her first son's death, Franklin told her he had designated "that side" of the cemetery for the Boykin family.

Sometime after her January 2004 purchase, Betty placed four corner posts around her sites. Thereafter, appellant Kathy Boykin (who was married to Ronald) discovered the markers and became upset. She claimed that Betty had not only bought specific sites that had been reserved for her and Ronald's family[2] but had acquired them in such a manner as to split the thirty-site Boykin plot in two, with some of the Boykin sites remaining to the south of Betty's purchases and others remaining on the north. When cemetery officials learned of the problem, they sent Betty a letter on April 20, 2004, telling her that all fifteen grave sites had been "purchased in error." According to the letter, "Franklin Boykin already designated nine of them for his family and Ronnie Boykin designated six of them for his family." The letter enclosed a $1500 refund and advised Betty to remove her corner posts within fifteen days. When she did not do so, the Association removed them.

On May 19, 2004, Betty filed suit, asking that she be declared the rightful owner of the disputed grave sites. A bench trial was held on December 1, 2004, and the above mentioned facts were established through the testimony of Betty and other mem-

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[2] There was evidence that, at some point, Franklin encouraged Roger and Ronald to mark off the grave sites that they wanted in the Boykin plot. While Roger did not do so, witnesses testified that, prior to 1999, Ronald placed corner markers around ten sites on the bottom row, six of which were bought by Betty.

bers of the Boykin family. In addition, Board member Ted Rial testified concerning the operating procedures of the Cemetery Association. He admitted that the Association had few rules and had primarily been operated on the "honor system" as far as designating grave sites. When the Board voted in 1999 to begin charging $100 per site, the cemetery was not platted, so the Board continued to rely on the marking system. He said that, when Betty purchased her spaces, they had already been marked for the Boykin family and the Funderbergs should have gone to the cemetery to see if the sites were marked before selling them to Betty. Yet, Rial admitted that at the time of Betty's purchases, the Association had no written records showing that any other party had an interest in the grave sites. He further testified that, when the Funderbergs signed the certificates, they had "authority to sell [the grave sites] and authority to collect the pay."

Another Board member, Clarence Wells, testified that the selling of grave sites was not intended to terminate any claim already established by corner markers. Mary Funderberg testified, however, that, when the Board members voted to charge $100 per grave site, they did not discuss the effect that the procedure would have on the sites that had already been marked. Nevertheless, she said that she had asked Betty whether the sites Betty wanted to purchase were "owned, marked off, did anybody else have them and she said no."

Following the presentation of evidence, the trial judge found that, at the time the Association conveyed the fifteen grave sites to Betty, it held title to those sites and, thus, Betty legally purchased the sites. The judge also found that, in those instances where individuals had simply marked off grave sites, no money or title changed hands "and therefore ownership of the graves was not legally transferred." Appellants now appeal from that ruling.

When a case is tried by a circuit court sitting without a jury, the inquiry on appeal is whether the trial court's findings are clearly erroneous, or clearly against the preponderance of the evidence. *Brown v. Blake*, 86 Ark. App. 107, 161 S.W.3d 298 (2004). Recognition must be given to the trial judge's superior opportunity to determine credibility of witnesses and the weight to be given to their testimony. *Id.* However, a trial judge's conclusion of law is given no deference on appeal. *Allen v. Allen*, 82 Ark. App. 42, 110 S.W.3d 772 (2003).

Appellants make several arguments for reversal: 1) the transfer of the grave sites to Betty should have been by deed; 2) the plat

certificates given to Betty lacked the necessary conveyance language to transfer title; 3) the trial judge "departed from the rules and principles of equity" in stating that the only issue he had to decide was the "legal issue" of whether the Association owned the grave sites at the time it conveyed them; 4) the conveyances to Betty should have been canceled due to mutual mistake; 5) the Boykin family acquired an interest in the subject spaces prior to Betty's purchases. Because we agree with appellants' final point, we reverse and remand on that basis without addressing the other assignments of error.

As one commentator has recognized, the custom of setting aside individual places for burial may be traced to ancient times, and this long history "bespeaks the special protection that society has deemed appropriate for these final resting places." 2 *Powell on Real Property* § 18.02[1] at 18-43 (2005). The special consideration accorded burial plots requires that, in some respects, they not be treated as subject to the laws of ordinary property. 14 AM. JUR. 2D *Cemeteries* § 31 (2d ed. 2000). In fact, it is generally recognized that the rights of a lot owner in a cemetery are contractual, 14 C.J.S. *Cemeteries* § 20 (2006), and that the interest acquired by the lot owner is considered a privilege, easement, or license. *Powell on Real Property, supra,* at § 18.02[2]; 14 C.J.S. *Cemeteries* § 21. Although Arkansas courts have not expressly ruled on the manner in which an interest may be established in a burial site, cases from other jurisdictions recognize as a general proposition that, when a family burial plot is established, it creates an easement against the fee and, while the naked legal title will pass, it passes subject to the easement created. *See Boyd v. Brabham*, 414 So. 2d 931 (Ala. 1982); *Aldridge v. Puckett*, 278 So. 2d 364 (Ala. 1973); *Walker v. Georgia Power Co.*, 339 S.E.2d 728 (Ga. App. 1986); *Heiligman v. Chambers*, 338 P.2d 144 (Okla. 1959); *In re Estate of Harding*, 878 A.2d 201 (Vt. 2005). Moreover, the easements and rights vested survive until the plot is abandoned by the person who established the plot or his heirs, or by the removal of buried bodies. *See Walker, supra; Estate of Harding, supra.* The *Walker* case also acknowledges that authority exists for the proposition that a place of burial may be established without written documentation.

■ ■ Based on the above, we believe the trial court erroneously concluded that Betty acquired ownership of the sites by virtue of having purchased them from the Association as legal title holder. There is ample evidence that Franklin Boykin and Ronald Boykin, prior to 1999, followed many years of custom and

usage and established a family burial plot in the Lone Sassafras Cemetery by placing markers around the plot area. And, although Betty denied any awareness of such markers, the trial court made no finding that the markers did not exist. Rather, the court concluded that the act of marking the plot created no interest in the Boykins because the act was not sufficient to pass legal title; and, by the same token, the court concluded that legal title was passed to Betty by virtue of the sale. However, this conclusion does not take into account that the Boykins acquired an easement, license, or privilege to use the burial sites via their clear, albeit informal, establishment of a family burial plot in accordance with the practices and procedures in effect at the time. Once that occurred, the Association, even if it still held legal title to the sites, could only convey an interest in them subject to the Boykins'. The practical effect is, despite the purported sale to Betty, the Boykin family members (and their heirs) who marked the sites retained the exclusive right to burial in them.

In light of the foregoing, we reverse and remand with directions to enter an order consistent with this opinion.

GLOVER and NEAL, JJ., agree.