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Jamie LONG *v.* ARKANSAS DEPARTMENT of HEALTH & HUMAN SERVICES

CA 05-306 237 S.W.3d 529

Court of Appeals of Arkansas
Opinion delivered June 28, 2006

[Rehearing denied August 23, 2006.]

DeeNita D. Moak, for appellant.

Gray Allen Turner, Office of Chief Counsel, for appellee.

JOSEPHINE LINKER HART, Judge. Jamie Long appeals from an order of the Pulaski County Circuit Court terminating her

parental rights to her daughter K.L. and son M.S. On appeal, she argues that the trial court erred in finding sufficient evidence to terminate her parental rights. We reverse and remand.

On February 27, 2003, Arkansas Department of Human Services (DHS) took Long's children into custody after she was arrested on drug charges relating to her use of methamphetamine. At the time, K.L., and M.S., were five and two years old, respectively. On April 25, 2003, the children were adjudicated dependent-neglected.

Initially, Long was not compliant with the requirements of the case plan. At the first review hearing, the trial court found that Long had not complied with its orders and the case plan services in that she had not submitted to the court-ordered psychological evaluation, failed to complete parenting classes, no longer attended NA/AA meetings at Celebrate Recovery, arrived late for visitation with her children and, contrary to the direction of DHS, brought people to the visits. The trial court did note, however, that Long did have a drug- and-alcohol assessment, "some visitation," and "some random drug screens." At an October 30, 2003, review hearing, the trial court found that Long still had not completed parenting classes and had not visited the children since September 8, 2003. The trial court ordered Long to continue to submit to random drug screens, visit the children "regularly," and "continue intensive outpatient substance abuse treatment." It also imposed a requirement that Long "have a stable home and employment and demonstrate that she can properly provide for her kids."

In its February 26, 2004, permanency-planning order, the trial court found that Long had complied with the court orders and case plan, and it continued to order reunification services. Additionally, the court awarded Long weekend visitation.

On March 19, 2004, the trial court entered an emergency *ex parte* order modifying the visitation to twice weekly at the DHS offices. The visitation was changed on March 16, 2004, after the foster mother, Mrs. Cherry, informed DHS that the children had not been returned on time from the weekend visit. This order remained in place even though Long informed DHS that the late return was caused by her hospitalization due to complications with her pregnancy.

At the next permanency-planning hearing, held on May 20, 2004, the trial court rejected DHS's recommendation that reunification remain the goal and *sua sponte* ordered a termination hearing. In that order, the trial judge stated: "I understand she's

pregnant. I am concerned about the fact that she's pregnant and having some problems. I'm not unsympathetic to that, but mom does not seem to have understood the priorities that she should have on this case." She further noted that Long had not provided the drug treatment sign-in sheets that she had been directed to submit. Nonetheless, the trial judge ordered reunification services to continue.

At the September 15, 2004, termination hearing, Dr. Paul Deyoub, a psychologist, testified that he administered a psychological evaluation to Long. He stated that Long admitted to using methamphetamine "four or five times," marijuana, "some alcohol," and pain medication. Long told him that she was currently living with a man from Mexico named Mario, whom she planned to marry when her DHS case was over. He noted that she had Mario's name tattooed on both sides of her neck, but he opined that it was consistent with her personality in that it reflected impulsiveness and poor decision making. Dr. Deyoub further opined that Long's involvement with Mario also reflected poor judgment in that he was a "big priority for her." According to Dr. Deyoub, Long's testing revealed some degree of personality disorders, with traits of Borderline, Histrionic, and Dependent disorders indicated. Long's I.Q. was 88. He noted that Long had an unstable life, having been abandoned by her parents to a group home for six years "for no apparent reason" after her parents divorced. Later, Long tried to live with her mother when she was fifteen, received in-patient treatment at Rivendell and Turning Point, and had, since age seventeen, tried to make "it as best she can with relationships" that failed but had produced two children. He opined that her prognosis for reunification was "very guarded and poor . . . although not impossible." Dr. Deyoub noted a trend of past dependence on males in relationships and stated that "Mario is an unknown. I have no idea what this individual is all about. So that's just one more factor that I don't know about, but that the Court has to see who is this person."

Jan Kucala, a licensed counselor, certified play therapist, and program manager for the Centers for Youth and Families in Jacksonville testified that she counseled K.L., beginning on January 13, 2004. She stated that the child had "a lot of anxiety and worry about family matters and concern about what was going to happen to her, what was happening to her mother." Ms. Kucala stated that Long had made progress, that she was much more aware of K.L.'s feelings, that she was "very open" about mistakes that she

had made, and that she showed "a lot of insight" into how her separation from her children has damaged her relationship with them and what she would need to do to repair that relationship. Ms. Kucala noted as well that, at times, there was confusion as to who K.L.'s case worker was and noted that there were several appointments for which DHS had failed to bring the child. She reported that being out of the home was "very stressful" on K.L., that K.L. felt "punished" because she was in foster care, and that there was a "very strong bond" between K.L. and her mother.

Further, Ms. Kucala opined that if Long's rights were terminated, "regression will probably occur on [K.L.'s] part," and while she declined to offer an opinion regarding termination because her agency did not encourage them to make this type of judgment, she did state that she thought that "the family had been making progress," and K.L. had not been prepared "in any way" for termination of her mother's parental rights. Regarding Mario, Ms. Kucala stated that his involvement had been limited, but she was aware that Long and Mario had an agreement that Long would be able to stay home with the children while Mario supported the family, and Mario affirmed that commitment. Nonetheless, she stated that she did not think that it would be prudent to put the children "totally in their mom's home today," but noted that the "kids are very bonded to her" and she did not believe that the reunification process "would be a long-term thing." She recommended that the trial court order unsupervised visitation.

Long testified that she currently lived in a one-bedroom apartment, but she had signed a transfer with the management company and paid fees to allow her to move into a larger apartment that would accommodate the return of her children. She stated that Mario's take-home pay was four to five hundred dollars per week. She admitted to testing positive for opiates the previous August, but attributed it to the Tylenol 3 that she had been prescribed. She admitted that she moved to Georgia for three or four months in 2003, but when she found that transferring her case there would be a "long process," she returned to Arkansas. She stated that she moved there because Mario was able to make more money. Nonetheless, while she was away, she claimed that she called her children regularly.

Regarding her substance-abuse problems, Long claimed that she was not "addicted in any way to any controlled substance" when she had her assessment because she had just been in jail for two-and-a-half months. Since getting out, she went to Celebrate

Recovery for drug meetings, AA meetings every day for a month "to keep busy doing things on the positive level," and UAMS Adult Psychiatry for individual counseling. She also claimed to have attended Narcotics Anonymous at Saline Memorial Hospital. Long admitted that she was slow to provide the documentation of her attendance at the various therapy sessions, but claimed that no one told her that her documentation was inadequate. Long noted that she had been assigned to take five drug screens since May of that year, and while she missed one, all except the August 9, 2004, screening when she was taking Tylenol 3 as prescribed, had been negative.

Long noted that the caseworkers had changed quite a bit during the pendency of her case. She recalled that Angela Haynes, Carolyn Williams, Bonnie Twillie, and Tamika Floyd had all been assigned her case at various times, and she stated that confusion as to who was handling the case had affected her visitation. She recounted having difficulty finding out who her caseworker was at several key times.

Long stated that she had a long-term relationship with Mario Cirilo and that they planned to marry once she got her kids back home. She claimed that she was working very hard to get her children back. Nonetheless, she admitted that Mario was "a priority," and she disputed that it was bad judgment to try to have a baby while her children were in DHS custody. Long stated that the reason she had failed to get her children back to the foster-parent's home on time after her last weekend visit was that she was hospitalized. She claimed that she provided DHS caseworker Carolyn Williams with "some proof" she had been in the hospital, but admitted it was "the wrong one." Long also conceded that she had not provided documentation to DHS proving that she had been employed at McDonald's.

Tamika Floyd, one of the four caseworkers that had worked with Long's children, testified that Long was aware of the requirement that she receive drug treatment and that she provide proof that she was getting drug treatment; that she submit to random drug testing showing that she was "clean"; that she maintain steady employment and stable housing; and that she attend NA meetings and provide DHS with the proof of attendance. Floyd stated that Long tested positive in August for opiates and positive for propoxyphene on May 18. Floyd stated that Long also missed one drug screen, claiming "she forgot." Floyd claimed that she "never saw any proof [Long] completed drug treatment." Floyd admitted

that Long gave her sign-in sheets for NA meetings in August, July, and May, and told her that the sign-in sheets for June were at her sister's house. However, Floyd claimed that she was only able to "confirm" attendance at two meetings in July and that she had no proof that Long attended individual counseling. Floyd further admitted that she received a letter from Long's father verifying that he paid Long to take care of her grandmother, but never received "pay stubs."

Floyd stated that Long "began to comply" with the case plan requirements, but noted that some elements still needed work, including the requirement that she maintain a stable home environment—Floyd stated Long's one-bedroom apartment was not large enough to accommodate her children. She further stated that the NA sign-in sheets are "somewhat questionable." Regarding the services that DHS provided to Long, Floyd listed "a drug and alcohol assessment, counseling services with [K.L.], psychological assessment, and random drug screens." She also claimed that transportation services were "offered" along with visitation with the children, "services" for M.S. at Pediatric Specialty Care, foster care, and medical and dental services. Floyd stated that she believed that Long knew her case worker, but admitted that there was considerable shuffling of the case among several workers in the office. Regarding individual counseling, Floyd stated that Long had told a previous case worker, Williams, that Long was receiving counseling at UAMS and "there's no notation that the counseling was deficient and more counseling was needed." Floyd also stated that she visited Long's current one-bedroom apartment, and she saw that there was "food in the refrigerator, the lights were on, and it was clean," and "fully furnished."

In its termination order, the trial judge found that "there is a potential that these juveniles would be harmed by continuing contact with the mother." It further noted that there was "great potential for emotional harm to these juveniles if they had continued contact with a mother who has not placed them first and foremost in her priorities so that she can be there for them all day, every day, and provide for all their needs." Additionally, the trial judge found that Long "has not demonstrated that she can remain drug free, have stability in housing and employment, and make appropriate decisions that do not negatively affect [the children's] well being." She noted deficiencies in the documentation that Long was ordered to provide.

On appeal, Long argues that the trial court erred in finding that there was sufficient evidence to terminate her parental rights. She contends that she "substantially complied" with the orders of the trial court and corrected the problems that caused the removal of her children. Long notes that she was ordered to submit to ten drug screens, and she never tested positive for methamphetamine, the use of which caused her children to be taken into custody. She further notes that she completed parenting classes, attended visitation, participated in a psychological evaluation, completed a drug and alcohol assessment, attended outpatient drug counseling at Celebrate Recovery, attended individual counseling at UAMS, and obtained a place to live and an adequate means of support. Long asserts that she met the three objectives required of her at the permanency-planning hearing: visit her children, continue in therapy with her daughter, and attend AA or NA meetings once a week and provide documentation of those meetings to the caseworker.

The grounds for termination of parental rights must be proven by clear and convincing evidence. *M.T. v. Arkansas Dep't of Human Servs.*, 58 Ark. App. 302, 305, 952 S.W.2d 177, 179 (1997). When the burden of proving a disputed fact is by clear and convincing evidence, the question on appeal is whether the trial court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). This court reviews termination of parental rights cases de novo. *Id.*

It is clear that Long substantially complied with the requirements imposed upon her by the court. As the trial judge recites in her order, Long was required to do "three main things: attend AA or NA meetings once per week and provide documentation to the caseworker every month; make her priority to visit the juveniles without fail; and continue in therapy with [K.L.] so that she could learn how to help [K.L.] alleviate her anxiety and better parent [K.L.] with her issues." With the exception of providing documentation, Long fulfilled all of these requirements. Given the extraordinary progress Long has made in fulfilling the requirements of the court, the overwhelming evidence of the very

strong bond between mother and children, and the testimony from K.L.'s therapist that the child would "regress," we hold that the trial court was clearly erroneous in finding that Long's continued contact with her children would be detrimental. Accordingly, the best interest of the children dictates that we reverse the termination of Long's parental rights and reinstate reunification services with a goal of returning the children to Long's custody.

Reversed and remanded.

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

CRABTREE and GLOVER, JJ., dissent.

TERRY CRABTREE, Judge, dissenting. The trial court in this case terminated appellant's parental rights nineteen months after the children had been removed from her care. There was evidence presented at the termination hearing that appellant had yet to comply with the most basic requirement of the case plan, which was to satisfy the court that she had come to terms with and had overcome her recognized drug problem. There was also evidence that she had yet to achieve the level of stability necessary for the children's return to her care, in that she had not maintained stable employment nor had she obtained suitable housing. The stability of her home was also complicated because of uncertainties arising from her relationship with her current boyfriend. Because I am not left with the definite and firm conviction that the trial court was mistaken in its judgment, I would affirm the termination decision.

On February 28, 2003, the children were taken into emergency custody after appellant was arrested on charges of possession of methamphetamine, possession of drug paraphernalia, and two counts of endangering the welfare of a child. Appellant failed to appear at the review hearing held the following July. In its ruling from that hearing, the trial court found that appellant was not in compliance with the case plan in that she had missed three appointments for a psychological evaluation; she had not completed parenting classes; and she was not attending AA/NA meetings as required. At the subsequent review hearing in October, it was disclosed that appellant had moved to Georgia. Again, it was found that appellant was not in compliance with the case plan, and the trial court warned appellant that the permanency-planning hearing was upcoming and urged appellant to bring herself into compliance. At this juncture, eight precious months had passed

since the children had been taken from her home, but appellant had not yet begun to engage in the process of facilitating their return home.

The permanency-planning hearing was held in February 2004. At this hearing it was shown that appellant was beginning to make progress toward the goal of reunification. In late December 2003, she had returned to Arkansas from her three-month sojourn in Georgia; she had completed parenting classes; she had regularly visited with the children; and a drug screen taken in January came back negative, as did a drug screen conducted the day of the hearing. Appellant was living with her sister and had a job interview at McDonald's. Appellant, however, had not completed outpatient drug treatment, nor had she been attending AA/NA meetings. Though the children had been out of the home for one year and could not be returned home, the trial court continued the goal of reunification because of the measurable progress appellant had made, giving her three more months to bring herself into compliance. Appellant was also granted unsupervised weekend visitation. However, this visitation was suspended after a month when appellant failed to return the children on time. Appellant offered the explanation that she had been hospitalized and was thus not able to return the children on time, but appellant never provided the court with documentation of her stay in the hospital, despite her representation that she possessed such documentation.

At the permanency-planning review hearing held in May 2004, after the three-month grace period, it was disclosed that appellant was still not attending AA/NA meetings. As before, appellant had provided no documentation that she was receiving outpatient drug treatment. She had inexcusably missed one drug screening. Since the last hearing, she had only attended three visitation sessions with the children. It was said that appellant had not maintained regular contact with the department. Further, it was disclosed that her criminal charges remained outstanding. Based on this evidence, the trial court decided to change the goal from reunification to termination, noting in particular that the children had been taken into protective custody over drug usage and that appellant had not complied with the case plan in that area. Even though appellant excused her lack of visitation on the basis that her caseworker had changed and that it had not been made clear to her when her visits were to occur, the trial court was not required to accept that any such confusion extended over an entire three-month period. Although the majority is critical of the trial

court's "*sua sponte*" decision not to accept the department's recommendation to continue the goal of reunification, it was the trial court's prerogative to change the goal to termination, despite that recommendation. Ark. Code Ann. § 9-27-338(c) (Supp. 2005). The decision rests with the trial court, not the department.

At the conclusion of this review hearing, the trial court offered appellant words of encouragement, advising her that changing the goal to termination was not the "death knell" and that there was still time to bring herself into compliance. Unfortunately, the testimony presented at the termination hearing, held some three months later, revealed that appellant did not take advantage of the additional time. There was testimony that she tested positive on May 19 for propoxyphen, also known as Darvon, that she had missed a drug screening in July, and that she had tested positive for opiates in August. She did not present satisfactory proof verifying her attendance at NA meetings. She provided one unsigned sign-in sheet for May, none for June, four unsigned sheets in July, and four unsigned sheets in August. Her attendance at only two meetings in July could be confirmed. Other than her own word, she provided no documentation that she had participated in or completed outpatient drug counseling. It should be noted that appellant represented throughout the proceedings, and to Ms. Kucala, K.L.'s counselor, that she had been receiving treatment on her own at UAMS.

Jim Pfeiffer, a licensed professional counselor and certified drug-abuse therapist, testified[1] that he performed a drug and alcohol assessment on appellant in May of 2003, while appellant was incarcerated on the drug charges. In the interview, appellant told him that she used drugs and that she drank alcohol sparingly, even though she admitted to having a DWI a year and a half ago. She said that she had smoked marijuana one time and that she had used methamphetamine four or five times, but that her drug of choice was hydrocodone. Appellant reported that she had been using this drug for five years on an average of four to five pills a day, twenty to thirty pills per month. Pfeiffer said that appellant did not believe that she needed treatment because she had experienced

[1] When the record was being prepared, the court reporter discovered that her equipment had malfunctioned and that Pfeiffer's testimony had not been recorded. The trial judge's clerk prepared a summary of his testimony from the judge's notes. By entry of an agreed order, the summary was accepted by the parties and the court as a fair representation of his testimony.

no cravings since her incarceration. Appellant stated that she traded methamphetamine for hydrocodone, but Pfeiffer said that she did not consider trading as dealing in drugs.

Dr. Paul Deyoub, a forensic psychologist, conducted an evaluation of appellant in September of 2003. He diagnosed appellant with a mixed personality disorder with Borderline, Histrionic, and Dependent traits. He said that this disorder was characterized by substance abuse, instability, and unstable and abusive relationships. Noting that appellant had been in and out of court on hot-check and contempt charges, as well as her more recent drug arrest, he said that trouble with the law also typified her personality disorder. Dr. Deyoub stated that appellant had no insight into her substance-abuse problem and that she tended to minimize it. He felt that she was at risk for continued drug use and regarded her prognosis for reunification as being guarded and poor, although not impossible. Dr. Deyoub said that one could not believe appellant's promises of improvement and that one would have to see evidence of improvement before the children could be returned. He testified that appellant must demonstrate to her caseworker that:

> she is drug free, living in a home, working, supporting herself, not using drugs and doing her therapy. All of that would have to happen before. At the time I did this, and in cases like this which I do a lot of these, you're looking at six months to a year and she would be able to verify those steps. Because individuals like her and specifically [appellant] would have a high likelihood of recurrence or positive drug screens and so forth and all of that would be a set back. You would have to see it before you could place the kids back with her and put two young children with her if she's still using drugs or if she's still living an unstable life. People like [appellant] with a diagnosis and with her IQ are capable of doing this. That's not the problem. The problem is doing it.

Jan Kucala did testify that appellant had made progress since the last hearing, that the children were very bonded to her, and that K.L. would probably regress if appellant's rights were terminated. However, Ms. Kucala also stressed K.L.'s overriding need for stability, which was a need that appellant could not presently fulfill. She testified that achieving stability was going to be a "great difficulty" because there were still a lot of unknowns in the relationship between appellant and her boyfriend. She could not recommend that the children return home, only that a trial period

of unsupervised but closely monitored visits in the home begin. She was not able to predict how long it would take before appellant became stable enough for the children to return home, saying only that she did not think it would be a "long-term thing."

There was further testimony at the hearing that, although appellant had been asked, she had never provided pay stubs to verify her four-month employment at McDonald's. Appellant claimed that she was presently working for her father caring for her aged grandmother. There was testimony that her caseworker could not verify appellant's claim that she was moving into a larger apartment.

An overview of this case reveals that appellant waited ten months to begin working toward the goal of reunification, that she maintained partial compliance for five months, and that she made no meaningful progress and in fact regressed in the final months of the proceedings. At the termination hearing, the trial court was entitled to accept Dr. Deyoub's testimony outlining the necessity for documented proof, not appellant's word, that she was meeting the goals of the case plan of living a stable and drug-free life, and of maintaining employment and suitable housing. The trial court could find based on the evidence at the hearing that appellant had not successfully dealt with her drug problem, which was the reason that the children were removed from the home. Appellant could not verify that she had attended drug counseling or NA meetings on a regular basis. Just prior to the termination hearing, she had failed two drug tests and had failed to attend one drug screening. Although appellant testified that she had tested positive for opiates because of prescribed medication, appellant did not offer any verification of this prescription, and the trial court was not obliged to believe her testimony. There was also testimony at the hearing that called into question whether or not appellant was or even had been gainfully employed. Appellant failed to provide proof of employment, and the trial court was not required to believe her testimony that she was currently employed by her father. There was testimony giving the trial court reason to doubt that appellant had made arrangements for an apartment that could accommodate the children. Moreover, after nineteen months, appellant had not achieved the level of personal stability necessary for the children to return home. According to Ms. Kucala, there was much work yet to be done, and she could not say when appellant would be ready for the children to return home on a permanent basis. Although Ms. Kucala expressed the opinion that K.L. would regress if

appellant's rights were terminated, the trial court was entitled to accord whatever weight to that testimony as it saw fit, and could properly focus on the overall best interest of the child in the context of all the evidence under consideration.

It is always a sad day anytime a trial judge makes the tough and unenviable decision that the best interest of children demands the termination of parental rights. On appellate review, we are to give a high degree of deference to the trial court, as it is in a far superior position to observe the parties before it. *Trout v. Ark. Dep't of Human Services*, 359 Ark. 283, 197 S.W.3d 486 (2004). With that degree of deference in mind, I am not willing to say that the trial court's decision is clearly erroneous. In this case, the seasoned trial judge had the best opportunity to observe appellant, as well as the other witnesses, and to make an informed assessment of the situation gathered over the course of nineteen months. The trial judge took the case under advisement in order to render a careful and thoughtful decision. It is my opinion that we should not second-guess the judgment of the trial court when there is an abundance of evidence to support its decision. I would affirm, and I am authorized to state that Judge Glover joins in this dissent.

Rita Faye Burkeen SEARS *v.* Michael Derwin BURKEEN Sr.; Regions Bank, Guardian of the Estate of Michael Derwin Burkeen Sr.; and Linda Darlene Burkeen, Guardian of the Person of Michael Derwin Burkeen Sr.; Richard S. Muse; and Lane, Muse, Armen & Pullen

CA 05-1337 237 S.W.3d 521

Court of Appeals of Arkansas
Opinion delivered June 28, 2006

Rieves, Rubens, & Mayton, by: *Elton A. Rieves IV* and *Lawrence W. Jackson*, for appellant.

Taylor, Halliburton & Ledbetter, by: *Mark Ledbetter,* for appellees.

Wood, Smith, Schnipper & Clay, by: *John T. Vines*, for appellee Regions Bank.

SAM BIRD, Judge. This case involves writs of garnishment that appellant Rita Burkeen Sears caused to be issued in an attempt to collect a judgment for child-support arrearages of more than $73,000.00 owed to her by appellee Michael Derwin Burkeen Sr.,[1] her ex-husband. Sears appeals an order of the Garland County Circuit Court, entered on September 8, 2005, that limited to $25,300 the amount she could recover by garnishment, which was less than the $46,017.36 of Burkeen's money that was held by the garnishee. We hold that the Garland County Circuit Court erred in limiting the amount subject to garnishment to less than the entire amount of Burkeen's funds held by the garnishee, and we reverse and remand.

A detailed explanation of the factually complex background of this case is necessary to an understanding of our decision. The Burkeens obtained a divorce in Chancery Court of Hardeman County, Tennessee, in the early 1990s, and Burkeen was ordered in the divorce decree to pay child support. On November 11, 1992, Burkeen was injured in an accident at Wal-Mart, which led to almost a decade of litigation, including two appeals to the Arkansas Supreme Court. *See Wal-Mart Stores, Inc. v. Regions Bank Trust Dep't*, 356 Ark. 494, 156 S.W.3d 249 (2004); *Wal-Mart Stores, Inc. v. Regions Bank Trust Dep't*, 347 Ark. 826, 69 S.W.3d 20 (2002). In the meantime, Burkeen became delinquent in his child-support obligations, and on February 7, 2003, Sears obtained a judgment in Tennessee against him for $56,893.96 in child-support arrearages accrued through January 14, 2003, plus interest accruing thereon at the rate of 12% per annum. By a consent order dated and filed March 28, 2003, the Tennessee judgment was registered as a foreign judgment in the Garland County Circuit Court. The consent order contained a finding that, as of March 24, 2003, Burkeen's child-support arrearage was $58,352.94, including accrued interest.

On December 7, 2004, the Hardeman County, Tennessee, Chancery Court entered an "Agreed Order and Decree" that provided, in pertinent part, as follows:

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[1] Throughout the lengthy history of this case, Michael Derwin Burkeen Sr. has been identified in a variety of legal proceedings, in some as a competent individual, *sui juris*, and in some as an incompetent ward with a duly-appointed guardian. For the purpose of simplification, throughout this opinion Michael Derwin Burkeen Sr. is denominated merely as Burkeen, whether he is being referred to in his individual capacity, in his capacity as a ward under guardianship, or to the guardianship estate.

Upon consideration of the pleadings, exhibits, agreement of the parties, and other matters before it, the Court **FINDS, ORDERS, ADJUDGES, AND DECREES:**

1. [Burkeen] shall pay directly to [Sears] the lump sum of $25,000 from the settlement proceeds in *Regions Bank v. Wal-Mart Stores, Inc.*, No. CIV-96-314 (Circuit Court, Garland County, Arkansas), which shall be credited against his current arrearage, immediately upon receipt of the settlement proceeds.

. . . .

3. [Burkeen] shall pay to [Sears] the sum of $50 per month toward his remaining arrearage and shall make such payments through the Circuit Court of Garland County, Arkansas. [Burkeen] shall immediately make such arrangements as are necessary to make such payments through the registry of the Circuit Court of Garland County, Arkansas, and shall be responsible for any fees and costs charged by the clerk. The first payment shall be due January 1, 2005, and each subsequent payment shall be due on the first day of each month thereafter.

4. [Sears] will not take any action to cause [Burkeen's] driving or any other license privileges to be revoked so long as [Burkeen] strictly complies with his [sic] all of his obligations under the terms of this decree.

5. Upon payment by [Burkeen] of the sum of $25,000 pursuant to paragraph 1 *and* [Burkeen] notifying this court and the Garland County Circuit Court of his current address, the court will dismiss [Sears's] petition for contempt by separate order without prejudice.

6. [Burkeen's] motion for relief from judgment is hereby dismissed without prejudice.

7. The judgment of this court dated February 7, 2003, remains in force and in place, subject to any credits that [Burkeen] receives toward his arrearages as a result of any payments he makes.

. . . .

On December 10, 2004, the Probate Court of Garland County entered an order approving the compromise settlement of Burkeen's claims against Wal-Mart and authorizing the dismissal

and release of those claims in consideration of Wal-Mart's payment of $160,000. This order also approved the payment of attorney's fees and expenses from the settlement proceeds and authorized other disbursements, "including the child support disbursement payment [sic] to Rita Sears." An exhibit to the order set forth the sums authorized to be distributed from the settlement proceeds, specifically including $25,000 to be distributed to Sears "under child support judgment."

Despite the December 7, 2004 Tennessee chancery court order directing that $25,000 be paid to Sears from the Wal-Mart settlement proceeds "immediately upon receipt," and the December 10, 2004 Garland County Probate Court order approving the settlement with Wal-Mart and authorizing the payment of $25,000 to Sears from the settlement proceeds, the $25,000 was not paid. On April 28, 2005, Sears caused writs of garnishment to be issued and thereafter served upon Burkeen's attorney, Richard S. Muse, individually, and on his law firm, Lane, Muse, Arman & Pullen (hereinafter referred to collectively as "the garnishees"), alleging that the garnishees were indebted to Burkeen or in possession of money belonging to him.

On May 5, 2005, the garnishees moved to quash the writs of garnishment, contending that, under the Tennessee court's December 7, 2004 Agreed Order and Decree, Sears was only entitled to $25,000 from the Wal-Mart settlement proceeds, plus $50 per month to be paid by Burkeen toward the remaining arrearage. The garnishees admitted that they held the $25,000 due to Sears "in trust." However, they contended that they were prevented from paying it to her because the Tennessee Office of Child Support had asserted a lien on the proceeds in a Tennessee proceeding, and they contended that the Tennessee court would decide to whom they should pay the $25,000 at a hearing scheduled during June of 2005. The garnishees also filed an answer to Sears's writs of garnishment on May 5, 2005, acknowledging that they held $46,017.36 from the Wal-Mart settlement for the benefit of Burkeen, and again asserting that Sears's rights to any of that money were limited by the terms of the December 7, 2004 Tennessee chancery court order.

Sears responded to the garnishees' motions to quash her writs of garnishment, denying that the December 7, 2004 Tennessee decree constituted a compromise settlement of her child-support claims against Burkeen, arguing that the Tennessee decree contained no release or waiver of her right to collect the child-

support judgment or limit her rights to undertake collateral efforts to collect the judgment, and arguing that the Tennessee decree, by its express terms, provided that Burkeen's child-support arrearages and the judgment against him were not affected by the December 7, 2004 order.

On June 13, 2005, the Garland County Circuit Court conducted a hearing on the motion to quash the writs of garnishment. Counsel for Burkeen argued that the writ should be dismissed because a hearing to be held in July in Hardeman County, Tennessee, would resolve "this whole issue." He explained that Sears had contacted social security disability as well as the Tennessee OCS to obtain satisfaction of the Tennessee court's December 7, 2004 order entitling her to a portion of the settlement proceeds in the personal-injury suit. Counsel stated, "The Tennessee Office of Child Support has filed a lien and served me with notice of a lien, saying you cannot pay Mrs. Sears this sum you agreed upon. It's illegal. You must pay us and we'll pay her." He argued that the December 7, 2004 order was *res judicata*, and that "from the standpoint of an *estoppel*, we settled the case against Wal-Mart on condition that we had everything resolved with Mrs. Sears. . . . So we have relied, to our detriment, settled the case, everything's worked out, it's twenty-five grand, and then other people have been brought into this to stop us."

Counsel for Sears noted that the December 7, 2004 agreed order specifically required "payment of a $25,000 lump sum immediately upon receipt of the settlement proceeds." He argued that the order had no release or mention of waiver, that the original arrearage judgment from Tennessee had been registered in Arkansas, that the motion by Tennessee OCS to set aside the December 7, 2004 order was not relevant to the writ of garnishment, that the Tennessee OCS lien was not effective in Arkansas, and that the money was located in Richard Muse's law firm. He noted that Sears currently was receiving $50 a month being withheld from Burkeen's social security. Citing *Stewart v. Norment*, 328 Ark. 133, 941 S.W.2d 419 (1997), he concluded that the writ of garnishment was collateral to the issues going on in Tennessee and was cumulative to the December 2004 order.

Burkeen's attorney responded that Sears would get her money after the matter was resolved in Tennessee. The court took the matter under advisement and announced that it would issue an opinion as soon as possible. Before the opinion was issued, further proceedings took place in Tennessee.

On July 18, 2005, a hearing was conducted in Tennessee chancery court on Sears's petition that the Burkeens be held in contempt and on the objection of Tennessee OCS to entry of the December 7, 2004 order as void. Counsel for Mr. Burkeen stated to the court:

> [T]he issue is whether or not my client, Mr. Burkeen, did what the Court instructed him to do. First of all, the Court said that you are to pay $25,000 from the settlement proceeds of this lawsuit, and that it is to be credited to what money he owes. So, we're not alleging that he doesn't owe more money after this $25,000 is paid. . . .
>
> The petitioning party says, "well, they didn't pay the $25,000." We couldn't, Your Honor, pay the $25,000 till the money came in. That was in December. As I understand it, the money came in after the first of the year. We received . . . some sort of notice from the State OCS that went into effect I think in January of that year. . . . The money is still there. The question is, do we pay it to OCS? We think we do. We think we have to. And it does not relieve my client of the additional amount that he owes. So I think he's not in contempt. . . . We know that when we get through here today that if he pays the $25,000, he's going to owe about forty something thousand dollars additional money to the State.

Ruling from the bench, the Tennessee court stated that the agreed order did not amount to a release of the entire child-support arrearage. The court stated that the agreement was binding as between the parties but had no effect on Tennessee's right to collect the $25,000 and any other money it could collect. The court ruled that payment of the $25,000 would constitute a showing that Burkeen was purged of contempt. The court specifically found that arrearage still existed in addition to the $25,000.[2]

On September 8, 2005, the Garland County Circuit Court issued its written order regarding the garnishees' motions to quash the writs of garnishment. The court found that the writs should not be quashed but that, pursuant to the December 7, 2004 agreed order and decree entered by the Tennessee chancery court, Sears's claim against the funds under the control of the appellees was

[2] The record on appeal contains a transcript but no written order of this Tennessee proceeding.

limited to $25,300. Sears was awarded judgment against the garnishees in the amount of $25,300. The appeal before us is taken from that order.

Whether the trial court correctly limited Mrs. Sears's recovery to $25,300

The agreed order and decree of December 7, 2004 required Burkeen to "pay directly to plaintiff the lump sum of $25,000 from the settlement proceeds, . . . which shall be credited against his current arrearage, immediately upon receipt of the settlement proceeds," as well as to pay "$50 per month toward his remaining arrearage" through the Garland County Circuit Court. Sears argues on appeal, as she did below, that she never agreed that Burkeen's payment of the $25,000 from the Wal-Mart settlement proceeds would constitute a release or waiver of his child-support arrearage or of her right to collect the child-support judgment from the settlement proceeds. She asserts that she should be permitted to levy and execute upon any of Burkeen's property and money that may be found, or to exercise any other remedy at her disposal, until the full amount of his arrearage is satisfied. She asserts that the arrearage exceeded $77,000 when her reply brief was filed on March 15, 2006.

Appellees accuse Mrs. Sears of forum shopping and maneuvering "to skirt a sister state's final ruling." They assert that her claim of entitlement to pursue an Arkansas garnishment is not a cumulative remedy. They assert that she is estopped to assert a claim to more than $25,000 of the settlement proceeds or is precluded from doing so by her "inconsistent" position in the matter, given that the intervening lien of Tennessee OCS was foreseeable to her as a recipient of aid from Tennessee and of the state's interest. They assert that the superior lien claim of Tennessee OCS on Sears's award prevents Burkeen from making any direct payment of the $25,000 to her, and that intervening claims, such as this lien, justify Burkeen's non-performance in order to prevent forfeiture or double payment. They assert that the Wal-Mart case "was settled by Burkeen in reliance upon a waiver by Sears of any further claim to the settlement proceeds and a release of her garnishment writ," and that Sears is estopped to now claim entitlement to all of his tort recovery.

Our decision in this case follows the guidance of our supreme court in *Stewart, supra*:

> For her sole point on appeal, Stewart argues that the chancellor was clearly erroneous in finding that the income-withholding order entered on March 6, 1996, provided her with the sole and exclusive method of collecting on the judgment. In support of her argument, Stewart cites Ark. Code Ann. § 9-14-234(b) (Supp. 1995), which provides that any order that contains a provision for child-support payments shall be a final judgment subject to a writ of garnishment as to accrued installments until a party moves to set aside or modify the order.
>
> *The statutory language is clear. The General Assembly has provided that an order for child-support arrearages is a final judgment subject to garnishment or execution until the order is modified or otherwise set aside. The fact that an order also provides for income withholding to satisfy accrued support arrearages is irrelevant in determining whether garnishment provides a viable alternative method for collecting the arrearage.* This conclusion is supported by Ark. Code Ann. § 9-14-202 (Repl. 1993), which states that the remedies provided in the child-support enforcement subchapter "shall not be exclusive of other remedies presently existing" and by Ark. Code Ann. § 9-14-218(a)(1)(B) (Supp. 1995), which expressly provides that the use of income withholding in orders providing for child support "does not constitute an election of remedies and does not preclude the use of other enforcement remedies."

328 Ark. at 136, 941 S.W.2d at 420 (emphasis added).

■ We reject appellees' argument that it was impossible to pay Mrs. Sears the $25,000 as a lump sum and that Mrs. Sears should be estopped from attempting to recover the previous judgment of arrearage. Clearly, the December 7, 2004 Tennessee chancery court order contains no language to suggest that, by accepting $25,000 of the Wal-Mart settlement proceeds, Sears released the balance of the judgment or waived her right to collect it. While she could have agreed to receive only $25,000 from the Wal-Mart settlement in full satisfaction of her judgment, there is no language in the agreed order of December 7, 2004 that she did so. Nothing in the agreed order precludes her from exercising whatever legal remedies are available to judgment creditors in general for the collection of judgments. Sears's right to recover the entire amount of her judgment was in no way restricted by the Tennessee court's December 7, 2004 order, which expressly

provided that the court's February 7, 2003 judgment remained in effect, subject only to any credits applied for payments made by Burkeen.

The writs of garnishment here were nothing more than Sears's exercise of her lawful remedy to execute on $46,017.36 of Burkeen's money in the possession of his lawyers. Just as the withholding order in *Stewart, supra,* was not the payee spouse's sole remedy, the December 7, 2004 order that Sears was entitled to $25,000 of the settlement funds did not constitute an election of remedies that precluded her use of garnishment or any other lawful remedy to collect money belonging to Burkeen, such as the $46,017.36 held in the law firm's client trust account for his benefit. Clearly, under Arkansas law, an order for the payment of a portion of a judgment from a specific source does not prohibit the judgment creditor from also exercising other lawful means to pursue the full satisfaction of the judgment. *See Stewart, supra; see also* Ark. Code Ann. § 9-14-202 (Repl. 2002).

Nor are we persuaded that, because Tennessee OCS claims to have a lien against the Wal-Mart settlement proceeds, the garnishees were prevented from paying $25,000 to Sears as required by the December 7, 2004 agreed order. While it does appear from the transcript of the July 18, 2005 hearing that the Tennessee chancery court held that Tennessee OCS was not bound by the December 7, 2004 agreed order, the effect of that holding was to merely recognize that Tennessee OCS claimed a lien that was not affected by the parties' agreement. However, other than the bare assertion by the garnishee's attorney that the garnishees have been served by Tennessee OCS with notice of a lien, there is nothing in the record before us to indicate that Tennessee OCS has taken any action to enforce its lien in the Garland County Chancery Court, which is the court with jurisdiction over Burkeen's funds that are the subject of Sears's garnishment. In the absence of Tennessee OCS's intervention in Garland County Chancery Court to enforce its lien, there is no such lien to be enforced in this proceeding.

We affirm the trial court's denial of the motions to quash the writs of garnishment, but we reverse its ruling that Sears's garnishment is limited to only $25,300, and we remand to the trial court for the entry of judgment in favor of Sears consistent with this opinion. Because the garnishees did not file a cross-appeal, we will not address their contention that the trial court's order should be

reversed in part to show that Burkeen is current with his $50 monthly child-support payments.

Finally, we note that Regions Bank has filed a brief in which it has renewed its motion that it be dismissed as a party to this appeal.[3] On January 25, 2006, we denied a similar motion. However, in view of the foregoing disposition of this appeal, we agree with Regions that it has no interest whatsoever in the conflict that is the subject of this appeal, and we grant its motion.

Affirmed in part; reversed and remanded in part; motion by Regions Bank granted.

VAUGHT and ROAF, JJ., agree.

Kevin BARTON *v.* STATE of Arkansas

CA 05-1146 237 S.W.3d 512

Court of Appeals of Arkansas
Opinion delivered June 28, 2006

[3] The personal-injury claim was brought against Wal-Mart by Linda Burkeen, individually and as guardian of the person and estate of Michael Burkeen. Regions Bank was substituted prior to trial as guardian of the estate. *See Wal-Mart Stores, Inc. v. Regions Bank Trust Dep't*, 347 Ark. 826, 69 S.W.3d 20 (2002), n.1.

Montgomery, Adams & Wyatt, PLC, by: *Dale E. Adams*, for appellant.

Mike Beebe, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. Appellant Kevin Barton interlocutorily appeals from the trial court's denial of his motion to transfer his case to juvenile court. On appeal, Barton limits his claim of error to a single issue — that the Arkansas juvenile transfer statute, Ark. Code Ann. § 9-27-318 (Repl. 2002), is unconstitutional because it is violates both equal protection and due process of law. We affirm.

Barton was charged with capital murder, aggravated robbery, and residential burglary following a felony information filed by the State. The State alleged that on August 5, 2004, he robbed, shot, and killed an eighty-four-year-old woman in her home. Because Barton was sixteen years old when the alleged offenses took place, he moved to transfer the case to the juvenile division of the lower court.

His motion to transfer the case to juvenile court was filed on June 30, 2005. On July 28, 2005, he filed a separate motion asking the trial court to declare the juvenile-transfer statute unconstitutional. On July 29, 2005, Barton brought his constitutional chal-

lenge before the trial court, after which all parties agreed to postpone a ruling until all evidence was heard. On August 30, 2005, the trial court denied Barton's motion for transfer. On August 31, 2005, the court entered a separate order relying on *Beck v. State*, 317 Ark. 154, 876 S.W.2d 561 (1994), denying Barton's request that it find the juvenile-transfer statute unconstitutional. That same day, Barton filed a notice of interlocutory appeal from the trial court's August 30 denial of his transfer motion. However, the sole issue he argues on appeal involves the constitutionality of the juvenile-transfer statute — the subject of a separate order entered on August 31.

Therefore, as an initial matter, we must consider the procedural posture of the appeal. Barton takes an interlocutory appeal from a motion to transfer, which is permitted, but then offers only a constitutional argument on appeal. At the outset we note that Barton has appealed from the transfer-denial order, which concluded his rights in the matter of juvenile transfer and by statute is immediately appealable. Ark. Code Ann. § 9-27-318. Thus, the issue of whether the trial court erred in its decision to deny Barton transfer is properly before this court. However, the appeal before us specifically limits the claim of error to only one issue — the constitutionality of the statute. In fact, in his jurisdictional statement, Barton states that he "raises but one point on appeal, to wit, that the trial court erred in denying his motion to hold the Arkansas juvenile-transfer statute, Ark. Code Ann. § 9-27-318 (Repl. 2002), unconstitutional as the denial of equal protection of the law and due process of law."

While it is well settled that interlocutory appeals are granted as a matter of statute or rule, and there is no right to such appeal granted by the Constitution of the United States, *Ellis v. State*, 302 Ark. 597, 598, 791 S.W.2d 370, 370 (1990), an appellant is permitted to make constitutional arguments in conjunction with a statutorily authorized argument — as in *Beck*. In *Beck*, the primary argument was the denial of a motion to transfer, but our supreme court also considered an equal-protection argument offered in conjunction with the denial-of-transfer argument. Although the *Beck* precedent permits us to hear any constitutional arguments Barton offered *in conjunction* with his transfer argument, in this case, the transfer denial and the constitutionality of the juvenile-transfer statute are separated by Barton's design. He filed two distinctly separate motions outlining each of his arguments — sufficiency and constitutionality — and received two separate rulings and

orders. He interlocutorily appeals the only order that he had a right to appeal — the transfer motion, yet makes no transfer argument.

Because Barton failed to offer any argument relating to the sufficiency of the evidence supporting the trial court's decision to deny him transfer to the juvenile division, he has not demonstrated a need for interlocutory relief. Accordingly, we affirm the trial court's denial of transfer because Barton's juvenile-transfer argument was abandoned on appeal. *Stacks v. Marks*, 354 Ark. 594, 600, 127 S.W.3d 483, 486 (2003). Further, we refuse to reach the merits of Barton's constitutional arguments at this stage of litigation because they are not made in conjunction with a valid interlocutory claim. It is axiomatic that the tail may not wag the dog.

Affirmed.

ROAF, J., agrees.

HART, J., concurs.

JOSEPHINE LINKER HART, Judge, concurring. I conclude that appellant's constitutional challenge of the juvenile-transfer statute was properly preserved for appellate review. Therefore, I would address the merits of appellant's argument. I would, however, affirm the circuit court's decision, and accordingly, I concur in the majority's affirmance.

In separate motions, appellant moved to transfer the case to juvenile court and moved to declare the juvenile-transfer statute unconstitutional. A hearing was held on both motions, and at the conclusion of the hearing, the court first orally denied appellant's challenge to the constitutionality of the statute and then denied appellant's motion to transfer. An order was filed denying appellant's motion to transfer the case to juvenile court, and the next day appellant filed a notice of interlocutory appeal from that order. On appeal, he challenges, as he did below, the constitutionality of the juvenile-transfer statute.

The majority concludes that because appellant did not, on appeal, make his constitutional challenge to the juvenile-transfer statute "*in conjunction*" with an argument challenging the sufficiency of the evidence to support the denial of the motion to transfer, "he has not demonstrated a need for interlocutory relief." Consequently, the majority declines to address appellant's consti-

tutional argument "at this stage of litigation because they are not made in conjunction with a valid interlocutory claim." I note that the majority does not cite any authority to support this proposition.[1]

I believe that the majority is wrong. The order appealed from, the denial of appellant's motion to transfer, was an appealable order, and appellant appealed from that order. *See* Ark. Code Ann. § 9-27-318(i) (Supp. 2005). And our appellate rules twice provide that "[a]n appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment." *See* Ark. R. App. P.–Civ. 2(b), 3(a) (2006); *Oliver v. State*, 312 Ark. 466, 851 S.W.2d 415 (1993) (raising on appeal only the denial of a motion for continuance in an interlocutory appeal from the denial of a motion to transfer). Accordingly, the denial of appellant's challenge to the constitutionality of the statute was brought up for review because it was an intermediate order that necessarily affected the appealable final order denying appellant's motion to transfer. If we found, as appellant argues, that in applying the statute the circuit court acted as a "rubber stamp" of the prosecutor, then it would affect the propriety of the circuit court's denial of the motion to transfer. Also, there is no statutory language requiring an appellant to challenge the sufficiency of the evidence before he can challenge the constitutionality of the statute in his appeal.

Further, the Arkansas Supreme Court has held that "an appeal from an order granting or denying transfer of a case from one court to another having jurisdiction over juvenile matters must be considered by way of interlocutory appeal, and an appeal from such an order after judgment of conviction in circuit court is untimely and will not be considered." *Hamilton v. State*, 320 Ark. 346, 350, 896 S.W.2d 877, 880 (1995). Thus, juvenile-transfer appeals can now only be made by interlocutory appeal. In support of its decision, the Arkansas Supreme Court noted that "[t]o allow a defendant who has been convicted in the superior court to question on appeal the propriety of the juvenile court's finding would afford him an opportunity to secure a reversal of a judgment of conviction even though he was found guilty after an errorless trial." *Id.* at 348, 896 S.W.2d at 879 (quoting *State v. Harwood*, 98

[1] I note further that the majority affirms the circuit court. Because the majority finds that appellant is not entitled to interlocutory relief, the proper disposition would be to dismiss the appeal. *See Barton v. State*, 366 Ark. 339, 235 S.W.3d 511 (2006).

Idaho 793, 572 P.2d 1228 (1977)). Also, the Arkansas Supreme Court noted that "it is in the accused's best interest to seek immediate relief from an improper finding in the juvenile court so he may be spared the burden and public scrutiny associated with a criminal trial," and "the delay inherent in criminal prosecutions may substantially prejudice a juvenile court reconsideration of its prior finding of unfitness should the cause be remanded after a review of criminal proceedings." *Id.* at 349, 896 S.W.2d at 879. I believe that this reasoning would likewise demand that a constitutional challenge to the juvenile-transfer statute be heard on interlocutory appeal as well, even if an appellant does not challenge the sufficiency of the evidence to support the transfer.

Finally, the Arkansas Supreme Court has observed that a constitutional challenge to the juvenile-transfer statute "would have been made more appropriately by a direct appeal from the circuit court's transfer order." *Webb v. State*, 318 Ark. 581, 586, 886 S.W.2d 624, 626 (1994). Thus, the proper time to raise this constitutional challenge is now, on appeal from the denial of the motion to transfer.

Given this precedent, and the absence of precedent to the contrary, I conclude that the proper time to appeal a constitutional challenge to the juvenile-transfer statute is in this interlocutory appeal from the order denying transfer, even if the appellant does not challenge the sufficiency of the evidence to support the transfer. The juvenile-transfer statute does not require — and no advantage results — from delaying the challenge to the constitutionality of the juvenile-transfer statute until appellant makes a direct appeal from a criminal conviction on the charges presented here. In fact, our appellate rules and the applicable case law require the constitutional challenge to be made in an interlocutory appeal. In my estimation, given the applicable precedent and the majority's conclusion, appellant cannot ever challenge the constitutionality of the juvenile-transfer statute. Thus, I would address the merits of appellant's constitutional challenge and affirm.

Ricky JUSTUS *v.* STATE of Arkansas

CA CR 05-878 237 S.W.3d 528

Court of Appeals of Arkansas
Opinion delivered June 28, 2006

Patrick J. Benca, for appellant.

No response.

LARRY D. VAUGHT, Judge. Appellant Ricky Justus was charged with false imprisonment, theft of property, and domestic battery. On March 31, 2004, Justus entered a plea of guilty as to all charges alleged. Included in his plea was an admission that the domestic battery occurred in the presence of his six-year-old daughter. As a result of his plea and admission, along with the fact that Justus had four or more prior felony convictions, he faced a potential term of 130 years' imprisonment in the Arkansas Department of Correction. On April 6, 2005, a jury trial was held on the issue of sentencing. After hearing the evidence, the jury imposed the maximum sentence. Judgment was entered on April 22, 2005, and a timely notice of appeal was filed on May 17, 2005.

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

of Appeals, Justus's counsel filed a motion to withdraw as counsel because "[t]here are no non-frivolous issues that would support an appeal in this case." Counsel's motion was accompanied by an abstract and brief purportedly referring to everything in the record that might arguably support an appeal, a record of all motions and requests made by Justus and denied by the court, and a statement of the reasons why counsel considers none of these adverse rulings to be a meritorious ground for reversal. The clerk of this court furnished Justus with a copy of his counsel's brief and notified him of his right to file a pro se brief. However, Justus did not file a brief. The State filed a letter with the Court stating that it has no adversarial interest in this matter because Justus did not file a pro se brief. From our review of the record and the brief presented to us, we find compliance with Rule 4-3(j), but we cannot say that the appeal is wholly without merit.

Our concern centers on an argument that Justus made prior to the sentencing trial. In relation to his status as a habitual offender, he argued that although he had three prior convictions for breaking or entering (he consecutively broke into three automobiles in a Wal-Mart parking lot), the convictions should be consolidated because they all arose from the same incident. In support of his position, Justus relied on *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989).

In *Tackett*, the appellant was involved in a motor-vehicle accident that resulted in the death of a passenger on the scene. *Id.* Another victim at the scene was injured and went into a coma. *Id.* Appellant was charged with manslaughter as to the death of the passenger at the scene and ultimately convicted. *Id.* His conviction was affirmed in *Tackett v. State*, 12 Ark. App. 57, 670 S.W.2d 824 (1984). Almost four years later, the comatosed victim died from her injuries. Her death resulted in a second charge of manslaughter. *Tackett*, 298 Ark. at 26, 766 S.W.2d at 413. At the second manslaughter trial, the court allowed introduction of the first manslaughter charge to support a habitual-offender sentence enhancement. On appeal, our supreme court found that this decision by the trial court was contrary to due process and fundamental fairness and was not within the spirit of the Habitual Offender Act. *Id.*

In support of his motion to be relieved as counsel, Justus's attorney distinguishes the *Tackett* case, pointing out that Justus's acts were not the result of a single impulse — that each act was a "separate incident with separate victims." He then noted that he

was "unable to locate any case law that supports [Justus's] position before the trial court that several felonies arising out of the same incident cannot be counted individually to support a habitual allegation," and "[f]or the foregoing reasons, this argument has no merit."

Based on these statements we believe that a fundamental misunderstanding exists as to what constitutes a meritless appeal. If indeed there is no case law that supports Justus's position — and we, like counsel, have found none — that does not render Justus's appeal "wholly without merit" or "wholly frivolous," which are the standards we apply in no-merit cases. *Ofochebe v. State*, 40 Ark. App. 92, 93, 844 S.W.2d 373, 374 (1992). Indeed, without clear case law addressing Justus's claim, it is impossible to meet the rigid *Anders* requirements. The test is not whether there is case law *supporting* Justus's argument, but whether there is case law *disposing* of his argument.

The fact that Justus's counsel was unable to find authority supporting Justus's sentencing claim does not render the issue wholly frivolous, and we are obligated to consider the issue on its merits. Accordingly, we direct Justus's attorney to file a brief developing an adversarial presentation relating to Justus's habitual-offender argument and any others that counsel may deem appropriate.

Motion to Withdraw as Counsel is denied.

Rebriefing Ordered.

CRABTREE and BAKER, JJ., agree.

Clare C. MARTIN, Trustee of the Clare C. Martin Trust UTA Dated 11-13-98 and Jack L. Martin, Trustee of the Jack L. Martin Trust UTA Dated 11-13-98 *v.* David L. SHEW and Hilary Ann Bishop Shew and Ben Melling and Susan Enna Melling

CA 05-1314 237 S.W.3d 497

Court of Appeals of Arkansas
Opinion delivered June 28, 2006

[redacted]

Carney Law Firm, P.A., by: *Mark Carney*; *John A. Crain*, for appellants.

Johnson, Sanders & Morgan, by: *Ted H. Sanders*, for appellees.

LARRY D. VAUGHT, Judge. Appellants Clare Martin, as trustee of the Clare Martin Trust, and Jack Martin, as trustee of the Jack Martin Trust, brought suit seeking a declaratory judgment to determine the validity of certain amendments to restrictive covenants that were adopted by vote of appellees David Shew, Hillary Shew, Ben Melling, and Susan Melling, owners of two-thirds of the property affected by the covenants. The trial court found that the modified restrictions were valid and enforceable. Appellants raise five points for reversal. We affirm.

The facts are largely undisputed. In March 1999, MMI, Inc., owned a 54.32-acre piece of property and decided to subdivide the property into a subdivision named "Oak Valley Estates." The property was divided into five ten-acre tracts with metes-and-bounds descriptions. The survey of the subdivision was recorded. Protective covenants and restrictions were adopted but not filed of record for Oak Valley Estates. The covenants covered topics such as the size of residences to be built, set-back lines, and whether mobile or manufactured homes would be allowed. The covenants also provided for amendments to the scheme if approved by two-thirds of the property owners.

In March 2001, MMI revised the survey of Oak Valley Estates whereby Tract 4 was divided between Tract 3 with a combined total acreage of 16.9 acres and Tract 5 with a combined total of 16.41 acres. On June 15, 2001, MMI revised the restrictive covenants for Oak Valley Estates by allowing Tract 3 to be subdivided into two eight-acre tracts and Tract 5 to be subdivided into three five-acre tracts. The amended covenants were otherwise unchanged. In July 2001, MMI filed a survey showing Tract 5

divided into three tracts of land — Tract X, Tract XX, and Tract XXX — and provided for a sixty-foot road and utility easement along the eastern boundary of Tract 5. The survey is shown as approved by the Baxter County Planning Board and signed by Boyce Drake, chairman of the planning board.

MMI made the first conveyance when Tract 2 was sold on June 29, 2001. Tract 2 was ultimately conveyed to the Shews on August 15, 2002. Tract 3, as modified by the 2001 amendment, was conveyed to the Shews on August 3, 2001. The Mellings purchased Tract 1 on November 9, 2001. In August 2002, MMI conveyed Tract 5 to appellants by a "correction" deed containing a metes-and-bounds description of Tract 5 and referencing the original 1999 survey. In March 2003, appellees, who constituted the owners of more than two-thirds of the property, amended the covenants to prevent any further subdivision of the tracts.

On October 2, 2003, appellants filed this action for declaratory judgment as to the validity of the March 2003 amendments to the restrictive covenants. Appellants alleged that the 2003 amendments were ineffective because Tract 5 had already been divided. Appellees answered and denied that appellants had the ability, after the 2003 amendments to the restrictive covenants, to divide Tract 5 into three separate lots. At the hearing, the court heard the arguments of counsel as to the effect of each document at issue, but no testimony was presented.

The trial court issued an order in which it found that the original protective covenants and restrictions were ineffective because they had not been filed of record as required by law. The amended covenants filed of record on June 15, 2001, were found to place appellees on notice that Tract 5 was subject to being divided into three parcels. The court concluded, however, that appellants did not divide Tract 5 into three parcels prior to appellees' filing the amended covenants prohibiting the further division of Tract 5 because there was no sale of the subdivided Tract 5 that made reference to the July 2001 survey showing the division into three lots. A timely notice of appeal followed.

Appellants raise five points for reversal. However, the case essentially turns on one issue: whether there was a division of Tract 5 prior to appellees filing the restrictions to prevent further division in March 2003. All of appellants' arguments concern various factors to be considered in answering that single question.

In bench trials, the standard of review on appeal is whether the trial court's findings were clearly erroneous. *Schueck v. Burris*,

330 Ark. 780, 957 S.W.2d 702 (1997). At issue in this case is interpretation of a protective or restrictive covenant on the use of land. Restrictions upon the use of land are not favored in the law. *Forrest Constr. Co., Inc. v. Milam*, 345 Ark. 1, 43 S.W.3d 140 (2001); *Faust v. Little Rock Sch. Dist.*, 224 Ark. 761, 276 S.W.2d 59 (1955). Further, a restrictive covenant will be strictly construed against limitations on the free use of land. *Forrest*, 345 Ark. at 9, 43 S.W.3d at 145; *Casebeer v. Beacon Realty, Inc.*, 248 Ark. 22, 449 S.W.2d 701 (1970). All doubts are resolved in favor of the unfettered use of land. *Forrest*, 345 Ark. at 9, 43 S.W.3d at 145; *Casebeer*, 248 Ark. at 25, 449 S.W.2d at 703.

Any restriction on the use of land must be clearly apparent in the language of the asserted covenant. *Forrest*, 345 Ark. at 9, 43 S.W.3d at 145; *Harbour v. Northwest Land Co., Inc.*, 284 Ark. 286, 681 S.W.2d 384 (1984). Where the language of the restrictive covenant is clear and unambiguous, application of the restriction will be governed by our general rules of interpretation; that is, the intent of the parties governs as disclosed by the plain language of the restriction. *Forrest*, 345 Ark. at 9, 43 S.W.3d at 145; *Clifford Family Ltd. Liab. Co. v. Cox*, 334 Ark. 64, 971 S.W.2d 769 (1998) (quoting *Barber v. Watson*, 330 Ark. 250, 953 S.W.2d 579 (1997)).

Under the facts of this case, we conclude that the trial court did not err in finding that there was no division of Tract 5 prior to the amendment to the restrictive covenants prohibiting further division of Tract 5. There is no dispute that, under the June 15, 2001, amendments to the restrictive covenants, MMI had the right to divide Tract 5 into three smaller tracts. It is also clear that MMI took steps toward dividing Tract 5 prior to any conveyances. It had a survey done showing Tract 5 divided into three smaller tracts and had it approved by the planning commission and recorded. However, approval of the plat by the planning commission did nothing more than entitle MMI to place the survey of record. *Rickman v. Mobbs*, 253 Ark. 969, 490 S.W.2d 129 (1973). Without a sale being made with reference to the revised July 2001 plat, Tract 5 remained undivided, and appellants owned the entire tract. *See City of Sherwood v. Cook*, 315 Ark. 115, 865 S.W.2d 293 (1993).

Appellants argue that the recording of the July 2001 survey was a division of Tract 5 pursuant to Ark. Code Ann. § 14-18-101(a) (Repl. 1998), which provides that "owners of land lying beyond the confines of municipal corporations, which have

not theretofore been subdivided as additions or subdivisions of any city or town, may have their lands surveyed and divided into numbered plots by a competent surveyor, who shall make a plat thereof." However, the trial court found that, because the 2002 conveyance from MMI to appellants did not convey the property encompassing Tract 5 by reference to the July 2001 survey, the division was never effective. This finding is not clearly erroneous and is supported by Ark. Code Ann. § 14-18-102, which makes the legal description for property platted pursuant to section 14-18-101 the legal description to be used in all instruments relating to the land. The 2002 conveyance only referred to a metes-and-bounds description of Tract 5 (and one-half of Tract 4) from the 1999 survey.

After the conveyance in 2002, appellants took no further action to divide Tract 5 into three smaller tracts. They could have replatted Tract 5 prior to the 2003 amendments. *Compare Ingram v. Wirt*, 314 Ark. 553, 864 S.W.2d 237 (1993). They were also on notice that the restrictive covenants could be amended by the requisite number of landowners and are, therefore, bound by such later amendments. *See Clifford Family Ltd. Liab. Co.*, 334 Ark. 64, 971 S.W.2d 769. Because there was no effective division of Tract 5 after the conveyance to appellants, the circuit court was not clearly erroneous in declaring that the amendments to the restrictive covenants adopted by appellees were valid and enforceable.

Affirmed.

GLADWIN, GRIFFEN, and NEAL, JJ., agree.

ROAF, J., concurs.

HART, J., dissents.

JOSEPHINE LINKER HART, Judge, dissenting. I respectfully dissent because I believe that my learned colleagues have failed to apprehend that the appellants are correct when they argue that the proper resolution of this case lies within the plain wording of Arkansas Code Annotated section 14-18-101 (Repl. 1998). The July 2001 survey, which was duly certified and filed for record, divided Tract 5 before the restrictive covenants were amended to prohibit it. The trial court — and the majority — are simply wrong when they conclude that the deed that conveyed the new parcel encompassing

Tract 5 and half of Tract 4, without reference to the July 2001 survey, had any effect on the new subdivision. It has been the law in Arkansas for more than sixty years that returning platted land to acreage requires the action of the County Court in which the land lies. Ark. Code Ann. § 14-18-110 (Repl. 1998).

The majority's reliance on Arkansas Code Annotated section 14-18-102 (Repl. 1998) as support for the proposition that the deed between MMI and the appellants is curious, at best. It could perhaps support the proposition that the deed, which does not reference the July 2001 survey, was deficient. It is quite a leap — or lapse — in logic to conclude that a faulty property description in a deed could annul the actions of the Baxter County Planning Board and relieve the County Court of its responsibilities under section 14-18-110.

The majority also errs when it cites *City of Sherwood v. Cook*, 315 Ark. 115, 865 S.W.2d 293 (1993), as authority for the proposition that the appellants were somehow required to make a "sale" with reference to the 2001 plat in order to divide Tract 5. I would think that the name of the appellant, "City of Sherwood" is the first clue that this venerable authority was inapposite for a case involving property that lay outside the incorporated territory of a city or town. *See* Ark. Code Ann. § 14-18-110. Even if *Cook* involved the same statutory scheme as the case at bar, it involves an entirely different situation. As our supreme court notes, the disputed property in *Cook* "has never been described or platted in the Bills of Assurances and plats for the Trammel Addition. Furthermore, the six acres has been described by metes and bounds in every instrument of conveyance introduced at the trial." 315 Ark. at 117, 865 S.W.2d at 294. The key point here is that the appellees in *Cook* never made the plat or filed it for record; whereas, the appellants in the instant case clearly did. Moreover, and more importantly, *Cook* does not authorize the majority to insert into the statutory scheme, codified as Arkansas Code Annotated section 14-18-101 and following, a requirement that a party make a sale with reference to a plat in order to make subdivision of his property effective. I decline to follow the majority in its unauthorized and ill-advised invasion of the province of the legislature.

Therefore, I respectfully dissent.

Theresa BEDFORD *v.* STATE of Arkansas

CA CR 04-706 237 S.W.3d 516

Court of Appeals of Arkansas
Opinion delivered June 28, 2006

S. Butler Bernard, Jr., for appellant.

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

KAREN R. BAKER, Judge. This is the second appeal in this revocation case. On November 26, 1996, appellant Theresa Bedford pleaded guilty to forgery and received a ten-year suspended imposition of sentence. The State filed a revocation petition on February 12, 2004, and a revocation hearing was held on March 4, 2004. After the hearing, the trial court found that appellant had violated the conditions of her suspended sentence by failing to pay fines and costs, and by committing a forgery, and entered an order sentencing her to four years in prison.

In the first appeal, appellant's counsel argued that the appeal was wholly without merit pursuant to *Anders v. California*, 386 U.S. 738 (1967) and Rule 4-3(j)(1) of the Rules of the Arkansas Supreme Court and Court of Appeals. In an unpublished opinion, *Bedford v. State*, CACR 04-706 (January 11, 2006), we ordered rebriefing on the grounds that appellant was entitled to an adversarial presentation by her counsel on the issue of whether the trial court's decision to revoke was clearly against the preponderance of the evidence.

In her adversarial brief, appellant presents two arguments for reversal. First, she asserts that the trial court erred in finding that she violated her conditions by failing to pay fines and costs because the written conditions of her suspended sentence did not require such payments. The State concedes error on this point, and we agree. Second, she argues that the trial court erred in finding that she committed a forgery and subsequently violated her probation. We agree and reverse.

The disposition of this case requires the application of permissible inferences by the trial court in the context of a probation revocation based upon an accusation of forgery. The State has the burden to prove a violation of a condition of probation by a preponderance of the evidence. *Lemons v. State,* 310 Ark. 381, 836 S.W.2d 861 (1992). This burden is not as great in a revocation hearing; therefore, evidence that is insufficient for a criminal conviction may be sufficient for revocation. *Bradley v. State,* 347 Ark. 518, 65 S.W.3d 874 (2002). If a court finds by a preponderance of the evidence that a defendant has inexcusably

failed to comply with a condition of his or her probation, it may revoke the probation. Ark. Code Ann. § 5-4-309(d) (Repl. 2006). The trial court's findings will be upheld unless they are clearly against the preponderance of the evidence; and because the determination of a preponderance of the evidence turns on the questions of credibility and weight to be given testimony, on review, the appellate courts will defer to the trial judge's superior position. *Id.*

The State argues that the trial court properly revoked appellant's suspended sentence for attempting to cash a check that was written on a closed account. The State cites Arkansas Code Annotated section 5-37-201(a) (Repl. 2006), which provides:

> A person forges a written instrument if with purpose to defraud he draws, makes, completes, alters, counterfeits, possesses, or utters any written instrument that purports to be or is calculated to become or to represent if completed the act of a person who did not authorize that act.[1]

In its argument, the State contends that the trial court found that appellant's presentation of a check on a closed account was a sufficient basis to revoke her suspended sentence and relies upon the principle that possession of a forged instrument by someone who seeks to utter it without any reasonable explanation of how she acquired it warrants an inference that the possessor committed the forgery. *See Mayes v. State*, 264 Ark. 283, 291, 571 S.W.2d 420, 425 (1978); *DeShazer v. State*, 94 Ark. App. 363, 230 S.W.3d 285 (2006). However, that premise does not apply on the facts of this case because the State failed to prove that the check at issue was a forged instrument.

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[1] In *Bedford I*, it was noted that appellant pro se asserted that she did not commit a forgery, claiming that no one bothered to check out the information she presented as to her employment, and this was one of the issues we identified in our determination that appellant was entitled to an adversarial brief. The dissent now comments that this very issue was not raised on appeal. In fact, appellant argues that the State failed to prove that appellant violated a State law, cites the statutory definition of forgery and states that "[t]he key here is whether or not the Appellant took her actions with the purpose to defraud another person *who did not authorize this action*." (Emphasis added.) She further argues that the evidence to the court included appellant remaining for the entire transaction, presenting proper identification, and "included facts concerning the drawer of the instrument." She asserts that "[c]learly the State did not meet its burden . . . to the underlying charge of forgery." Given appellant's arguments, it is difficult to understand how the dissent concludes that the adversarial presentation of this argument has not been met.

To prove that the check issued was forged, the State relied upon the testimony of an employee of the supermarket, Bruce Avan. He stated that he is employed at a Big Star grocery store in West Memphis. He further testified that, in September 2003, appellant cashed a check made out to her in the amount of $1220 at the store. In order to cash the check, appellant presented her driver's license, a photocopy of which is on the back of the check. According to Mr. Avan, the check was returned by the bank with "Account Closed" stamped on it, and Big Star never recovered the money it paid to appellant.

The State also elicited testimony from Mr. Avan that he had previously dealt with appellant and that "we have had other forgeries from her." Mr. Avan alleged that appellant had been banned from the store but that "she comes anyway." In addition, Mr. Avan related the following incident that occurred after appellant passed the check on the closed account:

> I know that she came back in our store after that and presented another check to be cashed and the assistant manager recognized the name and knew we had problems with her. We had not received the first check back yet. The assistant manager said to me, "let me look at it." [Appellant] said "no, that's okay, I'll just get it cashed somewhere else." She left without letting me see the check.

Officer Bernice Franks, employed by the West Memphis Police Department, CID Division, testified regarding the investigation of the passing of the check. Officer Franks explained that the check presented by appellant was made out to appellant, endorsed by appellant, and had superimposed upon the back of the check a picture of a driver's licensed issued by the State of Arkansas to appellant. The officer also stated that all of that information was on the check when Mr. Avan provided the check to the police. Officer Franks further described attempts to connect appellant with other fraudulent passing of checks but stated that the department could not identify her as the perpetrator. In particular, there was another check drawn on the same entity and cashed at Fidelity National Bank, although the department could never link appellant to the passing of that check.

Appellant testified on her own behalf, and asserted that she earned the $1220 check while working for Gates Cleaning Service in Memphis. Appellant gave a phone number and address for the company, and indicated that she performed cleaning work from

April through early September 2003, and that the check at issue was the last paycheck she received. She stated that her boss was a man named Cedric Yates. Appellant acknowledged that she had committed forgeries in the past and that she has three previous forgery convictions, but maintained that the transaction at issue was legitimate.

[redacted] Given this evidence, we cannot say that the State proved that the check was forged. While Mr. Avan testified that the check was returned stamped "account closed," there was no evidence as to when the account was closed, particularly as to whether the account was closed prior to the date the check was allegedly issued or presented by appellant to the supermarket. In fact, Mr. Avan testified that he did not know the specific date that the store received the check. The State presented no evidence to prove that the check was issued or presented for payment after the date the account was closed. Although the State argues that the evidence permitted the trial court to conclude that appellant presented a check knowing that the bank account was closed, that argument must fail when the record is void of any evidence that the account was closed prior to its issuance or its presentation by appellant to the supermarket.

While the drawing of reasonable inferences from the testimony is for the trial judge as fact-finder, not this court, *Deshazer, supra,* when the record contains no evidence as to when a checking account is closed in relationship to when the check was issued or passed, the record cannot support the inference that the account was closed prior to the issuance or passing of the check. In arguing that this court must defer to the trial court's determination of credibility, the State quotes the trial judge's description of appellant as a "career check passer," and asserts that the court's description suggests that the judge believed this incident to be yet another attempt by her to fraudulently obtain money. The State argues that we must defer to the trial judge's superior position to assess appellant's credibility.

We agree with the State's general proposition regarding permissible inferences from possession of a forged instrument. Possession of a forged instrument by one who offers it without any reasonable explanation of the manner in which she acquired it warrants an inference that the possessor committed the forgery or was an accessory to its commission. *DeShazer, supra. See also McGirt v. State,* 289 Ark. 7, 708 S.W.2d 620 (1986) (holding that "the

crime of forgery was complete upon his being in possession of the forged instrument, or upon his attempt to pass the check, or upon his passing of the check"); *Mayes v. State*, 264 Ark. 283, 571 S.W.2d 420 (1978) (holding that possession of a forged instrument by one who offers or seeks to utter it without any reasonable explanation of the manner in which he acquired it warrants an inference that the possessor committed the forgery or was a guilty accessory to its commission); *see also Faulkner v. State,* 16 Ark. App. 128, 697 S.W.2d 537 (1985).

Nevertheless, before the inference that the possessor of a forged instrument committed the forgery is warranted, the State must first prove that the instrument in question is a forged instrument. While the trial court is not required to believe the accused's explanation of how he or she came into possession of a forged instrument, the trial court may not use its disbelief of the explanation regarding possession of the instrument to infer that the instrument is in fact forged.

Because the State failed to prove that the check was issued or presented for payment prior to the closure of the bank account upon which it was drawn, the trial court could not reasonably infer that the check was forged. Therefore, we hold that the trial court erred in finding that appellant violated the terms of her probation by passing a forged instrument. Accordingly, we reverse and dismiss.

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

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

JOHN B. ROBBINS, Judge, dissenting. I respectfully dissent. The majority has reversed the trial court's decision on the basis that the State failed to prove that the check was a forged instrument. Ms. Bedford has not advanced this argument on appeal, and in order to reach its decision the majority has acted as appellant's advocate. It is a familiar rule of practice that an appellate court does not reverse on a ground not argued by the appellant. *Houston v. State,* 82 Ark. App. 556, 120 S.W.3d 115 (2003). This rule is applicable even in cases that are heard de novo on appeal, *see Cummings v. Boyles,* 242 Ark. 923, 415 S.W.2d 571 (1967), and has even been applied in the context of Rule 37.5 appeals following cases where the death penalty has been pronounced. *See, e.g., Echols v. State,* 344 Ark. 513, 42 S.W.3d 467 (2001).

In challenging the State's proof of a forgery on appeal, Ms. Bedford cites *Mayes v. State*, 264 Ark. 283, 571 S.W.2d 420 (1978), where the supreme court held that possession of a forged instrument by one who offers or seeks to utter it without any reasonable explanation of the manner in which he acquired it warrants an inference that the possessor committed the forgery or was a guilty accessory to its commission. In *Mayes*, the supreme court found substantial evidence to support the appellant's forgery conviction where appellant was not named as payee on the check he attempted to pass at a department store, and the appellant left the store while the cashier took the check to the store manager for inspection. In her brief, Ms. Bedford attempts to distinguish this case from *Mayes*, arguing:

> In the Mayes case, the individual left the grocery store before the clerk could verify whether or not the grocery store would accept the check. In this case, the evidence presented to the Court not only included the Appellant remaining for the entire transaction, but that she presented her proper information to the clerk. Additionally, her testimony included facts concerning the drawer of the instrument. These factors clearly set forth a reasonable explanation for the Appellant's actions.

In her brief appellant does not dispute the fact that the check is a forged instrument, but rather asserts that she gave a reasonable and innocent explanation for possessing it. Ms. Bedford makes no claim whatever that the State failed to prove that the check was issued or presented for payment after the date the account was closed, as so found by the majority.

In my view, the issue raised and pertinent inquiry in this appeal is whether Ms. Bedford acted with the intent to defraud. Although the evidence of Ms. Bedford's intent to defraud might not have supported a criminal conviction, I would hold that it was sufficient to support the trial court's determination that the State established a forgery by the preponderance of the evidence.

While Ms. Bedford explained that she earned the check and did not know the account was closed, the reasonableness and sufficiency of appellant's explanation was a matter to be determined by the factfinder, and the trial court had the right to accept or reject the testimony. *See Faulkner v. State*, 16 Ark. App. 128, 697 S.W.2d 537 (1985). The trial court obviously did not find Ms. Bedford's explanation credible. There was testimony by Mr. Avan

that Ms. Bedford had committed prior forgeries at the same store, causing her to be banned. There was also evidence that, on a subsequent occasion, Ms. Bedford attempted to cash a check at Big Star and upon inquiry by the assistant manager she left the store without allowing Mr. Avan to see the check. Intent can seldom be proved by direct evidence and must be inferred from facts and circumstances. *Johnson v. State*, 5 Ark. App. 78, 638 S.W.2d 686 (1982). The trial court described Ms. Bedford as a "career check passer" and believed this to be another attempt to fraudulently obtain money, and I cannot say its finding that she committed forgery was clearly against the preponderance of the evidence. Therefore, I would affirm the revocation of appellant's suspended sentence.

PITTMAN, C.J., CRABTREE, and ROAF, JJ., join in this dissent.

Laurie MARTIN *v.* Robert DECKER, Mary Ann Daley, Estate of Collette Weth, and Jeff Weth

CA 05-1190 237 S.W.3d 502

Court of Appeals of Arkansas
Opinion delivered June 28, 2006

Mary Thomason, for appellant.

Vickery & Carroll, P.A., by: *Robin J. Carroll*, for appellee Robert Decker.

ANDREE LAYTON ROAF, Judge. Mary Ann Daley's brother, Robert Decker, and her daughter, Laurie Martin, both sought to be appointed guardian of her person and estate. The trial court found Daley to be incompetent and determined it was in her best interest to have Decker appointed as guardian of her person, with a financial institution to be appointed guardian of her estate. Martin appeals, asserting that the trial court committed clear error because, in guardianship cases, the pertinent statutes manifest an intent for children to have preference over siblings. We affirm.

Mary Ann Daley, who suffered a stroke in September 2001 resided in the Beverly Nursing Home facility in El Dorado, Arkansas; she was wheelchair-bound and was diagnosed with dementia of Alzheimer's type and serious memory and reasoning problems. Daley also possessed substantial financial resources. Daley's daughter, Collette Weth, obtained a power of attorney in

January 2002, to take care of Daley's financial obligations and to make sure that the nursing home provided proper care and treatment. Weth died in May of 2003. At that time, Weth's sister, Laurie Martin, a resident of California who had been estranged from Daley for some years, took over handling Daley's personal and financial affairs pursuant to durable powers of attorney she obtained.

Daley is a one-third shareholder in Decker's Cash Depot, a company started by her brother Robert Decker, who resides in Omaha, Nebraska. Daley received substantial payments from this investment, but in 2003, after Martin took over her affairs, Decker decreased Daley's income from the previous years' $103,629 to $48,936. Upon Weth's death, Decker refused to deal with Martin, started drawing a higher salary, and had Daley removed from the board of directors. In April 2004, Decker made an offer to purchase Daley's interest in Decker's Cash Depot for $150,000; Martin rejected this offer on behalf of her mother. On May 13, 2004, Decker filed his petition for appointment of guardianship, claiming that Daley did not have the ability to make decisions regarding her care and finances.

Daley retained counsel, and in response to Decker's petition, requested that Decker's petition be dismissed, but in the alternative, that the court consider her desire and preference in appointing a guardian of her estate and guardian of her person. Martin also filed a response, requesting that she be appointed as guardian of her mother's estate and person.

A hearing was held on the matter on April 19, 2005. Decker orally amended his petition to request that he only be appointed guardian of the person and that the court appoint a financial institute as guardian of the estate. Daley testified that she currently lived in Little Rock and that she never was a resident of the Beverly Nursing Home, but just knew people there. She stated that she did not really want to have a guardian because she believed that she could handle her own affairs, but that she would take one if the court deemed that she could not handle them herself. She further stated that if the judge found a guardian to be necessary, she would prefer the court to choose "one of my people whom I'm close to and so forth. Like my daughter-in-law." Daley also stated that she had three children, "Collette, Laurie, who is dead, and my son Michael." She then stated that it was Collette who had died. Daley later testified that she currently paid her own bills and took

care of her own finances and that she would prefer her daughter Laurie be over her person and be over paying her bills and money when it is necessary.

Decker testified that his relationship with his sister had been good over the years. He stated that he asked Daley to invest in Decker's Cash Depot in 1995, and that she had subsequently received about $700,000 in income for her initial $63,000 investment. He testified that he paid Daley about $6,000 per month once the business started making a good cash flow and that currently, by vote of the board, he and his partner took a larger salary. He further testified that he had some concern over the years about paying Daley large sums of cash, and that he simply did not want to make payments to Laurie, noting that he had talked to her only about four or five times in twenty-five years.

Decker had worked closely with Collette in caring for Daley after her stroke in 2001, paid to have Daley taken to El Dorado where Collette lived, and together with Collette arranged for her to be placed in the Beverly Nursing Home. Decker stated that he was aware that Collette had had a drug problem, but that she was getting back on her feet. In addition, he stated that Daley and Martin had a period of estrangement from sometime around 2000 up until Collette's death, because Martin allegedly stole $46,000 out of a lock box that Daley forgot to put her name on and then moved to California and did not invite Daley to her second wedding. In addition, Martin had apparently been cut out of Daley's will, with the bulk of Daley's estate to go to Collette and her children. Decker said that he believed Martin got a power of attorney over Daley's affairs strictly for the money.

Decker went on to testify that he planned to place Daley in a private room in a nursing facility in Omaha, Nebraska, where he and Daley grew up and Daley still had some friends and extended family. He stated that when he first saw Martin at the nursing home after Collette's death, she accused him of trying to steal his sister's money and that he had refused to deal with Martin since. He also alleged that Martin had restricted his access to visitation with Daley and that he probably would not be allowed to visit his sister if Laurie took her back to California.

Laurie Martin testified that she had, indeed, become estranged from her mother for a period of time, but that until that time, she and her mother had been very close and she would visit for lunch almost everyday when she lived in Little Rock. She

stated that she could not remember exactly what was said, but that she and her mother had a falling out and her mother said some hurtful things that she took to heart and that she chose to stop speaking with her mother. She stated that she did not invite her mother to her second wedding and that she regretted that decision very much. She also stated that she continued to communicate with her mother on behalf of her two children and that she sent gifts in the children's names. She claimed that she began to miss her mother terribly in 2002, so she flew back to Little Rock to reconcile with Daley. Further testimony revealed that Laurie was essentially estranged from most of her family for many years. She stated that she cut her father out of her life after he admitted to having an affair and that her brother and sister had suffered from drug and alcohol problems for most of their lives; she also claimed to be frightened of her father and made rather serious allegations against him during the hearing.

Martin admitted that Daley and Decker had a very good brother and sister relationship and stated that she never restricted his visitation with Daley, but only requested that he not be allowed to take Daley off the nursing home premises because she feared he would kidnap her mother and take her to Omaha. She stated that she would take her mother back to California and place her in a good nursing home, and that Daley would be surrounded by her grandchildren. She also stated that she wished to be guardian of Daley's estate, in addition to guardian of the person, because she would perform her services for free and she did not want her mother to have to pay for the services of a financial institution.

The court heard testimony concerning Daley's financial assets and her stay at the Beverly Nursing Home from several other witnesses, including Daley's ex-husband and Martin's father, Robert Daley, who testified that he believed Decker would make a better guardian because Martin was probably more motivated by greed and spite, and that he believed Martin did not reconcile with Daley until after Weth died.

At the conclusion of the hearing, the court authorized Martin to take Daley back to California for a visit so that Daley could attend her granddaughter's high school graduation. On July 7, 2005, the court issued its order, finding that Daley was clearly incompetent and incapable of handling her own personal and business affairs, specifically noting that Daley could not remember the name of her bank, the location of her stocks and bonds, the disposition of her jewelry and furniture, and the names and ages of

her grandchildren or whether they had visited her recently. The court then found Decker to be more suitable as a guardian, stating that he had been in business with Daley for many years and "had a consistent interest in her well-being, staying in touch with her, with Collette Weth while she was alive, and traveling with her when she was healthy." The court further noted that Decker has had a close relationship with Daley for a long time, stating that he took care of Daley after her stroke in 2001 and that, from Omaha, he had regular contact with the nursing home personnel and the doctor about Daley's medical care and treatment.

The court's order further noted that Martin was estranged from her mother for a period of time, that Martin did not invite her mother to her wedding, that Martin was estranged from her father to the point of not letting him see or visit with her children, and that once Martin reentered her mother's life, she cut Decker off from visiting his sister in the nursing home and accused him of stealing from her mother in their business affairs. The court also found that Daley had lived in Omaha for many years and still had friends and family there, but that Daley had never lived in California, and that Decker would secure a private room in Omaha and, unlike Martin, would impose no restrictions on Daley's visitation. In the end, the court felt that it would be in Daley's best interests to have Decker appointed as guardian of her person. A reputable financial institution was to be appointed as guardian of the estate, and on October 7, 2005, Wachovia Securities was appointed to serve in this capacity.

On July 8, 2005, Martin filed a motion for reconsideration, noting that Daley had traveled with her to California and had been placed in a nursing facility where her physical condition had improved and her relationship with Martin and her children had become quite close. Attached to the motion was a physician's letter noting the general improvement of Daley's physical condition and suggesting that Daley be allowed to remain in California and continue to receive her care there. Martin filed a notice of appeal on August 3, 2005. After thirty days, the court still had not entered an order on the motion for reconsideration, and it was deemed denied.

On appeal, Martin asserts that the trial court clearly erred in determining that Daley's brother was better suited to serve as guardian than her own daughter. She does not challenge the trial court's appointment of a bank as guardian of Daley's estate.

Probate cases are generally reviewed *de novo*, and this court does not reverse a trial court's findings unless they are clearly erroneous. *Dillard v. Nix*, 345 Ark. 215, 45 S.W.3d 359 (2001). However, subject to statutory restrictions, the selection of a guardian is a matter largely committed to the sound discretion of the appointing court. *McCartney v. Merchant's and Planters Bank*, 227 Ark. 80, 296 S.W.2d 407 (1956). This is a standard of review that accords greater deference to the trial court than the clearly-erroneous standard. The appellate courts will not reverse an equity case involving an application of guardianship in the absence of a manifest abuse of discretion. *Knight v. Deavers*, 259 Ark. 45, 531 S.W.2d 252 (1976). Nevertheless, without regard to the standard of review employed in this case, we cannot say that the trial court either erred or abused its discretion in the selection of Decker as guardian.

A person is qualified to be appointed guardian of the person and of the estate of an incapacitated person if he or she is a natural person who is a resident of this state and is eighteen or more years of age, of sound mind, and not a convicted and unpardoned felon. Ark. Code Ann. § 28-65-203(a) (Supp. 2005). A nonresident natural person with all of the other enumerated qualifications is qualified for appointment if he or she had appointed a resident agent to accept service of process in any action or suit with respect to the guardianship and has caused the appointment to be filed with the court. Ark. Code Ann. § 28-65-203(e). In addition, a bank or similar financial institution with trust powers is qualified to serve as guardian of the estate of an incompetent person. Ark. Code Ann. § 28-65-203(d)(2).

In guardianship cases, the court shall appoint as guardian of an incapacitated person "the one most suitable who is willing to serve." Ark. Code Ann. § 28-65-204(b) (Supp. 2005). In making its determination, the court shall give due regard to the "relationship by blood or marriage to the person for whom guardianship is sought. Ark. Code Ann. § 28-65-204(b)(4). In addition, prior to the appointment of a guardian, the court shall consider "any request made by the incapacitated person concerning his or her preference regarding the person to be appointed guardian." Ark. Code Ann. § 28-65-204(c).

Martin's first sub-point is that the court erred because it did not consider Daley's preference to have Martin appointed as guardian of her person and estate. Under the statute, preference is only one factor that the court should consider. The statute does

not mandate an ironclad order of preference, but leaves the appointment of a guardian who would forward the best interests of the incompetent to the sound discretion of the court. *Moore v. Dallas*, 6 Ark. App. 10, 636 S.W.2d 881 (1982). In addition, there is no indication here that the court did not consider Daley's preference, especially in light of the fact that she appeared generally confused, and especially confused as to her preference. At first she requested that her daughter-in-law be appointed guardian. Then she stated that she preferred her guardian be her sister-in-law, Laurie. Then she stated that her daughter Laurie had died. Later in the proceedings, she requested that Laurie be the guardian of her person and her estate. The statute only requires the court to consider preference of the incompetent, but the court does not have to be bound by that preference.

Martin next suggests that the court erred in appointing Decker as guardian of the person because of his financial conflicts with Daley. Citing a number of Illinois cases, Martin states that the guardian of a disabled person must be free from any interest which would prevent or impair the proper assertion or protection of the incompetent's rights; specifically, evidence of bad faith in prior dealings between the proposed guardian and the incompetent should preclude his or her selection as guardian. *In re Estate of Robertson*, 144 Ill. App. 3d 701, 494 N.E.2d 562 (1986). However, the majority of the cases cited by Martin deal with people who have been appointed as guardian of the estate as well as of the person. *See Robertson, supra; In re Estate of Lamont*, 13 Ill. App. 3d 714, 300 N.E.2d 574 (1973); *Proehl v. Leadley*, 86 Ill. App. 2d 472, 230 N.E.2d 516 (1967). Martin cites *In re Estate of Bania*, 130 Ill. App. 3d 36, 473 N.E.2d 489 (1984), for the proposition that conflicting pecuniary interests should also preclude the appointment of a guardian. However, in *Bania*, the court refused to appoint appellant as guardian of an incompetent because she failed to testify as to her motives and freedom from self-interest and did not explain a trip to the bank where the incompetent kept $150,000 to $200,000. The court reiterated that the main concern should be the best interest and well-being of the incompetent, regardless of his or her purported preference. *Id.*

Martin asserts that, in retaliation for her taking over her mother's business affairs, Decker raised his own salary and correspondingly reduced her mother's income. In addition, she claims that he tried to cheat her mother out of her interest in the business

by offering to buy her shares at a reduced rate. Decker freely admitted that once Martin obtained power of attorney, he did not want to deal with her, so he took legal steps to have Daley's role in the business minimized. However, Decker also testified that he had had a good working relationship with Collette and that he had more money than his sister and would never attempt to steal anything from her. Unlike in *Bania*, Decker testified as to any apparent inconsistencies in his financial dealings with Daley and had taken proper measures to insure that Daley's money from the business was accounted for. In addition, Decker also took appropriate steps to guard against any seeming financial impropriety when he requested that a neutral financial institution be appointed as guardian of Daley's estate. Martin's argument cuts both ways because testimony revealed that Martin had been cut out of Daley's will and that Martin's estrangement from her mother had been precipitated by Martin absconding to California with $46,000 of her mother's money.

Martin's next sub-point is that Arkansas law shows a clear preference for children over siblings, citing Ark. Code Ann § 28-9-214, which mandates that when a person dies intestate, children are first to inherit the estate. However, the probate statutes regarding inheritance have nothing to do with the appointment of a guardian. The basic rule of statutory construction provides that in considering the meaning and effect of a statute, words are given their ordinary and usually accepted meaning in common language, *Yamaha Motor Corp. v. Richards Honda*, 344 Ark. 44, 38 S.W.3d 356 (2001), and Ark. Code Ann. § 28-65-204 simply states that the court should give due regard to the blood relationship of the proposed guardian and the incompetent. As stated previously, the statute provides no mandatory order of priority.

In *McCartney*, *supra*, the question presented was whether the probate court abused its discretion in appointing a bank as the guardian of the person and estate of the incompetent. McCartney, a sister of the incompetent, had sought to be appointed as guardian; in addition, the incompetent's adopted son had also sought to be appointed. *Id.* The trial court found that McCartney had shown continuous love and care for her sister, while the adopted son had let years pass by without seeing his mother or inquiring of her condition; thus, as between the two, McCartney was better qualified to serve as guardian, but selected a neutral third party in light of the dispute between McCartney and the adopted son. *Id.*

The supreme court found that the guardianship statute did not make an ironclad order of priority, but left it up to the court to select a guardian who would best serve the interests of the incompetent. *Id.* Our supreme court went on to note that while it is the usual practice to appoint the next of kin or a close blood relative as guardian because of the presumption that the next of kin is more likely to treat the incompetent with patience and affection than a stranger,

> the court is not necessarily bound to appoint next of kin or close relatives or the nominees of such blood relatives, for the court, keeping in mind the principle of law that the best interests of the incompetent are paramount, may, in the exercise of the discretion confided in it with respect to the appointment of guardians, appoint a stranger where to do so would be for the best interests of the incompetent in view of such factors as the adverse interests of the relatives and the incompetent, lack of business ability of the relative, and various other matters to be further noted.

Id. (citing 21 A.L.R.2d 880).

In *McCartney*, the court reiterated the trial court's wide discretion in appointing a guardian, relative or not, who will best serve the interests of the incompetent. Other cases have likewise illustrated that the courts usually show no preference for one relative over another in guardianship cases. *See Monroe, supra* (affirming appointment of maternal grandfather as guardian of minor child over the paternal uncle); *Bogan v. Ark. First Nat'l Bank of Hot Springs*, 249 Ark. 840, 462 S.W.2d 203 (1971) (affirming appointment of bank as guardian of the estate of an incompetent wife over the husband, finding that the statute conferred no absolute right to appointment on the husband).

Here, the court made clear findings as to why it believed it would be in Daley's best interest to have Decker serve as guardian of her person, namely, that Daley and Decker had a loving brother and sister bond; that they had a long history of working well in a business enterprise; that Decker had been a constant in Daley's life, and had helped Weth in providing for Daley's care; that Martin had a long period of estrangement from her mother; and that once Martin reentered Daley's life, she made it difficult for others, especially Decker, to see her mother, and often made wild accusations of theft. In fact, the evidence showed that although Martin had once had very close relationships with

both her mother and father, she was essentially estranged from her entire family, and had kept her children away from them. In addition, evidence revealed that Martin may have stolen $46,000 from her mother and that she failed to invite either of her parents to her second wedding.

For her final sub-point, Martin asserts that Decker is seventy-two years of age, and that, at forty-six, she is clearly more suited to handle the physical requirements of caring for her mother. This argument was not preserved at trial level, and an appellant must raise and make an argument at trial in order to preserve it on appeal. *Lee v. Daniel*, 350 Ark. 466, 91 S.W.3d 464 (2002). Even so, Ark. Code Ann. § 28-65-203 contemplates no age limit, and only requires that the person wishing to serve as guardian be over the age of eighteen and be of sound mind. Here, there was no testimony that Mr. Decker's age or health had ever or would interfere with the care he could provide for his sister.

Affirmed.

GLADWIN, GRIFFEN, NEAL, and VAUGHT, JJ., agree.

HART, J., dissents.

JOSEPHINE LINKER HART, Judge, dissenting. It is black-letter law that "a finding is clearly erroneous when, although there is evidence to support it, we are left on the entire evidence with a firm conviction that a mistake has been committed." *E.g., Fischer v. Kinzalow*, 88 Ark. App. 307, 198 S.W.3d 555 (2004). I do not recall a case in which I have ever had a firmer conviction that a mistake has been committed.

First, I agree with Laurie Martin's argument that the trial judge erred by failing to consider Mary Ann's preference, as required by Arkansas Code Annotated section 28-65-204(c) (Repl. 2004). While it is true that Ms. Daley exhibited some confusion in court, which was likely due in no small part because she was nervous about testifying, as she herself noted, the trial court's finding that she was "incapacitated mentally to such an extent that she is incapable of handling her personal and business affairs" simply does not address her stated preference for her guardian. This finding, while certainly sufficient to justify the appointment of a guardian — which is not contested — is not, as the majority apparently believes, tantamount to saying that she was incapable of stating a preference for her guardian, which she

unequivocally did in open court. Contrary to the majority's opinion, Ms. Daley was not found to be "incompetent." It is obvious from the record that Ms. Daley's mental capacity was demonstrated to be far greater than the ward in *McCartney v. Merchants & Planters Bank*, 227 Ark. 80, 296 S.W.2d 497 (1956), the precedent the majority so heavily relies on, where the ward was described simply as a "hopeless mental case." Finally, while Ms. Daley did express some confusion about Martin's title, she nonetheless consistently maintained her preference for the person who was present in court — Laurie Martin — to serve as her guardian. Significantly, she never indicated in any way that she wanted Decker to be her guardian even though he too was in court. It is remarkable that the majority can denigrate Ms. Daley's mental functioning on the one hand, and not have the ability to see what was obvious to Ms. Daley despite her supposed diminished capacity.

Moreover, I cannot ignore the fact that on June 6, 2003, with the assistance of counsel, Ms. Daley granted Laurie Martin durable powers of attorney to make health care and financial decisions for her. There is no evidence in this record that Ms. Daley was incapable of stating her preference for Martin at that time, and it strongly corroborates the validity of her in-court declaration of preference. It is axiomatic that such an erroneous application of law constitutes a manifest abuse of discretion. *See, e.g., Seeco, Inc. v. Hales*, 334 Ark. 134, 969 S.W.2d 193 (1998). Ignoring the statutory requirement that Ms. Daley's preference for Martin be considered is therefore a manifest abuse of discretion.

Even if I could accept the propriety of the majority undertaking its own fact finding, and I assume for the purposes of this discussion that they are correct in finding that Ms. Daley's preference was irrelevant, I certainly cannot accept the findings that the trial judge made to justify his decision. The trial judge found Decker "more suitable" because Decker had been in business with her "for a number of years" and had a consistent interest in her well-being, stayed in touch with her and with Weth, and traveled with her "when she was healthy." The trial judge also found that Decker put Mary Ann in a nursing home after her stroke. Finding Decker's business relationship with Ms. Daley weighed in favor of appointing him as her guardian is at best fanciful, if not down right absurd. By Decker's own testimony, he and his former girlfriend manipulated their majority ownership of the business venture that Ms. Daley had a one-third interest in to remove her from the board

of directors and to cut off the income stream that she had previously enjoyed while simultaneously increasing their own salaries as board members by approximately $3,000 each per month, despite Decker's own candid admission that he did not actually work in the business.[1]

Regarding Decker's supposed "staying in touch," by his own admission, Decker's contact with Ms. Daley was episodic at best for most of his adult life. The trips that he took with Ms. Daley, three total, occurred nearly a decade before the guardianship proceeding, and lasted for a mere matter of days. Finally, there is no basis for the trial court to conclude that Decker put Ms. Daley in the nursing home because Decker himself, as well as Susan Stogsdill, the business-office manager for the nursing home where Ms. Daley resided, testified that Weth, not Decker, checked Ms. Daley into the facility on November 12, 2001.

No more convincing are the trial judge's findings that attempt to justify his conclusion that Martin is a less suitable candidate for guardian than Decker. Specifically, the trial judge found that Martin "was estranged from her mother for a period of time," and Martin did not invite her mother to her second wedding. He also found that when Martin re-entered her mother's life, she "cut off Robert Decker from visiting Mary Ann Daley in the nursing home and from talking to her doctors." The trial court also noted that Martin accused Decker of "stealing from her mother in their business affairs." The court also found that while Mary Ann has never lived in California, she "lived in Omaha many years ago and has friends there together with two of Robert Decker's children and his ex-wife who is a friend of Mary Ann Daley" and unlike Martin, Decker would impose no restrictions on Mary Ann's visitation. I have no doubt that these findings are clearly erroneous.

The findings that justify the trial judge's decision that Martin would be less suitable are no more justifiable. Regarding Martin's estrangement from her mother, it had ended long before Decker instituted the guardianship proceeding, and their reconciliation is

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[1] Although we cannot weigh evidence on review, I believe it is worth noting that in contrast to what was proved by Decker's own admission that he had manipulated the distribution of profits to deny Mary Ann any further return on her investment, there was uncontroverted evidence that Martin faithfully and scrupulously took care of Ms. Daley's financial affairs.

proven by Ms. Daley giving Martin the powers of attorney. As far as Martin restricting visitation, evidence was conflicting on this issue, and the only person that Martin clearly tried to exclude from the nursing home was a lawyer hired by Weth's ex-husband who was trying to get Ms. Daley to execute a new will that would more strongly favor Weth's children. As far as Martin accusing Decker of stealing from Ms. Daley in their business affairs, it is well documented in the evidence, and admitted by Decker, that he took her off the board and redistributed the money that Ms. Daley had previously received to himself and his former girlfriend in the form of salaries, even though neither of them actually work in the business. Given these undisputed facts, the trial judge should not have faulted a lay person like Martin for interpreting Decker's actions as "stealing." The majority's crediting of testimony by Decker that he "had taken proper measures to insure that Daley's money from the business was accounted for" is laughable, but I submit, probably accurate; Decker will have to pay income tax on that money because he took it as a salary. I cannot understand why the majority feels that Ms. Daley has gotten more than her fair share from her investment. In the first place, from Decker's own testimony we know that Decker only offered her the opportunity to invest in his company because he could not obtain a bank loan. Secondly, Decker and the other shareholder, Decker's former girlfriend, who each contributed an amount of capital equal to Ms. Daley's contribution for the formation of the business, realized even more from their investment. Does the majority suggest that the Walton family would be justified in asking those fortunate souls who invested in Wal-Mart stock forty years ago to turn in their stock because they have made enough money already?

Finally, the trial judge's finding that Omaha would be a superior place for Ms. Daley to serve out the remaining years of her life because she had lived there forty years ago and would be visited by Decker, Decker's ex-wife, and friends that she had not seen since the mid-1960s, rather than near her daughter and grandchildren in California, is simply incredible. Taken together, after wading through this lengthy record, I am left with a firm conviction that a mistake had been made.

I think it bears noting that while the majority cites Decker's testimony that Martin had taken $46,000 from Ms. Daley's lock box, it should be given no weight. This bald accusation was belied by the fact that the signature cards from Ms. Daley's safety-deposit boxes, which were admitted into evidence over Decker's strenu-

ous objections, showed that Martin did not have access to the boxes and could not have taken anything from the boxes. Not surprisingly, the trial judge made no mention of this obviously spurious allegation, and the majority should avoid finding it credible where the trial judge obviously did not. This is but another example of the majority's invasion of the province of the trial court, making not only findings, but findings based on credibility determinations that the trial court obviously did not subscribe to because it was clearly refuted by documentary evidence.

Finally, it is worth noting that Decker's last-second motion to amend his guardianship petition to have a bank appointed guardian of the estate is nothing more than clever lawyering. By statute, the "reputable financial institution" that the trial judge ordered to be appointed guardian of Ms. Daley's estate is charged only with protecting the existing assets, not attempting to draw more assets into the estate by mounting a shareholders' suit against Decker for keeping Ms. Daley from realizing any more income from her investment. *See* Ark. Code Ann. § 28-65-301(b)(1) (Repl. 2004).[2] This tactic does not show personal concern for Ms. Daley or effectively insulate her from Daley's obvious conflict of interest, but rather insures that no one looks at the financial aspect of the Decker's business practices prior to the appointment of the guardian of the estate.

I cannot agree with the majority that Decker's appointment as guardian was in Ms. Daley's best interest. Therefore, I respectfully dissent.

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[2] Ark. Code Ann. § 28-65-301(b)(1) lists the duties of the guardian of the estate and are stated as follows:

> It shall be the duty of the guardian of the estate:
>
> (A) To exercise due care to protect and preserve it;
>
> (B) To invest it and apply it as provided in this chapter;
>
> (C) To account for it faithfully;
>
> (D) To perform all other duties required of him or her by law; and
>
> (E) At the termination of the guardianship, to deliver the assets of the ward to the persons entitled to them.

John P. VERKAMP and Darla Verkamp *v.*
FLOYD E. SAGELY PROPERTIES, LTD., and XTO Energy, Inc.
(formerly known as Cross Timbers Operating Company)

CA 06-85 238 S.W.3d 619

Court of Appeals of Arkansas
Opinion delivered August 30, 2006

Walters Law Firm, by: *Dianna Hewitt Ladd*, for appellants.

Hardin, Jesson & Terry, PLC, by: *Robert M. Honea*, for appellees.

JOSEPHINE LINKER HART, Judge. This appeal is from an order of the Franklin County Circuit Court which, according to appellants John and Darla Verkamp (collectively, Verkamp), set aside a 1976 decree quieting title to both the surface and the mineral interests in Verkamp's predecessors in title.[1] On appeal, Verkamp raises two points: first, the trial court erred in not applying the three-year statute of limitations found in Ark. Code Ann. § 18-60-510 (Repl. 2006); and second, the trial court erred in setting aside the prior decree without any evidence that the prior decree was based on insufficient evidence. We reverse and remand.

Verkamp is the record owner of certain real estate located in Franklin County, Arkansas. Appellee Floyd E. Sagely Properties, Ltd. (Sagely), is the operator of a gas well located within the same section as Verkamp's property. In November 1997, Verkamp entered into an oil-and-gas lease with Sonat Exploration, the predecessor in interest to appellee XTO Energy, Inc.

In September 2002, Verkamp filed suit pursuant to Ark. Code Ann. §§ 15-74-603, -604 (Repl. 1994) seeking payment of royalties from Sagely. The complaint alleged that Verkamp owned both the surface and the mineral interests in the property and that Sagely was not paying the royalties to Verkamp. The complaint also sought a declaratory judgment determining that Verkamp held title to the mineral rights for the property. Sagely and XTO answered, denying the material allegations of the complaint and asserting that Verkamp had failed to join all necessary parties.

Both parties moved for summary judgment. In their brief in support of the motion, Sagely and XTO argued that the 1976 quiet-title decree could not, as a matter of law, vest title to the mineral interests in Verkamp. Also attached to the brief was a December 1998 title opinion by attorney J.H. Evans (now deceased) in which he opined that the quiet-title decrees were erroneous because they were based on adverse possession of the

[1] Appellees assert that there is also a 1977 quiet-title decree involving some of the same heirs as the 1976 case and that it is relevant to this case. Verkamp disputes the relevance of the 1977 case. For simplicity, we use the term 1976 case to refer to both the 1976 and 1977 cases.

mineral interests.[2] Evans's title opinion, however, was not under oath, which is a prerequisite for proof submitted in support of, or opposition to, a motion for summary judgment under Rule 56. In his motion for summary judgment, Verkamp argued that the three-year statute of limitations found in Ark. Code Ann. § 18-60-510 barred the challenge to the 1976 quiet-title decree. Apparently, there was no hearing on the motions for summary judgment. The trial court, without explanation, granted Sagely and XTO's motion and denied Verkamp's motion. This appeal timely followed.

On appeal, Verkamp raises two issues: first, the trial court erred in not applying the three-year statute of limitations; and second, the trial court erred in setting aside the 1976 quiet-title decree without any evidence establishing that the prior decree was based on insufficient evidence.

The supreme court stated our standard of review for a summary judgment in *Hisaw v. State Farm Mutual Automobile Insurance Co.*, 353 Ark. 668, 122 S.W.3d 1 (2003):

> [S]ummary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. This court views 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. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. After reviewing undisputed facts,

[2] He also opined that there were probably 75 to 100 people with an interest in the mineral rights to the subject property. Evans also concluded that the 1976 and 1977 quiet-title decrees were ineffective as to the mineral interests because service was had only by publication of a warning order and there was no personal service on Hazell Dell Grissom, one of the heirs of the original owner. Evans further stated that many of the heirs conveyed their interests to Irene Williford as trustee before Williford conveyed the interests back. Evans also noted that Williford made later conveyances in the early 1980s.

> summary judgment should be denied if, under the evidence, reasonable men might reach different conclusions from those undisputed facts.

353 Ark. at 676, 122 S.W.3d at 4 (internal citations omitted in original).

Although Sagely and XTO sought to dismiss the complaint for Verkamp's failure to name necessary parties, the real issue is the validity of the 1976 quiet-title action. If the quiet-title decree is valid, there are no other parties necessary for this litigation to proceed. Appellees did not specifically ask the court to set aside the earlier decree but instead asserted that the 1976 decree was void. Further, Sagely did not tender the disputed royalties into the registry of the court or join the other individuals whom it asserts may have an interest in the mineral rights. An interpleader of the royalties into the registry of the court is the course of action set out in Ark. Code Ann. § 15-74-604(d) (Repl. 1994), which would relieve Sagely of the fear of being subjected to double payments of royalties. Sagely, as admitted in its response to a request for admission, is only a stakeholder.

■ Citing *Hall v. Blanford*, 254 Ark. 590, 494 S.W.2d 714 (1973); *Welch v. Burton*, 221 Ark. 173, 252 S.W.2d 411 (1952); and *Union Sawmill Co. v. Rowland*, 178 Ark. 372, 10 S.W.2d 858 (1928), appellees argue that Ark. Code Ann. § 18-60-510, the three-year statute of limitations, does not apply to known heirs who were not made parties to the earlier quiet-title suit. Those cases construed what is now Ark. Code Ann. § 18-60-508(b), which provides:

> The decree in the cause shall not bar or affect the rights of any person who claims through, under, or by virtue of any contract with the petitioner, or who was an adverse occupant of the land at the time the petition was filed, or any person who within seven (7) years preceding had paid the taxes on the land, or a remainderman unless the person shall have been made a defendant in the petition and personally summoned to answer it.

However, appellees fail to show how any potential claimant comes within the reach of section 18-60-508(b). Likewise, appellees do not identify any individual whom they claim is seeking royalties as an owner or show that a predecessor in title adverse to Verkamp's ownership was known but not named in the 1976 quiet-title action.

Without such a showing, it was error to grant summary judgment for appellees. Our supreme court has held that summary judgment is inappropriate where factual development of a crucial issue is lacking. *See Spears v. City of Fordyce*, 351 Ark. 305, 92 S.W.3d 38 (2002); *Waire v. Joseph*, 308 Ark. 528, 825 S.W.2d 594 (1992). In other words, appellees fail to provide any requisite proof that would entitle them to litigate the validity of the 1976 quiet-title decree. Without such proof, section 18-60-510's limitations period would apply and appellees' claim is merely a collateral attack on the 1976 decree. A confirmation decree rendered pursuant to Ark. Code Ann. §§ 18-60-501 through 511 is immune from collateral attack, except for jurisdictional defects apparent on the face of the record. *Champion v. Williams*, 165 Ark. 328, 264 S.W. 972 (1924); *Kulbeth v. Drew County Timber Co.*, 125 Ark. 291, 188 S.W. 810 (1916).[3]

We are mindful of the supreme court's decision in *Gilbreath v. Union Bank*, 309 Ark. 360, 830 S.W.2d 854 (1992), which appellees relied upon in support of their argument that the earlier quiet-title decree was defective. However, we believe *Gilbreath* is inapposite. In that case, the supreme court held that a trustee holding record title to the mineral interests was not properly served with process where the affidavit for a warning order did not conclude that, after making diligent inquiry, the trustee's whereabouts were unknown. *Gilbreath* is inapplicable to the present case because, in the 1976 quiet-title action, the affidavit for warning order named Hazell Dell Grissom the only known potential heir of Newton Temple, and stated that her whereabouts were unknown. Also, the attorney ad litem mailed a letter, together with a copy of the quiet-title petition, to her by certified mail, but the letter was returned unclaimed and address unknown. The quiet-title decree contains findings that service was proper, and Sagely has not presented specific proof to the contrary, only having made assertions that there are unspecified heirs of Newton Temple who should have been named. In *Gilbreath*, it was the party who had not received notice who challenged the validity

[3] However, such a decree may be attacked directly on any meritorious ground by the filing of a petition in the original proceeding within the three-year period, or it may also be directly attacked by a plenary suit having for its specific purpose the setting aside of the decree for fundamental errors such as fraud or lack of jurisdiction, which would render the decree void ab initio. *Welch, supra.*

of the quiet-title decree, while in the present case it is the appellees, who have failed to disclose any connection with any heir, who are challenging the quiet-title decree.

We reverse and remand the trial court's grant of summary judgment.

Reversed and remanded.

NEAL and VAUGHT, JJ., agree.

James E. BROWN *v.* STATE of Arkansas

CA CR 05-1409 238 S.W.3d 614

Court of Appeals of Arkansas
Opinion delivered August 30, 2006

Craig Lambert, for appellant.

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

SAM BIRD, Judge. James E. Brown was charged in the Poinsett County Circuit Court with second-degree sexual assault for, on or about March 26, 2003, engaging in sexual contact with the sex organs of a seven-year-old girl. On April 28, 2005, Brown was convicted by a jury and was sentenced to five years' imprisonment in the Arkansas Department of Correction. He raises one point on appeal, contending that the trial court abused its discretion in allowing into evidence the victim's videotaped statement to police. We affirm the conviction.

K.H., the victim of the sexual assault, was Brown's niece by marriage. The State's witnesses at trial on April 27 and 28, 2005, included K.H., who was then nine years old; her parents; Detective Mark McDougal of the West Memphis Police Department, a criminal investigator who interviewed K.H. and executed a search warrant of Brown's residence; Gary Gray, an Arkansas State Police criminal investigator who executed the search warrant with McDougal and conducted an interview of Brown; and Leann Vanaman, a supervisor in the state police Division of Crimes Against Children. Also introduced into evidence, despite Brown's objection, was a videotape of McDougal's interview with K.H. The tape was introduced through McDougal when the State recalled him after Vanaman testified.

The testimony of K.H. and her parents established that she lived with her family in West Memphis but frequently visited her aunt and uncle (appellant Brown) in Marked Tree. Their testimony also established that the criminal investigation of Brown ensued after K.H.'s parents became alarmed about comments she made concerning physical attributes of toy ponies she had received for her seventh birthday.

K.H. testified in part, marking on diagrams and using slang terms that she said she had learned from Brown, that he touched her private parts and taught her how to masturbate him until he ejaculated. She said that he touched her when she was in bed with her aunt, that the masturbation happened "lots of times" under her uncle's desk, and that it happened once when she and her uncle were in a vehicle in a parking lot while her aunt was inside a store. She said that she and Brown watched television and the computer

— seeing on a bed two men and a girl who acted like she was going to take off her panties, and seeing a man with a camera who took pictures of men and women together. She testified that Brown told her that, when she got older, they would do the things that were on the television and the computer.

Supervisor Leann Vanaman testified that she visited the prosecutor's office sometime after November 25, 2003, with the purpose of showing personnel there K.H.'s videotaped interview with Detective McDougal. Vanaman described the interview as "compelling." McDougal, who had testified earlier in the trial, was recalled. He testified that seventy-three video tapes, all containing graphic sexual conduct of adults, were taken from Brown's home during execution of the search warrant. McDougal admitted that he had been unable to find a photograph of Brown's penis and nude pictures of K.H., items that she had told McDougal about.

The prosecutor, arguing that there were inconsistencies between K.H.'s trial testimony and previous videotaped statement to McDougal, requested a hearing under Arkansas Rule of Evidence 803(25) to determine whether the videotape of the interview could be played. Rule 803, entitled *Hearsay Exceptions—Availibility of Declarant Immaterial*, includes the following:

> (25) Child Hearsay When Declarant Is Available at Trial and Subject to Cross-Examination. A statement made by a child under the age of ten (10) years concerning any type of sexual offense, or attempted sexual offense, with, on, or against that child, which is inconsistent with the child's testimony and offered in a criminal proceeding, provided:
>
> > (A) The trial court conducts a hearing outside the presence of the jury and finds that the statement offered possesses a reasonable guarantee of trustworthiness considering the competency of the child both at the time of the out of court statement and at the time of the testimony.
> >
> > (B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.
> >
> > (C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence.

In the present case, the court conducted an *in camera* hearing. The prosecutor asserted that K.H.'s videotaped, out-of-court statement should be admitted into evidence because "Rule 803(25) allows such a statement into evidence when the declarant is available at trial and subject to cross examination." The following arguments transpired during the hearing:

> DEFENSE COUNSEL: This is an adversarial proceeding. I cross-examine the witness and, invariably, things sometimes change. What this Rule is designed for is not that but the situation where a person completely forgets and there is no proof whatever. That is not the case here.
>
> PROSECUTOR: That is a misstatement of the Rules, Your Honor. When the declarant is available, you don't look to any other factors other than the ones outline[d] in this Rule. *We are not asking that this statement be admitted because the witness is unavailable. We are asking that it be admitted because the witness is available to cross-examination under this Rule.*
>
> TRIAL COURT: I have watched this tape and I think the Rule addresses situations just like this one. I am going to allow it to be shown to the jury.
>
> DEFENSE COUNSEL: Your Honor, this was done by a police officer and the witness was not subject to cross-examination. There are no guarantees of trustworthiness with this statement. That is the whole reason for the adversarial procedure and the confrontation clause. Why is this video tape more reliable than what she said today? [K.H.] was not scared when she testified. She gave testimony like a champ.
>
> PROSECUTOR: The question is whether the statement has sufficient indicia of reliability to meet constitutional muster. As the Court recalls from viewing the tape, there was nothing about the way the interview was conducted that shows there was any influence or words put into [K.H.]'s mouth.
>
> DEFENSE COUNSEL: If this were a business record, or something like that, it would be one thing, but this is a

> one-sided interview by a police officer who is trying to get charges filed and the purported victim. That is the reason in itself for the confrontation clause in the Constitution. Cross-examination of this statement cannot occur and it is particularly harmful to the defense because of the age of the case. The Prosecutor will want to go back at the end of the case and argue that, [K.H.] said it back then and she said it today. This will be bolstering the State's case. Actually, this will be more than bolstering her case, this will be her case.
>
> PROSECUTOR: The Rule only requires an inconsistency with a prior case and it is limited to children under the age of ten in sexual offenses. There is a two year gap between the trial and this event, and this is a seven and now nine year old. That is exactly the scenario and why this hearsay exception is there.
>
> TRIAL COURT: I agree. Proceed.

(Emphasis added.)

The videotape was admitted into evidence and was played for the jury. K.H.'s statements to Detective McDougal in the videotaped interview were more detailed and graphic than her trial testimony had been. She said that Brown penetrated her with his finger, and she described the process of physically assisting him until he masturbated. Using slang for body parts, she stated that Brown attempted to put his penis "up in" her, that it happened lots of times, that they watched acts of oral sex and sexual intercourse on the computer, that he took one picture of her wearing only her underwear and one with no clothes, and that he told her that when she was older — ten or eleven or twelve — he would put his penis in her vagina.

Defense counsel again protested when the playing of the tape was over, objecting that he could not "cross-examine the tape." The prosecution replied that counsel could cross-examine McDougal, and the court ruled, "That is how we're gonna do it." Defense counsel proceeded to cross-examine McDougal, asking him about the questions he had asked K.H. and about her answers.

After the jury retired to deliberate, it asked to view the tape. Brown objected that the jury would give undue emphasis and more weight to the tape than to K.H.'s courtroom testimony. He

argued that the evidence was prejudicial because it was not subject to cross-examination and was in contravention of the Confrontation Clause. The trial court agreed, likening the tape to videotaped depositions that are not allowed in the jury room, and the jury was not allowed to have the tape. The jury then sent the trial court a note asking, "How can we be denied evidence that has already been admitted?" In open court, the judge explained his concern that they might give the tape greater weight or emphasis than it should have; he instructed them to rely on their notes and recollections of the video just as with other testimony.

On appeal, Brown asserts that Ark. Rule Evid. 803(25), as applied to his case, is patently unconstitutional because it deprived him of cross-examination and his right to confront his accuser, as guaranteed him by the Sixth Amendment. He claims that the videotaped statement made by the victim to Officer McDougal violated his right to confront the witnesses against him under *Crawford v. Washington*, 541 U.S. 36 (2004). He asserts that "the witness was in no way unavailable. She testified." He complains that K.H.'s statement to Officer McDougal, made long before trial, was not subject to cross-examination; that cross was limited to examination of McDougal, "a poor substitute"; and that the State's case was much weaker absent the videotape.

To the extent that Brown now challenges the constitutionality of Rule 803 itself, we agree with the State that the issue cannot be raised because it was not raised to the trial court. *See, e.g.*, *Woolbright v. State*, 357 Ark. 63, 75, 160 S.W.3d 315, 323 (2004). Therefore, we reject on appeal any constitutional challenge regarding the rule. Brown also argues, chiefly citing *Crawford*, *supra*, that the admission of K.H.'s videotaped statement to Detective McDougal violated his Sixth Amendment right to confront the witness against him. We address this argument because it was presented to the trial court.

In *Crawford* the United States Supreme Court held that the Sixth Amendment's Confrontation Clause precludes the admission of testimonial hearsay evidence when the witness is unavailable to testify and the defendant has not had a prior opportunity for cross-examination. 541 U.S. at 68. The *Crawford* court also stated, however, that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar

admission of a statement so long as the declarant is present at trial to defend or explain it." 541 U.S. at 59 n. 9.[1]

We agree with the State that Brown has misinterpreted *Crawford*, and that it does not apply to the present case. The *Crawford* court clearly stated that the Confrontation Clause does not bar admission of hearsay statements when the hearsay declarant testifies at trial. Here, K.H. appeared at trial, was placed under oath, and was subject to cross-examination by Brown. Although Brown complains on appeal that he was unable to cross-examine K.H. about her videotaped statement to police, he points to no ruling that prevented him from recalling her after the tape was admitted after McDougal's testimony so that she could be questioned about the interview. We hold that the Confrontation Clause erected no barrier to the introduction of the videotaped interview, and Brown's right to confront K.H. was not violated. *Crawford*, *supra*, which addressed "testimonial statements of witnesses absent from trial," 541 U.S. at 59, was not implicated.

Affirmed.

BAKER and ROAF, JJ., agree.

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[1] In the recent case of *Davis v. Washington*, 547 U.S. 813 (2006), the Supreme Court defined the kind of police interrogations that are barred from admission into evidence under *Crawford v. Washington*, *supra*, where hearsay declarants do not testify at trial:

> When we said in *Crawford*, *supra*, at 53, 124 S.Ct. 1354, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator.

547 U.S. at 826. The *Davis* court held that a victim's 911 statements were not testimonial for purposes of the Confrontation Clause but that statements in response to police questioning, taken some time after potentially criminal events had ended and describing how they began and progressed, were inherently testimonial.

Herman G. FOLK, Sr. *v.* STATE of Arkansas

CA CR 05-1302 238 S.W.3d 640

Court of Appeals of Arkansas
Opinion delivered September 6, 2006

Joseph P. Mazzanti, III, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Herman G. Folk appeals his conviction for theft of property and the resulting sentence of fifteen years in prison and an order to pay $5600 in restitution. He argues that the trial court erred in failing to permit him to withdraw his plea of no contest. The State asserts that appellant failed to preserve this issue for appellate review, or in the alternative, that this argument holds no merit. We affirm.

The following is a chronology of relevant events leading to this appeal. An information charging appellant with theft of property was filed in Bradley County Circuit Court on August 4, 2004. A jury trial was set in the early months of 2005, but was continued several times to June 8, 2005. Appellant was accused of making fraudulent deposits into a bank account and making withdrawals from that account, otherwise known as "check kiting." He was on parole at the time. At the commencement of proceedings on June 8, the public defender and prosecutor announced that they had negotiated a plea bargain whereby the bank would quickly receive full restitution and appellant would also serve a five-year sentence. There was some discussion about waiting a week to accept the plea so that restitution could be paid first, but the trial judge said, "I'd like to consummate it today." The prosecutor asked that the trial court "let him plead guilty and sentence him when we get the money[.]" The public defender added that "if you don't accept the State's recommendation we can withdraw our guilty plea." The trial judge replied, "That sounds good." Thereupon, appellant verbally entered a no-contest plea in open court after a full verbal examination, waiving his rights to a trial on the charges. A written and signed "No Contest Plea Statement" was filed on the same day, reflecting appellant's identifying information, the criminal charge and range of punishment, and the consequences of pleading no contest, including:

> I believe the Prosecutor's recommendation is in my best interest. If I plead guilty, I understand the court is not required to accept either my no contest plea or the Prosecutor's recommendation for punishment, and the court can make my sentence greater or lighter than the recommendation.

The prosecutor's recommendation for this crime was (1) to serve a five-year prison sentence consecutively to another sentence appellant

had already served, with credit for time served since February 9, 2005; (2) to pay court costs and jury costs; and (3) to pay restitution of $5600 to Warren Bank and Trust Company within seven days of June 8, 2005. The trial judge indicated acceptance of the no-contest plea, commenting that he wanted appellant to promptly pay the restitution, which was the compelling interest argued by the State. At the conclusion, the trial court set sentencing for June 29, but appellant was ill that day, necessitating that sentencing be moved to July 11.

On July 11, 2005, appellant and his public defender appeared. Appellant announced that he wanted the public defender to cease representing him, he was seeking another attorney, and he wanted to withdraw his plea. The judge reminded appellant that his case was set for sentencing because he had already entered a no-contest plea upon which the court "made a finding that you were guilty." The public defender explained that since the June 8 hearing, appellant's sister was unable to garner the funds to pay full restitution, so appellant had suggested another sentence he would be willing to accept. Appellant stated, "I withdraw the plea." The judge responded that, "it's not that simple." However, the trial judge continued the sentencing for another month, to late in August, to allow appellant to try to find another attorney of his own choosing. At a review hearing on July 27, 2005, appellant had not acquired private counsel, so another public defender was appointed to represent appellant. A jury sentencing was conducted on August 18, 2005, without comment or objection from defense counsel. After deliberations on punishment, the jury rendered a fifteen-year prison sentence and restitution to the bank. Prior to pronouncement of sentence, appellant said that he would be appealing. Appellant filed a timely notice of appeal from the judgment of conviction.

Appellant argues that the trial court violated his absolute right to withdraw his no-contest plea pursuant to Ark. R. Crim. P. 26.1, or alternatively abused its discretion in not allowing withdrawal. Rule 26.1 provides in pertinent part:

> (a) A defendant may withdraw his or her plea of guilty or nolo contendere as a matter of right before it has been accepted by the court. A defendant may not withdraw his or her plea of guilty or nolo contendere as a matter of right after it has been accepted by the court; however, before entry of judgment, the court in its discretion may allow the defendant to withdraw his or her plea to correct a manifest injustice if it is fair and just to do so, giving due

> consideration to the reasons advanced by the defendant in support of his or her motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea. A plea of guilty or nolo contendere may not be withdrawn under this rule after entry of judgment.
>
> (b) Withdrawal of a plea of guilty or nolo contendere shall be deemed to be necessary to correct a manifest injustice if the defendant proves to the satisfaction of the court that:
>
> . . . .
>
> (iv) he or she did not receive the charge or sentence concessions contemplated by a plea agreement and the prosecuting attorney failed to seek or not to oppose the concessions as promised in the plea agreement; or
>
> (v) he or she did not receive the charge or sentence concessions contemplated by a plea agreement in which the trial court had indicated its concurrence and the defendant did not affirm the plea after receiving advice that the court had withdrawn its indicated concurrence and after an opportunity to either affirm or withdraw the plea.

Appellant alleges that it is unclear whether the trial court accepted his no-contest plea, giving him the absolute right to withdraw it, pursuant to subsection (a). Furthermore, he argues that even if the trial court accepted the plea, the trial court abused its discretion in not permitting it to be withdrawn to avoid manifest injustice pursuant to subsections (a) and (b) because he did not receive the sentence he had negotiated.

[redacted] The State responds that appellant's no-contest plea was in fact accepted at the June 8 hearing, reinforced by appellant's statement that he wanted to withdraw the plea at the review hearing in late July. We agree with the State's assessment, given a reading of the colloquy on the record among the attorneys, the judge, and appellant. The judge made clear that he desired to complete the no-contest plea and not wait to see if appellant fulfilled his promise to pay restitution within seven days of June 8. The review hearing where appellant stated his desire to withdraw his plea and obtain new counsel, and the trial court's response, support that proposition. For this reason, appellant did not have an absolute right to withdraw the plea.

Appellant argues in the alternative that the trial court abused its discretion in not permitting withdrawal of the plea after appellant did not comply with the time-sensitive restitution. The State argues that this argument is procedurally barred for failing to obtain a ruling on this specific aspect of the argument. Appellant, not his attorney, made only a general statement that he wanted to withdraw his plea. Nonetheless, his attorney amplified that appellant was unable to pay the monies owed and had his own idea of a sentence he would accept. It is apparent that he was invoking Rule 26.1, and we address the merits of the argument.

Appellant's argument is unavailing. It was his burden to show to the satisfaction of the trial court that a manifest injustice needed correcting, if it was fair and just to do so, giving consideration to the reasons advanced by the defendant and any prejudice resulting to the State if the motion to withdraw were granted. Ark. R. Crim. P. 26.1(a). This is a discretionary decision left to the trial judge. *See id.* What constitutes a "manifest injustice" is explained by way of example in subsection (b) of the Rule. Appellant seizes on the subsections speaking to a defendant not receiving the benefit of his bargain enumerated in (b)(iv) and (b)(v). He is mistaken.

Appellant has failed to show that the trial court abused its discretion in failing to permit withdrawal of the no-contest plea where appellant failed to comply with his end of the bargain. Appellant did not comply with the terms of the sentence recommendation in that he failed to pay restitution within seven days, and his attorney stated that appellant had another suggested "deal" for sentencing. Appellant gambled on his sister's ability to pay the restitution for him within seven days, and the trial court and prosecutor had no control over that outcome. There is no "manifest injustice" here, as defined in Rule 26.1, thus the trial court did not abuse its discretion in not granting withdrawal of his plea. *Compare Ellis v. State*, 288 Ark. 186, 703 S.W.2d 452 (1986). It would be inherently unfair for the judge to only bind one of the parties to the bargain. *See Williams v. State*, 272 Ark. 207, 613 S.W.2d 94 (1981). We hold that no abuse of discretion has been demonstrated.

Appellant adds in closing that the trial judge violated Ark. R. Crim. P. 25.3, which mandates the duty of a trial judge regarding pleas. This Rule provides in pertinent part that if the judge agrees with the plea agreement, but then decides before

sentencing that the concessions should not be included in the disposition, then he must advise the parties and give the defendant an opportunity to affirm or withdraw his plea. Ark. R. Crim. P. 25.3(b). In failing this, appellant argues that the trial court erred. We disagree that appellant has demonstrated an error here because the concessions were no longer applicable when appellant failed to abide by his duty under the plea agreement. *See Williams, supra.*

Affirmed.

GRIFFEN and CRABTREE, JJ., agree.

Robert Lee MITCHEM *v.* STATE of Arkansas

CA CR 05-735 238 S.W.3d 623

Court of Appeals of Arkansas
Opinion delivered September 6, 2006

Miller Law Firm, by: *Randel Miller*, for appellant.

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

KAREN R. BAKER, Judge. A Craighead County jury convicted appellant Robert Lee Mitchem of attempted rape and kidnapping and sentenced him to a total of twenty years in the Arkansas Department of Correction. Appellant challenges his convictions arguing that the trial court erred in failing to grant his motion for directed verdict on the charge of attempted rape because the evidence was insufficient to prove that appellant took a substantial step toward the commission of the offense of rape. He also argues that the trial court erred in failing to grant a directed verdict on the charge of kidnapping because the evidence was insufficient to show that appellant restrained the liberty of the alleged victim. We find no error and affirm.

Appellant's argument relies heavily on disputed testimony. Therefore, we first set out the facts of this case that are not in dispute. The victim in this case, H.G., was thirteen (13) years old. On the afternoon of February 15, 2004, appellant, a fifty-one (51) year-old male, and H.G. had a telephone conversation, and the subject of the phone conversation was whether H.G. could go to the movies with appellant's daughter. H.G. obtained her mother's permission to go the movies. Appellant called H.G.'s home to obtain directions to the home. Shortly after receiving directions,

appellant picked up H.G. from her home in his car. When H.G. entered appellant's vehicle, she was the only passenger in the vehicle. Appellant explained his daughter's absence to H.G. by stating that his daughter was already at the movies and that he would take H.G. there; however, appellant did not take H.G. to the movies. Instead, appellant took H.G. to the Regency Inn in Jonesboro where he procured a motel room. Appellant escorted H.G. to the motel room and left her. At 9:35 p.m., Officer Landrum of the Jonesboro police department received a call from dispatch reporting a rape in progress at the Regency Inn. Officer Landrum went to the motel room and found H.G. crying and upset. Appellant was not in the motel room at that time. The police attempted to locate appellant and spoke to his daughter at appellant's home. After the police left appellant's home, appellant's daughter called appellant on his cell phone to tell him that the police were looking for him. Appellant called the police from the motel after his daughter's call, and officers proceeded to the motel where they arrested appellant.

On appeal and at trial, appellant emphasized the differences in the testimony regarding who initiated the call concerning the movies and the reason H.G. was at the hotel room. Appellant asserted that the State failed to demonstrate that H.G. was restrained in any way. He argued that she walked into the room without coercion, that appellant left the room about 7:00 p.m., and that he did not return until after the police had been summoned. During the time he was gone, the door was not bolted, a working telephone was in the room, and H.G. was free to leave. Appellant also argued that the evidence regarding the attempted rape charge was insufficient in that there was not a substantial step toward the commission of the crime of rape. He asserted that he did not touch H.G. sexually, he did not restrain her liberty, and otherwise took no action to engage in sexual intercourse or deviate sexual activity.

H.G. testified at trial that appellant explained to her that, before going to the movie, he first had to visit someone at the motel room. H.G. watched appellant procure the key and went to the room with appellant; however, no one was in the room. Once in the room, appellant told H.G. that this was where she would be staying and asked her if she had "ever done crystal meth." He then inquired if H.G. had a boyfriend and if she did, to ask him to come over. When she said she did not have a boyfriend, appellant stated that he intended to engage in sexual contact with H.G. He also

stated that he and his girlfriend had engaged in sex with another person earlier that day and he wanted H.G. to engage in such acts with them. He gave his watch to H.G. when he left saying that he would return with his girlfriend. H.G. said that she remained in the motel room because she was frightened by what the appellant might do if she tried to leave. She also testified that there were people outside the motel room and that she did not know if they were with appellant or not. Instead of leaving, she used the phone in the room to call a friend and told her what happened. As a result, her friend's mother called the police.

Officer Landrum testified that once he found the room where H.G. was located, he knocked on the door. H.G. was very upset and crying and only opened the door to the police after multiple requests and assurances that Officer Landrum and his fellow officer were in fact police. Officer Landrum described her as "obviously afraid," "very distraught," and "upset." Her tone of voice was frantic and her speech patterns were rapid. She told the officers that appellant had brought her to the motel room, that he wanted her to have sex with him and his girlfriend, and that he wanted her to use "meth." She appeared frantic and wanted to leave immediately, because she feared that appellant would return.

Officer Landrum also described his contact with appellant following the attempts to locate him. Officer Landrum said that appellant contacted the police and asked what was going on. The officer explained that appellant was a suspect in a case involving the abduction of a child and he requested that appellant come to the station. The appellant said that he would come to the station "in the morning" and that he was on his way to Paragould. Officer Landrum said that, while talking to appellant, he heard a train whistle over the telephone and dispatched a patrol unit back to the motel, which was near the railroad tracks. Police officers subsequently located appellant at the motel. Appellant had returned to the motel with his girlfriend who opened the door to the officers, who then arrested appellant. Appellant told Officer Landrum that the reason he had left H.G. at the hotel was that he did not have room for her and his girlfriend in the car. Officer Landrum described the car as a four door and capable of carrying more than one passenger.

Appellant's first witness was his daughter, A.M., who testified that H.G. had told her that she had used "meth" and "smoked pot" prior to the incident with her father. She also testified that she

was unaware that her father or her father's live-in girlfriend, Laura Eaton, had invited H.G. to the movie with her and another friend, and that her aunt had picked her up from the movies and returned her home. Neither her father nor his girlfriend were at home when she returned after the movie.

Appellant claimed that he had rented the motel room for his girlfriend's aunt. According to him, the aunt had been staying in his home, but wanted to have her boyfriend spend the night. Appellant did not believe that an overnight guest was a good example for his daughter, so he had procured a motel room earlier in the day. He further asserted, contrary to H.G., that H.G. initiated the call to his house, wanting to go to the movie with his daughter, and he merely returned her call to get directions to the home. He testified that once H.G. was in the car with him, that she refused to go to the movies, and, instead of taking her back home, he took her to the motel. In support of his argument, he emphasizes that he left her at the motel a sufficient amount of time to allow for the viewing of a movie and travel.

Appellant also called as a witness a life-long friend who testified that she was supposed to meet appellant later that evening at another establishment. She was ahead of schedule driving home when she happened to see appellant and H.G. going into the motel room. She drove into the parking lot, gained appellant's attention, and observed appellant talking with H.G. in the doorway before coming to talk with her. She and appellant then left and conducted their business, which consisted of appellant loaning the witness money. The State argues that this chance encounter thwarted appellant's original plan.

A motion for a directed verdict is treated as a challenge to the sufficiency of the evidence. *Smith v. State,* 68 Ark. App. 106, 3 S.W.3d 712 (1999). When a defendant challenges the sufficiency of the evidence, we review the evidence in the light most favorable to the State, considering only the evidence that supports the guilty verdict, and will affirm the conviction if it is supported by substantial evidence. *Fairchild v. State,* 349 Ark. 147, 76 S.W.3d 884 (2002). Evidence is substantial, whether direct or circumstantial, if it is of sufficient force and character that, with reasonable certainty, it will compel a conclusion one way or the other and pass beyond mere speculation or conjecture. *Carmichael v. State,* 340 Ark. 598, 12 S.W.3d 225 (2000). We defer to the jury's determination on the matter of witness credibility. *Jones v. State,* 52 Ark. App. 179, 916 S.W.2d 766 (1996). Any inconsistencies in the

witnesses' testimony are for the jury to resolve. *Palmer v. State,* 60 Ark. App. 97, 959 S.W.2d 420 (1998).

We first consider appellant's argument that the trial court erred by not granting his motion for a directed verdict on the charge of criminal attempt to commit rape because there was not sufficient evidence that he attempted to engage in sexual intercourse or deviate sexual activity with H.G. A person commits rape if he engages in sexual intercourse or deviate sexual activity with a person who is less than fourteen years of age. Ark. Code Ann. § 5-14-103(3)(A) (Repl. 2006). To prove attempted rape, it must be shown that the defendant purposely engaged in conduct that constituted a substantial step in a course of conduct intended to culminate in the commission of rape. Ark. Code Ann. § 5-3-201 (Repl. 2006); *see also Rains v. State,* 329 Ark. 607, 953 S.W.2d 48 (1997). To be considered a substantial step toward the commission of a rape, a defendant's overt acts must be beyond mere preparation, and "must reach far enough toward accomplishment, toward the desired result, to amount to the commencement of consummation." 75 C.J.S. *Rape* § 34 (2002). That is, conduct is not a substantial step unless it is strongly corroborative of a person's criminal purpose. Ark. Code Ann. § 5-3-201(c).

While appellant's version of the events are in stark contradiction to the victim's description, the jury was not required to believe appellant's story that it was simply "foolish on [his] part not to just take her back home." *See Palmer, supra.* The testimony that he initiated a call to the victim, picked her up under false pretenses, isolated her in a motel room, told her that he intended to engage in sexual intercourse with her and that he also was bringing back his girlfriend to engage in sexual acts with the victim, and then returning to the motel room with his girlfriend goes beyond mere planning and preparation. Appellant had procured the victim. This evidence supports the jury determination that appellant had taken a substantial step toward engaging in sexual intercourse with a person under the age of fourteen.

Appellant's second argument challenges the sufficiency of the evidence regarding restraint. Arkansas Code Annotated section 5-11-102 (Repl. 2006) provides, in pertinent part:

> A person commits the offense of kidnapping if, without consent, the person restrains another person so as to interfere substantially with the other person's liberty with the purpose of:

. . .

(3) Facilitating the commission of any felony or flight after the felony;

(4) Inflicting physical injury upon the other person;

(5) Engaging in sexual intercourse, deviate sexual activity, or sexual contact with the other person;

(6) Terrorizing the other person or another person,

However, to support a separate charge for kidnapping in a case where a rape or attempted rape has been alleged also, it must be shown that the defendant employed some greater restraint on the victim than that normally incidental to rape. *Lee v. State,* 326 Ark. 529, 932 S.W.2d 756 (1996); *Wofford v. State,* 44 Ark. App. 94, 867 S.W.2d 181 (1993). A person acts purposely with respect to his conduct or a result thereof "when it is his conscious object to engage in conduct of that nature or to cause such a result." Ark. Code Ann. § 5-2-202(1) (Repl. 2006). In *Watson v. State,* 358 Ark. 212, 188 S.W.3d 921 (2004), our supreme court held:

> A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. Because intent cannot be proven by direct evidence, the jurors are allowed to draw upon their common knowledge and experience to infer it from the circumstances. Moreover, because of the obvious difficulty in ascertaining a defendant's intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his or her acts.

Watson, 358 Ark. at 219-20, 188 S.W.3d at 925 (citations omitted).

Appellant submits that the facts in this case fail to show that H.G. was restrained so as to interfere with her liberty. He urges that the facts demonstrate that H.G. willingly entered the room, was not restrained, could have left the room at any time she chose, and had access to a working telephone. He also concludes that his staying away from the motel room indicates that he had no intent to restrain her liberty. He distinguishes his case from *Kirwan v.*

State, 351 Ark. 603, 96 S.W.3d 724 (2003), where a defendant traveled from another state to meet a fictional eleven-year-old child, who actually was an undercover police officer as a part of an internet sting operation, for the purpose of engaging in sexual relations. Appellant argues that the evidence in *Kirwan* left no other reasonable explanation for the defendant's conduct other than his intent to engage in sexual relations with the eleven-year-old child.

We agree that appellant's case is distinguishable from *Kirwan*; however, it was within the jury's province to evaluate appellant's testimony and the testimony of the victim to determine the facts. The jury was not required to accept appellant's version even if it found the version to be plausible or reasonable. The jury is not required to believe any witness's testimony, especially the testimony of the accused, because he is the person most interested in the outcome of the trial. *Winbush v. State,* 82 Ark. App. 365, 107 S.W.3d 882 (2003). The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Isom v. State,* 356 Ark. 156, 148 S.W.3d 257 (2004). Indeed, after a jury has given credence to a witness's testimony, this court does not disregard it unless it was "so inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon." *Id.* One eyewitness's testimony, moreover, is sufficient to sustain a conviction, and his testimony is not "clearly unbelievable" simply because it is uncorroborated or because it has been impeached. *Id.*

■ While appellant asserts that there was no evidence that he intended to restrain H.G., sufficient evidence supports the conclusion that appellant used deception to restrain the victim. Our definition of "restraint without consent" includes restraint by deception. Ark. Code Ann. § 5-11-101(A) (Repl. 2006). In the case of a person who is under the age of fourteen (14) years, the definition includes "without the consent of a parent . . . ." *Id.* The mother of H.G. relied upon the representation that appellant was taking H.G. to the movies with his daughter when she gave permission for H.G. to leave her home with appellant. H.G.'s mother did not consent to appellant escorting her daughter to a motel room at the Regency Inn. When H.G. realized appellant's daughter was not in the car, appellant assured H.G. that his daughter was waiting for H.G. at the movies, and he would take H.G. to meet her. Appellant then escorted H.G. to the motel room

under the guise of meeting someone briefly before meeting his daughter at the movies. Given the testimony, substantial evidence exists to support appellant's convictions; accordingly, we affirm.

BIRD and ROAF, JJ., agree.

Jim NETTLES and Shirley Nettles *v.* CITY of LITTLE ROCK; City of Little Rock Planning Comm'n

CA 06-82 238 S.W.3d 635

Court of Appeals of Arkansas
Opinion delivered September 6, 2006

Appellants, *pro se.*

William C. Mann, III, Chief Deputy City Att'y, for appellees.

KAREN R. BAKER, Judge. This appeal arises from the Pulaski County Circuit Court's finding that it was without jurisdiction to review the pro se appellants Jim and Shirley Nettles' appeal that challenged a decision by the City of Little Rock and the City of Little Rock Planning Commission, appellees. The primary issue on appeal to this court concerns the sufficiency of the Nettles' affidavit to the trial court asserting their intent to appeal the appellees' decision and the timeliness of the filing of the affidavit. We hold that the trial court did have jurisdiction, and we reverse and remand the matter to the trial court for proper consideration of the Nettles' appeal.

The Nettles opposed the application by the Chenal Montessori School for a revised conditional- use permit to construct an adjacent building and enlarge its enrollment of students. This application for a revised-use permit was approved on March 17, 2005, by the Planning Commission. The Nettles then requested that the Little Rock Board of Directors rescind the Planning Commission's decision; however, the Directors confirmed the decision, refusing to alter or rescind the issuance of the revised permit. The Nettles' request for rescission was denied by the Directors on June 7, 2005, and on July 7, 2005, the Nettles filed an affidavit to appeal the denial. The Directors approved the minutes of the June 7, 2005 meeting on August 1, 2005. The Nettles filed an amended appeal to the circuit court attaching the approved minutes on August 15, 2005.

The affidavit stated: "Due to the time constraints wherein Pro Se Plaintiffs had but thirty (30) days to research, decide, and compose a timely filing, the City Clerk's response to a time estimate cannot be included in this Affidavit." The Clerk's response on July 12, 2005 states that the clerk "will only be able to certify to the transcribed and approved minutes of the Little Rock Board of Directors Meeting," and also states that she is in the process of transcribing those minutes. The response further states that "[o]nce they are approved by the Board of Directors, I will be able to copy and certify the transcribed minute record of that

meeting." The circuit judge dismissed the Nettles' appeal finding that they had failed to comply with Ark. Code Ann. § 14-56-425 (Repl. 1998) which incorporates the appeal procedure found in District Court Rules 8 and 9, and that the circuit court was therefore without jurisdiction to hear the appeal. This appeal followed.

Appellants assert that we must determine whether the Directors' decision was final at the June 7, 2005 meeting when the decision was made or was final in August when the Board approved the minutes of the meeting. Appellants argue that if the Directors decision was not final until August, their subsequent filing of the record with their amended appeal satisfied the statutory requirements for jurisdiction. In making that argument, they insist that this court must consider what actual harm occurs when an appellant properly requests the record but declines to swear that a city clerk has refused or neglected to produce that record. They argue that both the affiant and the State official would be subject "to the potential risk of unlawful activity" if the affiant submitted an affidavit swearing that an official of the State refused or neglected to perform an action they were required by law to do. They also expressed their concern regarding the proof necessary to substantiate their claim and questioned the weight of the evidence of telephone communication. It appears from their arguments that the Nettles were concerned that swearing that the clerk refused to produce the record was the same as accusing the clerk of committing an unlawful act which would subject both the Nettles and the clerk to retaliation. As the Nettles explained to the trial court: "For the City Clerk to simply notice a citizen that the record will not be available until a certain date is not in keeping with those two glaring words, neglected and refused. It is clear in the issue before this honorable Court that the City Clerk did not refuse to provide a record. She simply told Plaintiffs the truth, that she was prohibited from certifying the record until it became final."

Appellees simply rely upon the affidavit filed on July 7, 2005, and its failure to include the recitation that the clerk refused or neglected to prepare and provide the record. They assert that without that language in the affidavit or the filing of the certified record of the proceedings before the Board, the appeal was untimely and the circuit court had no jurisdiction to hear the matter.

Because section 14-56-425 only permits appeals from final action, as a threshold matter it is necessary to determine if the June

7, 2005, decision by the Directors constituted a final action as the term is used in the statute. Our supreme court discussed the issue of finality of a decision by governing city bodies in *Combs v. City of Springdale*, 366 Ark. 31, 233 S.W.3d 130 (2006):

> In *Stromwall v. City of Springdale Planning Commission,* 350 Ark. 281, 86 S.W.3d 844 (2002), this court interpreted the term "final action" found in section 14-56-425. There, we quoted with approval the United States Supreme Court's statement in *Williams County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), "[T]he finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Stromwall,* 350 Ark. at 846. We also said, "[F]or an order or action to be final it must terminate the action, end the litigation, and conclude the parties' rights to the subject matter in controversy." *Id.* And in the same vein, "Where further proceedings are contemplated, that do not involve merely collateral matters, the order or action is not final." *Id.* In *Stromwall,* we held that a preliminary plat approval by the Springdale City Planning Commission was not a final action under section 14-56-425 because further actions in the matter were contemplated, and there were still outstanding issues to be determined before the plat was finally approved.
>
> Here, no further action in the matter was contemplated, and no outstanding issues remained to be determined. The vote of the city council on April 26, which denied Combs' request for a lot split, signified that it had arrived at a definitive position on the issue that inflicted an actual, concrete injury on Combs, and it concluded the parties' rights to the subject matter in controversy. The April 26 vote meant that the city council had definitely determined that the appellant would not be permitted to split his lot, and the approval of the minutes on May 10 was merely a recordation of that determination. Accordingly, we hold that the vote taken on April 26, 2005, was a final action for the purposes of section 14-56-425.

As in *Combs*, the Directors' approval of the minutes from the June 7, 2005 meeting were merely a recordation of the Directors' determination with which the Nettles disagreed and challenged to the trial court. We hold that the decision was final on June 7, 2005, and the time for appeal began to run on that date. Therefore, we must decide if the affidavit filed on July 7, 2005, was

sufficient to meet our statutory requirements. The appeal from the city council's action was taken pursuant to Ark. Code Ann. § 14-56-425, which provides:

> In addition to any remedy provided by law, appeals from final action taken by the administrative and quasi-judicial agencies concerned in the administration of this subchapter may be taken to the circuit court of the appropriate county where they shall be tried de novo according to the same procedure which applies to appeals in civil actions from decisions of inferior courts, including the right of trial by jury.

Our supreme court has interpreted Ark. Code Ann. § 14-56-425 to incorporate the appeal procedure found in District Court Rules 8 and 9. *Ingram v. City of Pine Bluff,* 355 Ark. 129, 133 S.W.3d 382 (2003). In particular, Rule 9 provides in part:

> (a) *Time for Taking Appeal.* All appeals in civil cases from district courts to circuit court must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within 30 days from the date of the entry of judgment. . . .
>
> (b) *How Taken.* An appeal from a district court to the circuit court shall be taken by filing a record of the proceedings had in the district court. Neither a notice of appeal nor an order granting an appeal shall be required. It shall be the duty of the clerk to prepare and certify such record when requested by the appellant and upon payment of any fees authorized by law therefor. The appellant shall have the responsibility of filing such record in the office of the circuit clerk.
>
> (c) *Unavailability of Record.* When the clerk of the district court, or the court in the absence of a clerk, neglects or refuses to prepare and certify a record for filing in the circuit court, the person desiring an appeal may perfect his appeal on or before the 30th day from the date of the entry of the judgement in the district court by filing an affidavit in the office of the circuit court clerk showing that he has requested the clerk of the district court (or the district court) to prepare and certify the record thereof for purposes of appeal and that the clerk (or the court) has neglected to prepare and certify such record for purposes of appeal. A copy of such affidavit shall be promptly served upon the clerk of the district court (or the court) and the adverse party.

The filing requirements of Rule 9 are mandatory and jurisdictional, and failure to comply prevents the circuit court from acquiring subject-matter jurisdiction. *Douglas v. City of Cabot,* 347 Ark. 1, 59 S.W.3d 641 (2001). Any interpretation of a statute by our supreme court becomes a part of the statute itself. *Night Clubs, Inc. v. Fort Smith Planning Comm'n,* 336 Ark. 130, 984 S.W.2d 418 (1999).

The question presented is whether the affidavit filed by the Nettles is sufficient to comply with District Court Rule 9(c). Critical to the analysis of this question is the supreme court's reasoning in *Velek v. City of Little Rock*, 364 Ark. 531, 222 S.W.3d 182 (2006). Our supreme court reasoned that:

> Although the Veleks did not use the exact words, "the clerk refused to prepare and certify the record," to require a defendant's affidavit to quote the Rule's language exactly in this instance would be to exalt form over substance. *See Romes v. State,* 356 Ark. 26, 144 S.W.3d 750 (2004) (rejecting argument that, simply because the word "continuance" was not used by counsel, the court should not consider this period as a delay requested by the defendant for purposes of speedy trial; clearly, a comment that counsel would "probably . . . need more time to prepare" was a request to continue the trial date, and to hold otherwise would be placing form over substance).
>
> In sum, the Veleks complied with Rule 9(c) by filing an affidavit before the thirtieth day after the date of the district court's judgment; the trial court erred in dismissing the Veleks' appeal.

Id.

Our supreme court's decision in *Velek* relied upon the affiant's statement that the clerk had specifically informed the affiant that the clerk would not provide the necessary transcript. Therefore, the substance of the affidavit established that the record was unavailable to the affiant because of an action or non-action by the clerk. In reaching its decision, the supreme court admonished that we must not exalt form over substance.

To ensure that we do not exalt form over substance, we must examine the substance of the Nettles' affidavit. The affidavit states that due to the time constraints, the affiant is unable to provide an estimate of the date when the record of the meeting would be available. The substance of the affidavit is that the

Nettles would provide the record when it was made available to them, but they did not know when the record would be available. The letter from the clerk to the Nettles confirms that the person responsible for preparing the required record was in the process of transcribing the record and would not release the record to the Nettles until after the Board's approval of the minutes of the meeting. Given these facts, we would be applying form over substance to say that the affidavit was insufficient because, like the appellant in *Velek*, the Nettles did not specify that the "clerk refused to prepare and certify the record." The substance of the affidavit and the clerk's response make clear that the record was not available to the Nettles on July 7 and would not be available until after it was transcribed and approved by the Board of Directors.

Accordingly, we hold that the trial court did have jurisdiction, and we reverse and remand the matter to the trial court for proper consideration of the Nettles' appeal.

BIRD and ROAF, JJ., agree.

Robert Heath KILLIAN *v.* STATE of Arkansas

CA CR 05-1214 238 S.W.3d 629

Court of Appeals of Arkansas
Opinion delivered September 6, 2006

[Rehearing denied October 11, 2006.]

James B. Bennett, for appellant.

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

ANDREE LAYTON ROAF, Judge. A Union County jury convicted appellant Robert Heath Killian of delivery of a counterfeit controlled substance, delivery of a controlled substance, and two counts of the use of a communication facility. He was sentenced to a total of forty-five years in prison. On appeal, Killian argues that the trial court erred when it denied his motion to dismiss for lack of a speedy trial and when it denied his three motions for mistrial. We affirm.

Because Killian does not challenge the sufficiency of the evidence supporting his conviction, only a brief recitation of the facts related to the issues on appeal is necessary. On July 2, 2003, Killian was charged with delivery of a counterfeit controlled substance, delivery of a controlled substance, and two counts of the use of a communication facility. On July 22, 2005, immediately before his trial, Killian filed a motion to dismiss in which he argued that 781 days had elapsed since he was arrested on June 2, 2003. The trial court denied the motion to dismiss, citing several excluded periods and declaring that only 323 non-excluded days had passed since Killian's arrest date.

During Killian's trial, he made three motions for a mistrial. Killian first moved for a mistrial during voir dire when a prospective juror stated that he was employed as a supervisor at the jail and had seen Killian "come through [the] facility several times." Killian again moved for a mistrial when the State's confidential informant testified that he had seen Killian selling methamphetamine at a time not related to the offenses for which Killian was

being tried. Killian last moved for a mistrial on the basis that the State, in its closing argument, had commented on Killian's right not to testify. The trial court denied all three motions for mistrial.

For his first point on appeal, Killian argues that the trial court erred when it denied his motion to dismiss for violation of the speedy trial rule. Arkansas Rule of Criminal Procedure 28 governs speedy trials. Any defendant charged in circuit court shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve months of the date he was arrested or the date the charges were filed, whichever is earlier, excluding any periods of necessary delay as authorized by Rule 28.3. Ark. R. Crim. P. 28.1(c) (2006); Ark. R. Crim. P. 28.2(a) (2006). Rule 28.3 governs the included periods and further provides that "such periods shall be set forth by the court in a written order or docket entry, but it shall not be necessary for the court to make the determination until the defendant has moved to enforce his right to a speedy trial pursuant to Rule 28 unless it is specifically provided to the contrary below."

Here, Killian was arrested on June 2, 2003. His trial was held 781 days later on July 22, 2005. Killian filed his motion to dismiss for lack of a speedy trial on July 22, 2005, just before his trial began. His motion did not challenge any specific excluded period. Instead, Killian generally asserted that he had been denied a speedy trial based on the 781 days since his arrest. Immediately preceding the trial, the trial court held a hearing on Killian's motion to dismiss. The trial court reviewed the docket and found a few periods that had been previously excluded and further excluded a few more. The trial court determined that only 323 non-excluded days had elapsed since Killian's arrest and ruled that Killian's trial was being held within the time allowed by Rule 28. During the hearing, Killian did not object to any of the excluded periods cited by the trial court or to the trial court's calculation of the number of excluded days.

The State asserts that Killian's speedy-trial argument is not preserved for appellate review. To preserve a speedy-trial objection for appeal, the defendant must make a contemporaneous objection at the hearing where the time is excluded. *DeAsis v. State*, 360 Ark. 286, 200 S.W.3d 911 (2005). The reason for requiring a contemporaneous objection is to inform the trial court of the reason for disagreement with its proposed action prior to making its decision or at the time the ruling occurs. *Id.* at 292. "The idea is to give the trial court the opportunity to fashion a

different remedy." *Id.* Here, the trial court expressly noted periods of exclusion during the hearing on Killian's speedy-trial motion, and Killian never objected to any of these periods at the hearing when the trial court charged these periods to him.

Killian argues that *DeAsis, supra,* is distinguishable from the present case, because *DeAsis* involved a motion for a mental evaluation in which the trial court announced at the time the motion was made that a specific time period related to the motion for mental evaluation would be excluded and charged to the defendant. Here, only three of the six excluded periods announced in open court had had orders entered contemporaneously. The trial court did not announce in open court the additional disputed, excluded periods until the hearing on the speedy-trial motion. Killian challenges the exclusion of those three additional periods on appeal, and he asserts that a contemporaneous objection at this time was not necessary because the trial court announced these periods at the same time that it ruled on his motion for dismissal for lack of a speedy trial. Killian argues that, because these excluded periods had no prior orders or docket entries and were announced in open court only at the hearing, he was denied the opportunity to make a contemporaneous objection to the excluded periods at issue. Killian, however, cites no cases to support this argument.

The hearing on Killian's motion to dismiss for lack of speedy-trial issue consisted of the following:

> THE COURT: He was arrested June 2, 2003. Since that time I find a total of . . . Did you have 760 days?
>
> STATE: I just figured up what was not excluded.
>
> THE COURT: Okay. I have an excluded period of August 21 to September 25, 2003.
>
> STATE: I didn't find that one.
>
> THE COURT: There was a plea agreement filed on August 21, 2003. We continued it to September 25, 2003, for the plea, I'm excluding that. September 11, 2003 to March 25, 2004.
>
> STATE: Yes, sir.
>
> THE COURT: March 26, 2004 to July 29, 2004.

STATE: Yes, sir.

THE COURT: July 29, 2004 to August 19, 2004.

STATE: Yes, sir.

THE COURT: He didn't show August 19, 2004, a Bench Warrant was issued and he was arrested February 15, 2005, and then he appeared February 17, 2005, and it was continued to May 3, 2005 with an excluded period. Now the only questionable period is March 24, 2004 to July 29, 2004 and I'm excluding that because that is when we had the letter from the Gyst House, when he was accepted to the Gyst House.

STATE: I thought I read the docket sheet to reflect that there was an excluded period to that in any event.

THE COURT: There was initially. Any way that is a total of 323 days. We are on the 323rd day. The [m]otion for dismissal on speedy trial is denied.

Here, Killian filed a general speedy-trial motion that asserted only that 781 total days had elapsed since he was arrested and did not delineate any periods that he challenged. At the hearing, Killian did not contemporaneously object to any of the excluded periods announced by the trial court, and thus did not inform the trial court of the reason for his disagreement with its proposed action prior to or at the time it ruled on the matter. Contrary to Killian's assertion, he was not denied the opportunity to make a contemporaneous objection, because he could have made this objection when the trial court announced the specific disputed periods of excluded time or when it ruled on the matter. The trial court was therefore never informed of the reasons that Killian disagreed with its exclusion, or advised whether he disputed all or some of the exclusions, nor was the court given the opportunity to "fashion a different remedy." Accordingly, we agree that under these circumstances, Killian's speedy-trial issue is not preserved for appellate review.

Killian's second argument on appeal is that the trial court erred when it denied his three motions for mistrial. A mistrial is a drastic remedy only to be used when an error is so prejudicial that

justice cannot be served by continuing the trial and when it cannot be cured by an instruction to the jury. *DeAsis, supra.* The decision to grant a mistrial is within the sound discretion of the trial court and will not be overturned absent a showing of abuse or manifest prejudice to the appellant. *Id.*

First, Killian moved for a mistrial during *voir dire.* A prospective juror, Jimmy Sanders, stated that he was employed as a supervisor at the jail and had seen Killian "come through [the] facility several times." Killian moved for a mistrial, and the trial court asked if any of the jurors had heard the remark. The trial court then instructed any jurors who had heard it to disregard it. The record is not clear as to how many, if any, of the prospective jurors heard Mr. Sanders's remark.

In *Parker v. State,* 355 Ark. 639, 144 S.W.3d 270 (2004), an officer testified that he recognized Parker because the defendant had been "in and out of the Dumas jail." The trial court denied Parker's motion for mistrial and admonished the jury to disregard the testimony. The supreme court held that the trial court acted within its discretion and that the admonition removed any prejudice. Generally, an admonition to the jury cures a prejudicial statement unless the statement is so inflammatory that justice could not be served by continuing the trial. *Parker, supra.* The supreme court noted that it took into consideration whether the prosecutor deliberately induced a prejudicial response. *Id.*

Here, Sanders's comment was not in response to a question by the prosecutor but Mr. Sanders was instead responding to a question by Killian's attorney. Sanders did not indicate what, if any, crimes Killian may have been charged with or why he might have been in jail. Thus, we cannot say that Sanders's comment was so prejudicial that it precluded Killian from obtaining a fair trial; moreover, any prejudice that might have resulted from the comment was cured by the trial court's admonition to the jury.

Killian again moved for a mistrial when the State's confidential informant, Leroy Williams, testified that he had seen Killian selling methamphetamine at a time not related to the offenses for which Killian was presently being tried. The trial court admonished the jury that the trial was about the two counts that Killian was charged with and that the jury was to disregard Williams's comment about another possible criminal incident.

This court has held that any reference to a defendant's prior convictions during the guilt phase of a criminal trial results in some

prejudice to the defendant. *Smith v. State*, 351 Ark. 468, 95 S.W.3d 801 (2003); *Hamilton v. State,* 348 Ark. 532, 74 S.W.3d 615 (2002). The trial court, however, is granted a wide latitude of discretion in granting or denying a motion for mistrial, and the decision of the trial court will not be reversed except for an abuse of that discretion or manifest prejudice to the complaining party. *Smith, supra.* The general rule is that a cautionary instruction or admonishment to the jury can make harmless any prejudice that might occur from an inadvertent reference to a prior conviction. *Id.*

Here, the reference was not to a prior conviction but to another possible crime that Killian might have committed. The State asked Williams how he became involved in the case against Killian. Williams replied that he had "been knowing Mr. Killian for some time, seen him in certain places and . . . seen him sell somebody else some meth." The trial court explained to the jury that the trial was limited to the crimes that Killian had been charged with and that it should disregard Williams's unsolicited statement about another possible criminal incident. The State's question was not intended to induce a prejudicial response. We cannot say that Williams's comment was so prejudicial as to preclude Killian from obtaining a fair trial; likewise, any prejudice that might have resulted from the comment was cured by the trial court's admonition to the jury.

Finally, Killian argues that the trial court should have granted a mistrial based on a statement made by the State in its rebuttal closing argument to the jury. In arguing that Williams was a credible witness, the State made the following statement:

> [W]illiams gained nothing out of this other than our appreciation. . . . The work he does is good. You are the judges of credibility. You didn't hear anything from [Williams's] mouth or from *anybody else's mouth* in here except for [defense counsel's] that brought that into issue.

(Emphasis added.) Killian's attorney asked to approach the bench at this point, but the trial court told him "no." After the jury retired for its deliberations, Killian's attorney moved for a mistrial on the basis that the State had commented on his right not to testify. The trial court denied the motion for mistrial after it accepted the State's explanation of its argument, which was that no witness had brought into issue Williams's credibility. The trial court noted that the argu-

ment was that no one had impugned Williams's character and that the State's argument was directed toward the testimony itself and not toward Killian.

A motion for mistrial based on an improper closing argument must be made at the time the objectionable statement is made, rather than waiting until the end of the State's argument. *Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999). A mistrial motion that is based on improper argument is untimely when it is made after closing argument and out of the jury's presence. *Id.* Motions and objections must be made at the time the objectionable matter is brought to the jury's attention or they are otherwise waived. *Donovan v. State*, 71 Ark. App. 226, 32 S.W.3d 1 (2000). Here, Killian moved for a mistrial after the closing argument and outside the presence of the jury. Although the trial court initially told Killian's counsel that he could not approach the bench, Killian was nevertheless required to make his record but instead said nothing further to apprise the trial court of the nature of his objection or that he wished to move for mistrial. While Killian's argument was thus untimely, *see id.*, even if we treat his motion as preserved for appellate review, we would conclude that the State's comments did not refer to Killian's failure to testify. Killian argues that the comments were a "clear reference to [Killian's] failure to take the stand." However, the State asserted only that none of the testimony presented at trial called into question the truthfulness of Williams's testimony. Taking the context in which the comments were made into consideration, the State did not suggest that Killian had not testified. The State never referred to Killian and simply noted that none of the testimony from Williams, or anyone else, had called into question Williams's credibility. This is not an improper comment directed toward Killian's failure to testify.

Affirmed.

BIRD and BAKER, JJ., agree.

Charles M. BETTIS *v.* C. Welton BETTIS

CA 05-1323 239 S.W.3d 5

Court of Appeals of Arkansas
Opinion delivered September 13, 2006

Womack, Landis, Phelps, McNeill & McDaniel, P.A., by: *Tom D. Womack* and *J. Nicholas Livers*, for appellant.

W. Ray Nickle, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. This case involves a dispute between two Georgia residents regarding ownership of stock in the Bank of Trumann. When the Bank of Trumann, which is located in Arkansas, was sold to another party, it was obliged to deliver the proceeds of the sale to the owner of the stock. Difficulties arose in doing so with respect to the shares in question because ownership of the stock was disputed; appellant Charles M. Bettis had directed the Bank of Trumann to issue the stock certificates in the name of his son, appellee C. Welton Bettis, but C. Welton Bettis did not have possession of the stock certificates issued in his name. Consequently, the Bank of Trumann filed an interpleader action

naming appellant and appellee as defendants and requesting that it be allowed to deposit the funds into the registry of the court and be discharged from liability. After a hearing, the trial court found that appellee had presented sufficient evidence to shift the burden to appellant to show that he did not intend to make an *inter vivos* gift of the stock and that appellant had failed to do so. On appeal, appellant argues that the trial court erred in applying Arkansas law rather than Georgia law, and in finding that appellant made a completed gift of the stock to appellee. We find no error, and we affirm.

Appellant argues that Georgia law should have been applied in determining ownership of the stock. He argues that we should determine which state's law should apply based on application of the five choice-influencing factors presented by Dr. Robert A. Leflar and adopted by the Arkansas Supreme Court in *Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977).[1] We need not do so in the present case because our examination of the law leads us to the conclusion that the laws of Arkansas and Georgia applicable to this case are substantially the same. Dr. Leflar considered this situation to be one involving "false conflicts," explaining that:

> The concept is properly applicable to any case in which the laws of two involved states are the same, or would produce the same result. In that situation there is *no conflict* between the two states' laws, and no conflicts of laws problem. It is not necessary to choose between the laws of the two states. The case is easily resolved by applying to it the rule of law which is common to both states. There are strange old cases in which courts, not recognizing that this is a "false conflicts" situation, went through the gymnastics of deciding which state's law should govern, then wound up with the odd conclusion that neither state's law should govern. Theirs was an easy problem, but they made it a hard one. They did not recognize that the problem was one of conflict of *laws*, not one of conflict of *states*.

[1] These are: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. *Wallis v. Mrs. Smith's Pie Co.*, *supra*.

R. Leflar, *Conflict of Laws: Arkansas — The Choice-Influencing Considerations*, 28 Ark. L. Rev. 199, 204-05 (1974) (emphasis in original) (footnotes omitted).

There is no dispute about the relevant facts. Appellant directed the Bank of Trumann to issue stock in the name of his son, the appellee. The stock certificates were delivered to appellant's offices, where appellee was employed, and were kept there in a safe. After several years had passed, there appears to have been a falling out between the parties; appellee was no longer employed by appellant. The dividends were sent to appellee at a different address, and he reported the dividend income as taxable income on his returns. Appellant retained possession of the stock certificates.

In *Plant v. Plant*, 271 Ark. 369, 609 S.W.2d 93 (Ark. App. 1980), an early case of the Arkansas Court of Appeals involving a gift of stock, Judge Hays summarized the applicable law as follows:

> We find that the case law dealing with gifts of stock reflects a solemn emphasis on the formal execution of documents which are the subject of a gift, especially when followed by delivery of the certificate itself. Such transfer of all the indicia of ownership, i.e., both the formal title and the manual possession of the certificate itself, should not be readily disregarded. In *Johnson v. Johnson*, 115 Ark. 416, 171 S.W. 475 (1914), in considering a gift of stock, the Supreme Court stated that since the stock was transferred on the records of the company and appeared in the name of the donee, the burden was on the appellant to prove that the stock was not the property of the donee.
>
> Similarly, in *Owens v. Sun Oil Company*, 482 F.2d 564 (C.C.A. - 10th Circuit), applying the substantive law of Arkansas, it was held that where the donor directed a transfer of ownership of corporate stock for the purposes of a gift to a donee who died before completion of delivery, the fact that the donee's name was on the certificate was prima facie evidence of his ownership.
>
> In *Aycock v. Bottoms*, 201 Ark. 104, 144 S.W.2d 43 (1940), an attempt was made to subject various assets, including stock, to a trust for the benefit of heirs of a decedent, the shares being held in the name of the widow. The court rejected the argument that delivery of the stock was not proven, essential to a gift, stating that the assignment to a donee by a holder is tantamount to delivery of the stock, though manual delivery may be wanting.

Plant, 271 Ark. at 374-75, 609 S.W.2d at 96-97. Despite appellant's arguments to the contrary, the law of Georgia is fundamentally identical. Physical delivery of the stock certificates is not an essential element of an *inter vivos* gift of stock under Georgia law where the stock is transferred on the corporate books to a son who thereafter received the income therefrom. *Foley v. Allen*, 170 F.2d 434 (5th Cir. 1948). Furthermore, a rebuttable presumption of gift arises under Georgia law where a parent pays the consideration for the transfer of legal title to real or personal property to a child. Ga. Code Ann. § 53-12-92(c) (1997).

Based on the undisputed evidence that appellant directed that the stock be transferred to appellee's name on the corporate books and appellee enjoyed the benefits of ownership for many years, the trial court found that appellee had presented sufficient evidence to shift the burden to appellant to show that he did not intend to make an *inter vivos* gift of the stock, and that appellant had failed to do so. The remaining question on appeal is whether the trial court erred in so finding. Where, as here, 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. *Brown v. Blake*, 86 Ark. App. 107, 161 S.W.3d 298 (2004). In making this determination we recognize the trial judge's superior opportunity to determine the credibility of the witnesses and the weight to be given to their testimony. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *McCarley v. Smith*, 81 Ark. App. 438, 105 S.W.3d 387 (2003). On this record, giving due recognition to the trial court's superior opportunity to determine weight and credibility, and considering that the same strict degree of proof as to delivery that a gift was intended is not required between members of a family as is required where the gift is to a stranger, *Aycock v. Bottoms*, 201 Ark. 104, 144 S.W.2d 43 (1940), we cannot say that the trial court clearly erred in finding that appellant failed to rebut the presumption.

Affirmed.

GLADWIN and GLOVER, JJ., agree.

MORROW CASH HEATING & AIR, INC. *v.*
Jerry JACKSON

CA 05-1260 239 S.W.3d 8

Court of Appeals of Arkansas
Opinion delivered September 13, 2006

Hixson Law Firm, by: *Kenneth S. Hixson*, for appellants.

Davis, Wright, Clark, Butt & Carithers, PLC, by: *John G. Trice*, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. Appellants employed appellee as an accountant. After appellants suffered a severe business reverse, appellee sued appellants alleging that he had not been

paid approximately $15,000 for accounting services rendered. Appellants counterclaimed, alleging that they sustained damages in excess of $600,000 as a result of the accounting malpractice of appellee. The trial court directed a verdict on the counterclaim, ruling that it was barred by the three-year statute of limitations because the incorrect advice was initially given in January 2000, just over three years before the claim was filed. The correctness of that ruling is the issue to be decided in this appeal.

Professional malpractice actions are governed by the three-year limitations period set out in Ark. Code. Ann. § 16-56-105 (Repl. 2005). In determining whether a directed verdict should have been granted, we view the evidence in the light most favorable to the party against whom the verdict is sought and give it its highest probative value, taking into account all reasonable inferences deducible from it. *Mankey v. Wal-Mart Stores, Inc.*, 314 Ark. 14, 858 S.W.2d 85 (1993); *Lytle v. Wal-Mart Stores, Inc.*, 309 Ark. 139, 827 S.W.2d 652 (1992). A motion for a directed verdict should be granted only if there is no substantial evidence to support a jury verdict. *Boykin v. Mr. Tidy Car Wash, Inc.*, 294 Ark. 182, 741 S.W.2d 270 (1987). Where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented, and the directed verdict should be reversed. *Mankey v. Wal-Mart Stores, Inc., supra.*

Viewing the evidence in the light most favorable to appellants, the record shows that, in January 2000, appellee in his capacity as appellants' accountant advised appellants to stop collecting sales tax on equipment installed in new construction. The advice was initially rejected because appellants were not convinced that it was correct; was discussed further at subsequent meetings in February and March; and, after considerable disagreement and reluctance, was ultimately accepted and implemented in March 2000. In February 2003 appellants filed their counterclaim alleging appellee committed malpractice by negligently giving them incorrect tax advice. The question on appeal is whether the trial court was correct in ruling that the malpractice counterclaim was barred by the three-year statute of limitations because the incorrect advice was initially given in January 2000, just over three years before the claim was filed. We hold that it erred because fair-minded persons might conclude, on this record, that the statute of limitations did

not begin to run until appellants accepted and implemented the advice in March 2000, just under three years before the counterclaim was filed.

Arkansas adheres to the "occurrence rule" in professional malpractice cases, which provides that a cause of action accrues when the last element essential to the cause of action occurs, unless the professional actively conceals the wrongdoing. *Ragar v. Brown*, 332 Ark. 214, 964 S.W.2d 372 (1998). Here, there was evidence that appellants did not accept the advice until, after some cajoling that extended into March 2000, during which time appellee repeated the advice and urged them to follow it, appellants relented, accepted the advice, and implemented it. Given the evidence that the advice was rejected when initially given in January 2000, was afterward repeatedly urged, and was not accepted until March 2000, we hold that the trial court erred in directing a verdict on this issue.

Reversed and remanded.

ROBBINS, BIRD, and GLOVER, JJ., agree.

NEAL and BAKER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. The majority holds that fair-minded persons might conclude, on this record, that the statute of limitations did not begin to run until appellants accepted and implemented the advice in March 2000, just under three years before the counterclaim was filed. I disagree.

All the parties agree that the advice was given to appellants in January 2000, more than three years prior to the filing of appellants' counterclaim. The statute of limitations period for professional malpractice actions is three years, and absent concealment it begins to run upon the occurrence of the wrong. *Delanno, Inc. v. Peace*, 366 Ark. 542, 237 S.W.3d 81 (2006); *Goldsby v. Fairley*, 309 Ark. 380, 831 S.W.2d 142 (1992). The approach of calculating the time for the limitations period from the occurrence of the alleged wrong is known as the "occurrence rule." The "occurrence rule" provides that an action accrues when the last element essential to the cause of action occurs, unless the wrongdoing is actively concealed. *Delanno, supra*; *see also Ragar v. Brown*, 332 Ark. 214, 964 S.W.2d 372 (1998) (acknowledging that the Arkansas Supreme Court had held fast to this minority rule in cases involving attorneys and other professionals, including accountants and insur-

ance agents). Arkansas has utilized the "occurrence rule" since 1877, and our supreme "court has expressly declined to retroactively change the legal malpractice occurrence rule to any of the other approaches. The General Assembly's silence for over 100 years indicates tacit approval of [our supreme] court's statutory interpretation." *Moix-McNutt v. Brown* 348 Ark. 518, 523, 74 S.W.3d 612, 614 (2002).

The majority implies that because the advice was repeated and not accepted until "after some cajoling," that a fact question exists as to when the alleged negligence occurred. That it is not the case. *Ford's, Inc. v. Russell Brown & Co.*, 299 Ark. 426, 773 S.W.2d 90 (1989) involved a professional malpractice claim against accountants for giving erroneous tax advice. Our supreme court held that the limitation period in tax malpractice cases begins to run, in the absence of concealment of the wrong, when the negligence occurs, and not when the government assesses additional taxes. The court refused to establish the commencement of the three-year statute of limitations from the time that the accountants conceded that the IRS was correct and admitted that appellants owed money, even though the accountants defended their initial advice after the clients were notified they owed a tax deficiency.

Our court, without any ambiguity, has rejected any approach in contradiction to the occurrence rule. In *Moore Investment Co., Inc. v. Mitchell, Williams, Selig, Gates & Woodyard,* 91 Ark. App. 102, 208 S.W.3d 803 (2005), the appellant claimed that its attorneys continued to be intermittently and repeatedly negligent by repeating the same advice. Our court acknowledged that appellant was asking the court to embrace the continuing-representation rule. *Id.* at 108, 208 S.W.3d at 806. Under that doctrine, the statute of limitations does not begin to run until the relationship between the professional and client has ended for that particular matter. *Id.* However, we refused to adopt that rule stating that it "is simply not the law in Arkansas." *Id.*

Recently, our supreme court in *Delanno, supra,* found that repeating the same information over a period of three years, absent evidence of fraudulent concealment, did not toll the statute of limitations. *Delanno*, 366 Ark. at 547, 237 S.W.3d at 86. All parties in this case agree that the first time the erroneous tax advice was conveyed was in January 2000. Given our supreme court's, and our precedent, the trial court did not err in finding that the statute of limitations barred recovery. Simply maintaining in later meetings that the advice given in January 2000 was correct did not toll

the statute of limitations or create a relevant fact question for the jury. Due to our long-standing adherence to the occurrence rule, we should affirm.

NEAL, J., joins.

Deborah Elizabeth FOSTER *v.* Charles Ray FOSTER, Sr.

CA 05-1343 239 S.W.3d 1

Court of Appeals of Arkansas
Opinion delivered September 13, 2006

[Rehearing denied October 25, 2006.]

Law Offices of John R. VanWinkle, by: *John R. Van Winkle*, for appellant.

Gean, Gean & Gean, by: *David Charles Gean*, for appellee.

ROBERT J. GLADWIN, Judge. The appellant Deborah Elizabeth Foster appeals from a decision of the Sebastian County Circuit Court that denied her motion for a portion of appellee Charles Ray Foster, Sr.'s military retirement finding that the issue is barred by *res judicata*. We affirm.

The parties were divorced September 6, 2002, by a decree granting an absolute divorce, dividing the property and debts, and granting temporary custody to appellee. No visitation or child support was awarded at that time. As stated in the decree, the trial court retained jurisdiction "of this matter and the parties to make further orders in the future as may be proper in law and equity." By motion of June 2, 2005, appellant sought a portion of the appellee's military retirement to which he became entitled after the decree was filed. Appellant also sought alimony from appellee.[1] The circuit court issued an order denying the motion based upon *res judicata* on August 9, 2005, and this appeal followed. Appellant contends that the trial court erred in finding that *res judicata* barred her motion for entitlement to appellee's military retirement.

On appeal, equity cases, such as divorces, are reviewed de novo. *Adametz v. Adametz*, 85 Ark. App. 401, 155 S.W.3d 695 (2004). With respect to the division of property in a divorce case, we review the trial court's findings of fact and affirm them unless they are clearly erroneous, or against the preponderance of the evidence; the division of property itself is also reviewed, and the same standard applies. *Gray v. Gray*, 352 Ark. 443, 101 S.W.3d 816 (2003). However, as stated in *Office of Child Support Enforcem't v. King*, 81 Ark. App. 190, 100 S.W.3d 95 (2003), the trial judge's conclusion of law is given no deference on appeal. If the law has been erroneously applied and the appellant has suffered prejudice, the erroneous ruling is reversed; manifestly, the trial judge does not have a better opportunity to apply the law than does the appellate court. *Duchac v. City of Hot Springs*, 67 Ark. App. 98, 992 S.W.2d 174 (1999).

The trial court found that the appellant's motion was barred by *res judicata*. The claim preclusion aspect of *res judicata* forecloses relitigation in a subsequent suit when:

(1) the first suit resulted in a final judgment on the merits;

(2) the first suit was based upon proper jurisdiction;

(3) the first suit was fully contested in good faith;

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[1] The issue of alimony was not brought before the circuit court at the hearing held on June 20, 2005, nor was the issue briefed along with the issue of military retirement for the circuit court. However, it was part of the motion that the court held was barred by *res judicata*, and was therefore addressed by the trial court.

(4) both suits involved the same claim or cause of actions; and

(5) both suits involved the same parties or their privies.

Linn v. NationsBank, 341 Ark. 57, 14 S.W.3d 500 (2000). The doctrine bars relitigation of claims that were actually litigated in the first suit as well as those that could have been litigated. *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002).

Appellant argues that the first requirement of *res judicata* was not satisfied because the divorce action was not final. She claims that the decree granted only temporary custody, and therefore, a final hearing on that issue would be necessary for the order to become final and appealable. Before the matter was set for what the appellant refers to as a final hearing, appellant filed her motion for military retirement, and further asked that appellee pay her permanent alimony.

The appellant argues that an order is not final when one issue is reserved for later determination, and cites *Tapp v. Fowler*, 288 Ark. 70, 702 S.W.2d 17 (1986). In *Tapp*, appellant filed an appeal after a default judgment was entered against him. The Arkansas Supreme Court held that because the claim for punitive damages was to be determined at a later proceeding, the order was not final, and therefore, not appealable. The Court stated, "If this appeal were allowed and we decided the issue on punitive damages and subsequent errors occurred during the trial on the remaining issues, the case could be appealed a second time, resulting in two appeals where one would suffice." *Tapp*, at 71-72. The instant case is distinguishable from *Tapp* in that the division of property and grant of divorce was final. Also, the circuit court in the instant case did not reserve any specific issue, instead generally retaining jurisdiction "to make further orders in the future as may be proper in law and equity."

Collateral estoppel, or the issue preclusion aspect of *res judicata*, requires four elements before a determination is conclusive in a subsequent proceeding:

(1) the issue sought to be precluded must be the same as that involved in the prior litigation;

(2) that issue must have been actually litigated;

(3) the issue must have been determined by a valid and final judgment; and

(4) the determination must have been essential to the judgment.

State Office of Child Support Enforcem't v. Willis, 347 Ark. 6, 15, 59 S.W.3d 438, 444 (2001) (citing *Palmer v. Ark. Council on Econ. Educ.*, 344 Ark. 461, 40 S.W.3d 784 (2001); *Fisher v. Jones*, 311 Ark. 450, 844 S.W.2d 954 (1993); *East Tex. Motor Freight Lines, Inc. v. Freeman*, 289 Ark. 539, 713 S.W.2d 456 (1986)).

Appellant claims that collateral estoppel, or *res judicata,* does not apply here because the issue of military retirement was not litigated in a prior action between the parties. She cites *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997), which was a divorce action involving the issue of paternity. In that action, the trial court ruled that *res judicata* did not apply when he granted the wife's petition for paternity testing. It is important to note that the divorce action was still pending, and the parties were under a temporary order of the court when the wife filed her motion. The temporary order granted the parties joint custody, and the parties reconciled for a time after the temporary order was granted. After the wife left the state with the child, the husband obtained an emergency order granting him custody. At that point, the wife filed a motion challenging the husband's paternity. This court ruled *res judicata* did not apply because the case was currently pending. In contrast, the divorce action herein had been concluded when the original order was entered.

In paragraph VII of the Divorce Decree, the Court awarded the property as follows:

> That during the marriage of the parties, the parties acquired various items of personal property.
>
> (A) That of such property the plaintiff shall be awarded any and all property now in his possession.
>
> (B) That of such property the defendant shall be awarded any and all property now in her possession.

The decree further states in pertinent part as follows:

> IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the plaintiff, Charles Ray Foster, Sr., be and he is hereby awarded an absolute divorce from the defendant, Deborah Elizabeth Foster, on the grounds of eighteen (18) months separation

> as to afford the plaintiff grounds for absolute divorce under the laws of the State of Arkansas; and, further, the bonds of matrimony heretofore existing between the plaintiff and the defendant are hereby dissolved, set aside, and held for naught, and both parties are released from the same.
>
> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the parties shall be awarded such property as is specified in paragraph VII and shall be responsible for such debts as are specified in paragraph VIII above.

In *Jones v. Jones*, 26 Ark. App. 1, 759 S.W.2d 42 (1988), this court held that Ark. Code Ann. § 9-12-315 (1987) did not authorize a division of marital property after the divorce decree has been entered, in the absence of fraud or other grounds for relief from the original judgment, stating:

> As we have noted our statute requires that marital property be divided at the time the divorce is granted. On the basis of this statutory requirement we have held that failure to assert rights in a retirement fund in the divorce action, or to appeal from the trial court's failure to effect the statutorily mandated property division in the divorce decree, results in a waiver of the party's rights to the property where the asserted property interest is based solely on the marital relationship.

26 Ark. App. at 6, 759 S.W.2d at 45 (citing *Mitchell v. Meisch*, 22 Ark. App. 264, 739 S.W.2d 170 (1987)). Based upon the language of the decree, the parties were absolutely divorced, and their property was divided in a final manner. Therefore, *res judicata* is applicable because the division of military retirement could have been litigated at the divorce hearing. The trial court's reservation of jurisdiction clearly relates to further orders regarding child custody, or those matters conditioned upon changes in circumstances after the decree. The time to appeal any matters regarding the divorce or property division began to run after the divorce decree was filed on September 6, 2002.

Appellee points out that appellant never raised the issue of military retirement in her answer or in her counterclaim for divorce. Further, no evidence was presented to the trial court regarding the amount of military retirement to which appellant claimed to be entitled, or whether appellee was entitled to military retirement at the time of the divorce. Appellee claims that he was not entitled to his retirement at the time of the divorce, and

therefore, appellant is not entitled to any portion of it. *Holloway v. Holloway*, 70 Ark. App. 240, 16 S.W.3d 302 (2000). However, this Court does not reach those issues, as *res judicata* prevents the necessity of reviewing them.

Affirmed.

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

Robert LEWIS and Misste Lewis *v.* Lloyd ROBERTSON d/b/a Lloyd's Used Cars

CA 05-1383 239 S.W.3d 30

Court of Appeals of Arkansas
Opinion delivered September 13, 2006

Hurst, Morrissey & Hurst, PLLC, by: *Josh Hurst*, for appellants.

Daniel D. Becker, for appellee.

JOHN B. ROBBINS, Judge. This appeal involves the timeliness of an appeal from Hot Springs District Court to Garland County Circuit Court. The circuit court dismissed the appeal of appellants Robert and Misste Lewis for lack of jurisdiction, and the Lewises now appeal the order of dismissal to this court. We affirm.

This case began when the Lewises filed a complaint in district court against appellee Lloyd Robertson d/b/a Lloyd's Used Cars, and the appellee filed a counterclaim. A hearing on the complaint and counterclaim was held on April 22, 2005. On June 23, 2005, the district court made a docket entry dismissing appellants' claim and awarding a judgment of $3331.85 in favor of the appellee. On July 6, 2005, the district court filed a judgment with the clerk, which was consistent with the prior docket entry. The appellants received a copy of the July 6, 2005, judgment on the day after it was filed.

On August 2, 2005, the Lewises filed an appeal to the circuit court. Three days later, the appellee filed a motion to dismiss the appeal because it was not timely filed. The Lewises responded to the motion on September 13, 2005, and on the same day the circuit court held a hearing on the motion. The trial court granted the appellee's motion to dismiss, and the Lewises now assert that this was error.

We hold that the circuit court properly dismissed appellants' appeal. Rule 8 of the Arkansas District Court Rules prescribes the method for entering judgments in district court, and provides in pertinent part:

> (a) *By Default.* When a defendant has failed to file an answer or reply within the time specified by Rule 6(b) of these rules, a default judgment may be rendered against him.
>
> (b) *Upon the Merits.* Where the court has decided the case, it shall enter judgment in favor of the prevailing party for the relief to which the party is deemed entitled.

> (c) *Docket Entry*. The court shall timely enter in the docket the date and amount of the judgment, whether rendered by default or upon the merits.

Rule 9(a) provides:

> (a) *Time for Taking Appeal.* All appeals in civil cases from district courts to circuit court must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within 30 days from the date of the entry of judgment. The 30-day period is not extended by a motion for judgment notwithstanding the verdict, a motion for new trial, a motion to amend the court's findings of fact or to make additional findings, or any other motion to vacate, alter or amend the judgment.

The foregoing rules reflect that a district court enters any judgment it renders by entering, in a timely manner, the date and amount of the judgment in the court's docket. *See West Apartments, Inc. v. Booth*, 297 Ark. 247, 760 S.W.2d 861 (1988). In the instant case, the district court entered the judgment against the Lewises on the court's docket on June 23, 2005, and more than thirty days elapsed before the Lewises filed their appeal on August 2, 2005. That being so, we conclude that the trial court was correct in finding that it had no jurisdiction because appellants' attempted appeal was untimely. *See id.* The thirty-day requirement is mandatory and jurisdictional, and the circuit court has no authority to accept untimely appeals. *State v. Dawson*, 343 Ark. 683, 38 S.W.3d 319 (2001).

In their brief, the Lewises argue that Rule 8(c) violates the Fourteenth Amendment and is thus unconstitutional. They contend that the wording of the rule is vague in that it requires only a "timely" docket entry, and further complain that under the rule a party is void of any notice of a docket entry until they receive a judgment filed by the district court. Appellants contend that, because they were not given notice of the adverse judgment until July 7, 2005, and yet the time for filing an appeal began to run on June 23, 2005, the due process mandate of the Fourteenth Amendment was not satisfied. Appellants argue that because Rule 8(c) does not comport with the Due Process Clause, they have been wrongfully denied their right to a jury trial based on the untimeliness of their appeal.

We need not address the merits of appellant's constitutional argument because it was not raised to the trial court. In appellants' written response to the motion to dismiss they asserted only that

"the appeal herein was timely filed with the Circuit Clerk pursuant to Rule 9 of the District Court Rules." At the hearing on the motion, the appellants' counsel argued:

> Your Honor, I filed my notice of appeal within thirty days that the judgment was filed in district court. That was the first time I had notice the judgment was entered against my client. I know that it was entered pursuant to the docket in district court, but I would argue that the case was originally tried back in — I believe it was April, April the 22nd, and it was taken under advisement for a number of months.
>
> . . . .
>
> Your Honor, other than checking — calling the district court clerk on a daily basis, you know, I would have no notice that a judgment was even entered against my client until I received the order from the district judge[.]

The trial court responded:

> I agree it's an imperfect system, and quite honestly, it really isn't fair or doesn't seem fair. The problem is it's jurisdictional for me. If the Rule isn't met, then I have no basis on which to even rule other than to dismiss the appeal.

While the appellants did complain below about their lack of notice of the docket entry, they did not allege any constitutional violation, and the appellants now challenge the constitutionality of Rule 8(c) for the first time on appeal.

Our supreme court has repeatedly held that appellants are precluded from raising arguments on appeal that were not first brought to the attention of the trial court. *See, e.g.*, *Green v. State*, 365 Ark. 478, 231 S.W.3d 638 (2006). Issues raised for the first time on appeal will not be considered because the trial court never had an opportunity to rule on them. *Id.* A party cannot change the grounds for an objection or motion on appeal but is bound by the scope and nature of the arguments made at trial. *Vanesch v. State*, 343 Ark. 381, 37 S.W.3d 196 (2001). On appellate review, issues of even constitutional dimension are waived if not presented to the trial court and a ruling obtained. *See Warnock v. Warnock*, 336 Ark. 506, 988 S.W.2d 7 (1999). The argument being made in this appeal was not raised and decided below, and now comes too late.

Affirmed.

GRIFFEN, J., agrees.

CRABTREE, J., concurs.

TERRY CRABTREE, Judge, concurring. I agree that this case must be affirmed because it is the law that the time for taking appeals from district court begins to run on the day a docket entry is made. That a docket entry denotes the rendering of judgment is perhaps owing to the relative informality associated with district court proceedings. However, I perceive an inherent unfairness in this rule where no provision is made for the litigants to be given notice that a mere docket entry has been made and that the time for appeal is running. I am thus somewhat sympathetic to appellants' confusion where, as here, the district court also entered a formal judgment, and it was the only judgment about which they received notice. I consider this rule a trap for the unwary, and the rule should be changed so that the time for appeal begins to run when a written order is entered rather than when it is noted on the docket.

B.J. McADAMS *v.* Melissa CURNAYN; Tracy Warner; Lisa Faulk, D.V.M.; W. Kendall Faulk, D.V.M.; Paul Winchester; Shondra Harris and Vets & Pets

CA 06-70 239 S.W.3d 17

Court of Appeals of Arkansas
Opinion delivered September 13, 2006

[Rehearing denied October 4, 2006.*]

* BAKER, J., would grant rehearing.

[redacted]

Appellant, *pro se.*

Wright, Lindsey & Jennings, LLP, by: *Gary D. Marts, Jr.*, and *Regina A. Young*, for appellees.

JOHN B. ROBBINS, Judge. This is the second appeal of this lawsuit filed by appellant, B. J. McAdams, against a veterinary clinic and its employees[1] regarding harm appellant alleged came to his sixteen-year-old dog, Mr. T, during a clinic visit on February 14, 2000. Appellant contends that the trial court's grant of summary judgment to the defendants/appellees constitutes reversible error. Appellant additionally contends that the trial court erred in refusing to recuse on this case. We disagree with his assertions and affirm.

This cause of action arose from the following chain of events. On February 14, 2000, appellant took his dog, not to his "regular" veterinarian, Dr. Richard Allen, but to the Vets & Pets clinic, asking for a routine steroid shot. The clinic required that appellant leave his dog there for a few hours. Appellant alleged that when he brought his dog into the clinic, the dog could walk, but when he retrieved the dog hours later, it could not walk. Appellant alleged that someone at the clinic physically restrained his dog in such a way as to break or fracture the dog's spine. Appellant took the dog to specialist veterinarian Dr. Larry Nafe on March 7, 2000, and treated with Dr. Nafe intermittently for the dog's paralysis and other maladies until the dog died in December 2000 of organ failure.

Appellant first filed his "Complaint for Malpractice and Negligence" in May 2001, which was dismissed upon a defense motion pursuant to Arkansas Rule of Civil Procedure 12(b)(6).

[1] The named defendants were Melissa Curnayn, Tracy Warner, Dr. Lisa Faulk, Dr. W. Kendall Faulk, Paul Winchester, Shondra Harris, and Vets & Pets. All the defendants were either owners, employees, nurses, or otherwise agents of the clinic.

Appellant appealed the dismissal of his complaint, and we reversed and remanded the case to the trial court. *See McAdams v. Dr. Faulk*, CA01-1350 (April 24, 2002). Treating all the allegations in the complaint as true, as is required in review of a 12(b)(6) motion, we determined that appellant had sufficiently stated a cause of action for malpractice[2] and negligence on his own behalf, though we affirmed the dismissal of the action regarding the dog itself as a named party. *See id.*

After remand, appellant non-suited his case and refiled it alleging malpractice, res ipsa loquitur, and the tort of outrage, all based upon the same allegations of fact. In short, appellant asserted that his dog never walked again after the February 14, 2000 visit, which paralysis caused premature organ failure and death. When asked to name his expert witnesses via interrogatories, appellant responded with three: Dr. Richard Allen (the dog's regular doctor), Dr. Kendall Faulk (the defendant doctor who treated the dog on February 14), Dr. Larry Nafe (the dog's treating doctor for the remainder of the dog's life).

One deposition was taken, that of Dr. Nafe, and the defense moved for summary judgment based upon his sworn testimony. Dr. Nafe had no expert opinion regarding the medical care provided by Dr. Faulk or the clinic, or whether that standard was breached in the clinic visit of February 14, because he had not seen those clinic notes. However, Dr. Nafe did opine regarding the cause of the dog's inability to walk and ultimate death. Dr. Nafe stated that when he saw the dog in early March, blood tests confirmed that the dog's spine was infected with a staph bacteria, that the infection predated the February 14 visit, that the infection led to a breakdown in the vertebrae causing paralysis, and that despite eventually obtaining control of the infection by use of antibiotics, the dog ultimately suffered heart failure and secondary kidney failure that were the cause of death. Dr. Nafe stated that there was no known scientific connection between heart and kidney failure and a staph infection of the spine.

The defense moved for summary judgment stating that appellant had the burden of proving the standard of care, a breach of the standard of care, and proximate cause of injury or death due to the breach of the standard. The motion alleged that appellant

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[2] Arkansas Code Annotated section 16-114-201(2) (Repl. 2006) includes veterinarians as medical care providers within the meaning of the Medical Malpractice Act.

had failed on all those requirements, pursuant to the expert witness, Dr. Nafe. The defense also moved for summary judgment on the res ipsa loquitur claim and the outrage claim, both depending upon the validity of the medical negligence claim.

At the hearing, appellant first asked the trial judge to recuse and to disqualify opposing counsel because he believed that there was an improper personal connection between the attorneys and the trial judge. Both requests were denied. Thereupon, the trial judge heard argument on the motion for summary judgment. Defense counsel restated their position that to support a malpractice claim, appellant bore the burden to demonstrate the standard of care, a breach of that standard, and that the breach caused injury. Defense counsel also stated that appellant had no cause of action for res ipsa loquitur because there was a reasonable explanation for why the dog could not walk and eventually died that was not connected to any alleged assault or harm on February 14, 2000. Lastly, defense counsel argued that the outrage claim failed because it was dependent upon the negligence claims.

During the hearing, appellant was allowed to explain his side of the story, arguing essentially that because he had prevailed on appeal as to the first dismissal, then the defense was not entitled to a summary judgment. Appellant restated that he believed his dog barked while kept in the clinic on February 14 and that someone there physically restrained or choked the dog to cause injury to his spine, causing him never to walk again. The trial court granted the motion for summary judgment, dismissing the complaint with prejudice, by an order filed on August 16, 2005. Appellant moved the trial court to reconsider, in which appellant asserted that Dr. Nafe was not his expert witness. Appellant added in his argument that the defense was barred by res judicata from trying to have his complaint dismissed. The trial court denied the motion to reconsider, and a timely notice of appeal followed that order.

We now consider the order granting summary judgment to the defendants. The standard of review on a grant of a summary judgment is markedly different than that for grant of a 12(b)(6) motion to dismiss. Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the movant is entitled to judgment as a matter of law. *Rice v. Tanner*, 363 Ark. 79, 210 S.W.3d 860 (2005). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof to 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 its motion leave a material question of fact unanswered. *Id.* We review the evidence in a light most favorable to the non-movant, resolving any doubts and inferences against the movant. *Id.* We review the pleadings, affidavits, and other documents filed by the parties. *Id.*

In considering the medical malpractice claim, we are mindful that pursuant to Ark. Code Ann. § 16-114-209 (Repl. 2003), a plaintiff must provide, within thirty days of the filing of the complaint, an affidavit containing an expert opinion as to the standard of care in the particular specialty, the breach of that standard, and resulting injury. Failure to do so subjects the plaintiff to dismissal. However, this code section was amended in the 2003 legislative session to create this requirement; it does not apply to the present appeal because the alleged cause of action here occurred in 2000.

The law applicable to the present appeal requires that the plaintiff provide these three components of proof, and appellees argued in their motion challenging the existence of any of the three to support the medical negligence claim. Appellees did not present affirmative proof of the applicable standard of care required of a veterinarian in the February 14, 2000 visit or affirmative proof that the veterinarian complied with the standard of care. Indeed, Dr. Nafe refused to opine on Dr. Faulk's professional care without having the medical records relative to that day. Without proof supporting the motion for summary judgment on the applicable standard or breach thereof, appellant was under no duty to rebut those two aspects of medical negligence. *Compare Cash v. Lim*, 322 Ark. 359, 908 S.W.2d 655 (1995) (discussing the principle that the burden does not shift in the absence of the movant offering proof on a controverted issue). However, appellees did present affirmative proof through Dr. Nafe that the cause of the dog's inability to walk was a festering spinal infection that pre-dated the February 14 visit; that the defects in the dog's spine made visible on x-ray were due to the effects of infection on the spine and the effects of old age; and that the dog's ultimate death resulted from organ failure that Dr. Nafe said was unrelated to the infection. This constituted proof that challenged the proximate cause of appellant's allegation of harm — that his dog was rendered unable to walk and ultimately died from a physical trauma inflicted at Dr. Faulk's office that day.

The dissenting judge misconstrues appellees' contentions when she states that appellees never challenged the third requirement of proof — that being proximate cause of alleged harm. No doubt, appellees asserted that Dr. Nafe did not provide proof that the dog affirmatively suffered harm at the hands of the defendants that would not have otherwise occurred. Dr. Nafe's expert opinion about the cause of the dog's paralysis and ultimate death was in direct conflict with the allegation of physical injury inflicted on the dog at Vets & Pets. Therefore, Dr. Nafe provided proof that harm did not come to the dog as alleged by appellant's complaint.

In addition, we cannot agree with the dissenting judge's belief that Dr. Nafe's testimony was equivocal on the issue of what caused the dog's inability to walk and eventual death. The deposition was more than sixty pages long. Read as a whole, Dr. Nafe's opinion is definitive and within reasonable medical certainty. Dr. Nafe was not presented with the February 14 medical records. Instead, Dr. Nafe was given a history by Mr. McAdams about his suspicions of personnel man-handling his dog to keep the dog quiet. Mr. McAdams did not allege that Vets & Pets was responsible for introducing an infection into the dog.

Dr. Nafe examined the dog, x-rayed the dog's spine which showed marked changes in the cervical region, ran blood tests on him, and confirmed the presence of staph bacteria in large quantities in the blood stream. The blood test confirmed with certainty the statistical probability that staph was growing. Dr. Nafe did not want to do a myelogram, because this test required direct needle contact with the spine, which might spread the infection. Dr. Nafe opined with certainty that staph infection was the cause of the discospondylitis, and opined with certainty that the discospondylitis was the cause of the paralysis. When asked if there was any other possible cause of the paralysis, Dr. Nafe responded, "No, I felt that that was the cause." When asked if he had any suspicions that something happened to the dog three weeks earlier at Vets & Pets that would render the dog unable to walk, Dr. Nafe said that he could not know but that "on the radiographs, there was no evidence of fracture or dislocation or anything like that." Dr. Nafe stated that while there was a spine problem, it was a degenerative and infectious trauma predating the February 14 visit. In concluding the deposition, the following pertinent questions and answers were given:

Q. It's my understanding that the initial cause of the dog's problems walking, in your opinion, was attributable to the discospondylitis that you observed from the radiographs; is that correct?

A. That's correct.

Q. And then it's your opinion that the dog ultimately died from kidney failure secondary to the cardiomyopathy; is that correct?

A. That's correct.

Q. And it's your opinion that there's really no relation between those two conditions in this dog?

A. Well, you know, I mean, again, I don't know of any studies that have suggested any kind of relationship.

. . . .

Q. So the discospondylitis that you saw on the radiographs preceded February 14th, 2000 —

A. Right.

Q. — in your opinion?

A. Yes.

Q. So the infection had been building prior to that date?

A. Right, which is typical.

. . . .

He had a severe spinal cord injury, and so that spinal cord was damaged, and it was damaged severely. And that's the problem with him is his was much worse than many of them.

Q. But the damage was attributable to the discospondylitis?

A. Right.

Q. Not to some sort of external trauma?

A. Not that I can tell. Right. He had underlying disease present in his spine.

This sworn testimony rebuts appellant's allegation that Vets & Pets fractured or broke his dog's neck, leading to its paralysis and death.

■ With Dr. Nafe's expert opinion regarding lack of proximate cause, appellant was duty bound to meet proof with proof, which appellant did not produce. Conclusory allegations would no longer suffice. Therefore, no material question of fact existed on causation, rendering summary judgment appropriate. The trial court did not err in entering summary judgment and dismissing that count.

■ Likewise, appellees were entitled to summary judgment on the claim of res ipsa loquitur. This doctrine may apply in medical malpractice cases if the essential elements are present. *See Schmidt v. Gibbs*, 305 Ark. 383, 807 S.W.2d 928 (1991). The general requirements are a duty to the plaintiff to use due care, an accident caused by something under the defendant's control, the existence of an accident that in the ordinary course of things would not otherwise occur if the defendant used proper care, and an absence of evidence to the contrary. *See id.* In this instance, the missing element of plaintiff's proof here is the "absence of evidence to the contrary." Appellant's allegation that his dog suffered a traumatic injury to the spine causing paralysis and death was refuted by Dr. Nafe's explanation to the contrary. Appellant was required to meet proof with proof to create a question of fact on this point, and he failed to do so. Summary judgment was appropriate for the res ipsa loquitur claim.

■ As to the tort of outrage, it was wholly dependent upon there being a valid negligence claim. Moreover, the tort of outrage is an extremely narrow tort, rarely recognized in Arkansas caselaw. It requires extreme and outrageous behavior not to be tolerated in a civilized society; it encompasses acts beyond all bounds of decency. *See Crockett v. Essex*, 341 Ark. 558, 19 S.W.3d 585 (2000). Given that the negligence claims were unsupported by any rebutting proof on the motion for summary judgment, we affirm the entry of summary judgment on the tort of outrage as well.

■ Appellant also raises on appeal an allegation that the trial court was biased against him and should have recused. He asks that we consider this impropriety in connection with the grant of summary judgment. We are not persuaded. The vast majority of instances appellant cites as evidence of bias against him by the trial judge are events outside the record on appeal. We do not consider

evidence that is not included in the record on appeal. *See Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001); *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000). To the extent that appellant claims that the trial judge should have recused, we review that decision for an abuse of discretion. *See Searcy v. Davenport*, 352 Ark. 307, 100 S.W.3d 711 (2003). The decision whether to recuse is a matter left to the conscience of the trial court. *Id.* We discern no abuse of discretion in this instance. The fact that a judge has ruled against a party in prior litigation is not sufficient to establish bias, nor is the filing of a complaint by the movant with the Judicial Disability Commission. *Id.* Appellant has failed to present a record on appeal demonstrating that the trial judge was infected with such bias that he should have recused. We affirm this point.

Affirmed.

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

CRABTREE, J, concurs.

BAKER, J., dissents.

TERRY CRABTREE, Judge, concurring. I am in full agreement with the decision to affirm this case. I write separately to express but one concern. I am disturbed that the Medical Malpractice Act applies to veterinarians. Ark. Code Ann. § 16-114-201(2) (Repl. 2006). Although I have a duty to apply the law as written, and have done so in this case, I sincerely question the propriety of applying the Act to veterinarians. In my opinion, it is inappropriate to apply the same restrictions of the Act to veterinarians because the dynamics of a lawsuit for an injured pet are not as devastating as that of a patient under the Act. Further, notice of an injury to an animal may not manifest itself in the short time required by the Act. In my view, it is mixing apples with oranges.

KAREN R. BAKER, Judge, dissenting. I am aware that this case involves the loss of a seventeen-year-old dog. Common sense tells us that the loss of this pet was inevitable, perhaps even imminent. Despite this, our legislature has mandated the application of our medical malpractice laws to the practice of veterinarian medicine, precluding us from relying on the general premise that old dogs die. Furthermore, this case is before us on appeal from the grant of a summary judgment motion. Our procedures and case law dictate the trial court's duty to review the pleadings, discovery responses, and evidence presented to determine whether the moving party is entitled

to judgment as a matter of law. Our responsibility to review the trial court's decision is no less onerous. Unfortunately, the majority's analysis fails to fulfill this obligation.

In their motion for summary judgment, appellees stated that they were entitled to summary judgment because "[appellant's] expert witness, Dr. Nafe, did not render an opinion as to the standard of care of veterinarians in the locality. Dr. Nafe also did not render an opinion as to whether the defendants breached the standard of care or whether [the dog] suffered injuries that would not have otherwise occurred." In their reply to appellant's response to their motion for summary judgement, appellees repeated their position that Dr. Nafe did not render an opinion and affirmatively stated that their "motion for summary judgment incorporates the deposition testimony of Dr. Nafe who testified that he did not have an opinion as to Dr. Faulk's treatment of [the dog]. [Appellees'] motion for summary judgment requests judgment in favor of [appellees], because [appellant] has failed to produce an expert who will offer the requisite expert testimony."

The first two paragraphs of appellees' reply also accurately summarize the arguments presented on appeal regarding the claims of malpractice:

> 1. In the defendants' motion for summary judgment, the defendants requested judgment in their favor on plaintiff's claims for negligence and medical malpractice because plaintiff's expert witness, Dr. Nafe, did not render an opinion as to the standard of care of veterinarians in the locality at his deposition. Dr. Nafe also did not render an opinion as to whether the defendants breached the standard of care or whether [plaintiff's/appellant's dog] suffered injuries that would not have otherwise occurred.
>
> 2. In response to defendants' motion for summary judgment, plaintiff merely states that "Dr. Nafe was not singled out as the only expert witness." . . . However, plaintiff did not produce the testimony of an expert witness in response to defendant's summary judgment motion that would establish the existence of the elements essential to plaintiff's case, and on which plaintiff bears the burden of proof at trial.

The majority correctly concludes that the appellees failed to offer proof of the applicable standard of care required of a veterinarian in the February 14, 2000 visit or affirmative proof that the

veterinarian complied with the standard of care. That conclusion is consistent with appellees' statement that Dr. Nafe did not render an opinion as to whether the appellees had breached the standard of care. However, the majority then holds that appellees did present sufficient proof to "challenge the proximate cause of appellant's allegation of harm — that his dog was rendered unable to walk and ultimately died from a physical trauma inflicted at appellees' office that day." This holding directly contradicts appellees' admission that Dr. Nafe "did not render an opinion as to . . . whether [appellant's] dog suffered injuries that would not have otherwise occurred." The majority finds that appellant failed to meet proof with proof as to proximate cause, when appellees offered no proof for appellant to meet. In fact, appellees never moved for summary judgment on the issue of proximate cause.

Appellees clearly recognized that any argument regarding proximate cause must fail because they did not present expert proof regarding causation that was stated within a reasonable degree of medical certainty or probability. *See Ford v. St. Paul Fire & Marine Ins. Co,* 339 Ark. 434, 5 S.W.3d 460 (1999). Moreover, Dr. Nafe's deposition testimony indicates that he was painfully aware of this inability to provide such certainty. Dr. Nafe testified regarding the reason the dog was presented to him:

> [The dog] was paralyzed in all four legs, what we call tetraparesis. He had some other problems. You know, he was 16, so he had some other problems. But that's not really why he was presented to me. So at that time he had neurological changes and reflex changes that suggested that his problem was in his low cervical spinal cord.
>
> At that time he had some low neck pain. We radiographed the dog at that time. Radiographed the spin, the cervical spine while he was awake. And he was a little painful that day, so we didn't get perfect radiographs. But we had enough to show that he had some marked changes between his sixth and seventh cervical vertebra and between his seventh cervical vertebra and his first thoracic vertebra. In addition to that, he had some generalized osteoporosis in his spine that was noted.

When asked if he could identify what the changes in the vertebra were, Dr. Nafe responded "that he *probably* had a problem called discospondylitis." (Emphasis added.) Dr. Nafe then explained that a urine test can be used to identify the discospondylitis presence in "about 50 percent of the dogs that we think have

active discospondylitis. . . ." Dr. Nafe performed a urine test, but the test did not culture the discospondylitis organism. Instead, the test "cultured a Staph. aureus" and Dr. Nafe explained that, in his practice, the Staphylococcus organism causes about fifty percent of the discospondylitis infections in the dogs he treats. With no positive culture for the discospondylitis infection, and able to correlate the presence of the Staphylococcus organism to only one-half of the dogs who have the discospondylitis infection, it is understandable as to why Dr. Nafe was reticent to say with any degree of medical certainty that the dog suffered from discospondylitis.

When appellees' counsel asked Dr. Nafe to describe generally how a dog can get a Staphylococcus infection, not a question specifically directed to how this dog came into contact with the organism, Dr. Nafe responded, "Well, you know, again, it's a little bit of *supposition.*" (Emphasis added.) Then, counsel for appellees asked the direct question: "And was there anything in the history given to you by Mr. McAdams or anything that you were able to find by other means to give you an opinion as to the cause of the Staph. infection in [the dog]?" Dr. Nafe's response: "No." His response was "no." Nothing in the history and nothing he was able to determine by other means gave him an opinion as to the cause of the Staphylococcus infection. He did muse a bit about possible ways the bacteria may have entered the dog's system. Nevertheless, he was clear that he had no opinion as to the cause of the Staphylococcus infection.

When asked if he was "able to formulate an opinion as to why [the dog's] immune system was not able to resist the Staphylococcus infection, Dr. Nafe explained that "*it's a guesstimate.* But overall, if you took a hundred [dogs], *probably* a 16-year-old dog *probably* isn't going to have a great immune system." (Emphasis added, again.)

In response to the question as to whether Dr. Nafe had determined what caused the dog's paralysis, he stated, "Well, *again, through supposition* . . . . (Emphasis added.) Appellees' counsel followed up with the following query: "So it was your *suspicion* that the problem with the dog's paralysis was being caused by the discospondylitis that we talked about earlier, is that correct." (Emphasis added.) Dr. Nafe confirmed that his suspicion was that the paralysis was secondary to the suspected discospondylitis infection. Dr. Nafe further explained that the definitive medical

diagnostic procedure to identify a discospondylitis infection would be a mylegram and stated that this diagnostic procedure had never been performed.

Counsel for appellees also specifically asked Dr. Nafe if there was "anything from your observation or treatment of the dog to make you *suspicious* of an event or something happening to the dog on February 14th that would render him unable to walk?" (Emphasis added.) His response, "No, but I'm seeing the dog three weeks later. I mean, *that would be impossible for me to know*. . . . And there was sufficient evidence that there was a problem in the spinal cord — mean in the spine. *No, but again, that's impossible for me to say*." (Emphasis added.)

When counsel asked Dr. Nafe whether or not he could attribute the dog's inability to walk to the dog's eventual heart failure, identified by Dr. Nafe as cardiomyopathy, the doctor replied, "No. I mean, *I don't know* that you can be definitive about that *because nobody has really done much studies* in geriatric animals with cardiomyopathy." (Emphasis added.)

Dr. Nafe also cited a lack of clinical studies in answering whether he had an opinion as to whether the dog's eventual kidney failure, secondary to the cardiomyopathy, was related to the discospondylitis: "Well, you know, I mean, again, *I don't know of any studies that have suggested any kind of relationship*. What happens in older animals is they get one problem. And then it kind of, you know, leads to other problems, and not necessarily in a direct correlation." (Emphasis added.) Dr. Nafe continued: "Now whether or not they were going to occur anyway, . . . *I don't know*. . . . *But my guess in this case would be* that there is no direct link that I can see." (Emphasis added.)

Given this evidence, I understand why appellees admit that Dr. Nafe could not negate appellant's allegation regarding causation. The best appellees could say was that appellant could not bring his case to trial because the expert that appellees deposed did not have an opinion. Dr. Nafe did not give an opinion as to whether the spinal cord injury would have occurred even without the alleged choking because, as Dr. Nafe stated, his examination was too remote in time to make that determination. As Dr. Nafe said, the veterinarian to ask would have been Dr. Allen, another expert listed as an expert witness by appellant.

What I do not understand is how the majority determined that this testimony established that appellees were entitled to judgment as a matter of law. The majority's position is even more

perplexing given its premise that appellees proved as a matter of law that the dog died from an infection that had been present prior to the spinal cord injury and the spinal cord injury was due to the effects of infection and old age. Dr. Nafe testified that the dog suffered a "severe spinal cord injury" and that the spinal cord was "damaged severely." The following exchange during Dr. Nafe's testimony provides evidence that the underlying cause of the dog's inability to walk, even the suspected infection, could be caused by trauma:

> Q. Could the fact that this dog was walking at one period of time in the course of the day and then not walking at another period of time in the course of a day — could that be indicative of the sudden onset of this discospondylitis?
>
> A. Yeah. Now when you have an animal that, say, is fairly normal, and then he goes down from the disco, then probably something has occurred. And it doesn't have to be necessarily a lot because of the instability that becomes present. So, you know, it doesn't necessarily require much.
>
> And that area will be predisposed to injury because of the instability. So in other words, it could be caused by, you know, trauma of some type. The looseness there would predispose that dog to injury, or it can happen from the dog rolling over to get up in the morning. I mean, it could be either direction.
>
> Q. The sudden onset could be caused by trauma?
>
> A. Trauma.

As the majority recites, "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 question of fact unanswered." *Rice v. Tanner*, 363 Ark.79, 210 S.W.3d 860 (2005). We review the evidence in a light most favorable to the non-movant, resolving any doubts and inferences against the movant. *Id.*

Dr. Nafe acknowledged that his opinion could be nothing more than suspicion and supposition. The one thing he was unequivocal about was that this dog had suffered a severe spinal cord injury. He also acknowledged that it was possible that this dog's sudden inability to walk could have been caused by trauma.

Dr. Nafe testified that even the sudden onset of the dog's underlying infection could have been caused by trauma. Given this evidence it is not surprising that appellees never argued that the expert testimony they relied upon left no material question of fact unanswered. Instead they argued that appellant had failed to "produce the testimony of an expert witness . . . that would establish the existence of the elements essential to the plaintiff's case." Appellant had no duty to do so, and the majority has failed in its duty to properly review this case.

Accordingly, I dissent.

MULTI-CRAFT CONTRACTORS, INC. *v.* PERICO, LTD., Gerber Life Insurance Co., Inc., and AdminOne Corporation

CA 06-46 239 S.W.3d 33

Court of Appeals of Arkansas
Opinion delivered September 13, 2006

Bassett Law Firm, LLP, by: *Vincent O. Chadick*, for appellant.

Davis, Wright, Clark, Butt & Carithers, PLC, by: *Constance G. Clark* and *Don A. Taylor*, for appellees.

SAM BIRD, Judge. Appellant Multi-Craft Contractors, Inc., a general contractor that maintains a partially self-funded health plan for the benefit of its employees, appeals a summary judgment entered for appellees Gerber Life Insurance Company Inc. and Perico Ltd., Gerber's general managing underwriter. Multi-Craft contends that the trial court erred in finding that no issues of material fact existed as to whether Gerber and Perico had adequate grounds to retroactively exclude a Multi-Craft employee from an insurance policy for excess-loss coverage. The appeal focuses on a form, completed as part of Multi-Craft's application for the policy, that required disclosure of "benefits paid, pended, or denied in the last 12 months." The trial court found that the quoted term was not ambiguous. We agree, and we affirm the summary judgment.

In July 2003 Gerber and Perico bound the excess-loss policy to Multi-Craft to cover claims exceeding $50,000 for employees participating in Multi-Craft's health plan. "Run-in coverage" was included for claims incurred during the twelve months before the policy's effective date of June 1, 2003. In September 2003 Multi-Craft submitted through its third-party administrator, AdminOne Corporation, over $70,000 in bills incurred by a diabetic plan participant and denied during the one-year retroactive period. Gerber and Perico refused the claim, asserting that AdminOne had misrepresented the amount of "benefits paid, pended or denied" the participant by inserting only $7,060.23 where this information was requested on the application form. Gerber subsequently notified Multi-Craft that Gerber was exercising its contractual right to revise the policy and that the participant was being excluded from its coverage.[1]

After receiving this notification, Multi-Craft brought an action for breach of contract and promissory estoppel against Gerber, Perico, and AdminOne. Gerber and Perico denied that the loss disclosure form was properly and correctly filled out, and they asserted that substantial and material information was withheld from them during the application process, including the submission of the excess-loss disclosure form. They contended that, under the clear terms of the disclosure form and policy,

[1] Because of privacy concerns, this individual was identified to the trial court only as "employee" or "plan participant."

Gerber was entitled to modify its excess-loss policy to exclude the employee as to whom claims information had been misrepresented.

At the conclusion of a hearing held on July 26, 2005, the trial court granted Gerber and Perico's motion for summary judgment. The court's written order of judgment, entered on August 12, 2005, included the following findings:

> 2. The Court finds that the excess loss disclosure form at issue in this matter is clear and unambiguous in its terms, conditions and intent and that a material failure to disclose information was made on said excess loss disclosure form.
>
> 3. Based upon the clear and unambiguous language of the excess loss disclosure form, the application and the contract of excess loss coverage itself, there is no material issue of fact[.]

An order of voluntary dismissal without prejudice was entered as to AdminOne, and Multi-Craft filed this appeal from the order of summary judgment in favor of Gerber and Perico.

Multi-Craft asserts that it presented evidence to the trial court sufficient to create five issues of fact: whether the application form was ambiguous, whether the application was completed correctly, whether an alleged misrepresentation was material, whether Gerber had knowledge of the employee's medical condition, and whether Multi-Craft had knowledge of the alleged misrepresentation. We do not agree.

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Hanks v. Sneed*, 366 Ark. 371, 235 S.W.3d 883 (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.* The reviewing court determines 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.* The evidence is viewed on appeal in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Appellate review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.*

The excess-loss disclosure form, which was dated May 8, 2003, was submitted through AdminOne as a required part of Multi-Craft's application process. The document included the following statements and instructions:

> This Disclosure Form is an integral part of your request for and/or renewal of Excess Loss Insurance. It will be relied upon by the Excess Loss Insurer in issuing an Excess Loss Insurance Contract.
>
> . . . .
>
> After receipt and review of the completed Disclosure Form, the Excess Loss Insurer reserves the right to revise the initial offer of coverage and/or to withdraw its offer to provide Excess Loss Insurance. Further, the Excess Loss Insurer reserves the right upon discovery of any omitted information, to revise or otherwise reconsider any underwriting actions that may have been made, and such actions may be retroactive to the Effective Date of coverage. . . .
>
> All representations shall be deemed to be material to acceptance of the risk by the Excess Loss Insurer and the Excess Loss Contract is to be issued in reliance of the truth and accuracy of such representations. Should subsequent information become known which, if known prior to issuance of the Excess Loss Contract, would affect the premium rates, factors, terms or conditions for coverage thereunder, the Insurer will have the right to revise the premium rates, factors, terms or conditions as of the effective date of the Excess Loss Contract. . . .

The disclosure form requested information on "any participants with a history or a current diagnosis of any serious disease or disorder, such as . . . cancer, diabetes, heart diseases, renal failure, . . . and potential organ transplants, etc."; the hand-written response stated that a particular employee had diabetes with renal manifestation. Also regarding this employee, the figure $7,060.23 was entered under the heading, "Benefits Paid, Pended or Denied in Last 12 Months."

Evidence submitted to the trial court, in addition to the pleadings and insurance documents, included deposition testimony regarding the application process. Anita Carol Holmes, a claims processor for AdminOne, testified that she could review a person's claims history by using a computer system. She said, "All of that information as far as paid, pended, and denied claims would be on the RIMS system. When we deny a claim, there is a code

that indicates why it's denied. When a claim is suspended or pended, we suspend it with a particular code . . . ."

Richard Barrows, president of Multi-Craft, testified that Multi-Craft relied on AdminOne to properly fill out the application, including the excess-loss disclosure form. He said that he had no idea if AdminOne provided on the form accurate information regarding the amount of benefits paid, pended, or denied. He said that he became aware of a problem with the issuance of the policy after he assumed the policy had been issued, that Multi-Craft then "just paid the claims all out of our pocket," and that a policy of insurance excluding the employee was eventually issued by Gerber and Perico.

Gary Baker, one of the owners of AdminOne, testified, "I don't know where you would write in pended and denied and paid in that little square . . ., because there is just not enough room on the form. That's not the intent of the form."

Mason Baker, an AdminOne employee, testified that he wrote the figure "$7,060.23"on the excess-loss form, which he said was "the total amount of the claims that were paid" but "not the total amount that were pended." He stated that he "chose not to put in denied or pended," further explaining:

> I didn't need to tell anyone at Perico or Gerber that this figure did not respond to the pended or denied portion of the question, because it was obvious. That's what's implied based on experience. When they want additional information they will come back and ask for it.

He said that he did not provide the amount of claims denied or pended on the excess loss disclosure form "because that information has never been asked for or supplied." He stated that he had filled out the same disclosure on several occasions for Perico. His testimony continued:

> [B]ecause I never provide the amount of denied or pended claims, I didn't do it this time for Employee. We had never given Perico a dollar amount for claims denied.
>
> It's very obvious from the numbers in the column on the loss form that there are claims for Employee that are out there that have either been incurred and are paid or have been denied, and from that point you're going to dig deeper, which goes down to the Large

> Case Management notes, which is exactly what happened — so this was all standard procedure exactly like we had done on multiple occasions. . . .
>
> The answer I provided is accurate.

James Cook, Perico's vice-president of underwriting, testified that on May 9, 2003, AdminOne submitted the disclosure form to Perico and also emailed Perico a "Large Case Management Report" revealing that one employee had been on dialysis since at least February 2003. Cook stated that "it was fair to assume, based upon reasonable dialysis charges of $6,000 per month, that [the employee] could easily have had $30,000 in medical bills for dialysis for the period of time from February 2003 through June 2003." Cook said that Trinice Harris, Perico's underwriter assigned to the case, made a handwritten notation in her file that the employee had kidney failure after she received the email and that she bound coverage for Multi-Craft under Gerber's excess-loss policy on July 10, 2003, with an effective date of June 1, 2003 and "run-in coverage" for claims incurred during the twelve months prior to the effective date.

Cook revealed that he took over the underwriting process after Harris voluntarily resigned her employment on August 15, 2003. Cook testified that Harris explained to him before she left that there was a "transplant policy" in force for the diabetic employee that would exclude transplants from the insurance policy. He explained that, after telephoning Harris in late August and learning that she had relied upon the information written on the disclosure form, Cook made the decision to exclude the employee from coverage.

He said that his company was not concerned so much about a condition as it was about the risk to the plan, explaining that the risk was what was being underwritten. He said that "a large case management report . . . may or may not represent a potential risk." He stated his belief that the "substantial dollar amounts" of the employee's claims should have been on the form's list of pended claims, which "would have made a difference in the way we underwrote the case had we known . . . ."

Cook noted that the large case management report did not have "any dollar amounts" on it. He testified:

> From an underwriting standpoint in relationship to the risk that Gerber Life is taking, *i.e.*, claims over $50,000, the dollar amount

> becomes very, very important. And as I explained before, there are several reasons why people with expensive, on-going conditions might not have — the plan may not be liable for them. We're not interested in that, we don't care about that. We don't care if a person is getting their bills paid by the coverage they might have on their spouse's policy. We don't care if the bills are being paid under Medicare. What we're underwriting is what does the plan — what liability does this claim or claimant represent to the plan.
>
> It is possible that a person who is incurring $6,000 a month on dialysis could have only $7,000 in combined, paid, pended or denied claims because somebody else is paying the claims. We've assumed that [$7,060.23] was all that was paid, pended, or denied in the previous twelve-month period. We relied upon the accuracy of that number. It doesn't matter who paid it as long as it wasn't a risk to the plan.

Cook stated that the employee was later excluded from the policy's coverage because the amount on the form was not accurate, but he acknowledged that on September 8, 2003, he had given different reasons for excluding the employee from coverage.

Hex Bisbee, Multi-Craft's chief financial officer, testified that his company could call AdminOne to ask what the denied claims of a particular plan participant were. He stated, "I would expect that they would get that information for us."

James Reagan, an assistant marketing director for Perico, testified that he received a "large case management report" about the employee from AdminOne's Mason Baker on May 9, 2003. Reagan said that he forwarded the report to underwriter Trinice Harris, that Perico underwriters determine what information a third-party administrator needs to provide to the underwriting department, and that the report included a statement that the employee had renal disease and was currently on dialysis. Reagan testified that he was first notified by an email from James Cook on September 8, 2003, that Perico would retroactively exclude the employee from the policy. Reagan stated that the two reasons Cook gave on September 8 for the exclusion were that "no information about [the employee's] current condition was supplied prior to the binding of the policy" and that the third party administrator "had told Trinice that [the employee] would be off the plan."

Erwin Rittinger, a principal and employee of Perico, stated his belief that the claim amount indicated on the disclosure form

should have been around $70,000. He stated that Trinice Harris, as the underwriter who was assigned the case, had the ultimate authority to make underwriting determinations. Rittinger said that Harris did not need to know the amount of charges being generated as a result of the employee's renal failure and dialysis in order to discharge her responsibilities, and he said that he did not think that Multi-Craft acted improperly. Regarding the disclosure form's request for "benefits paid, pended, or denied," Rittinger stated: "It's clear to me from the use of the word 'or' that it's the sum. . . . [T]he form is clear to me that it asks for the sum of the three."

Mark Kuhls, a potential expert witness, testified that he would look to the parties' course of dealing in order to define the word "or" in "benefits paid, pended or denied." He stated that the terms "denied" and "pended" are sometimes interchangeable, that things move from one to the other, and that the disclosure form "does request the amount of pended claims and it requests denied claims as well."

The trial court's written order of summary judgment set forth the following finding: "Based upon the clear and unambiguous language of the excess loss disclosure form, the application and the contract of excess loss coverage itself, there is no material issue of fact . . . ." The written order specifically incorporated comments from the court's oral ruling. Those comments were as follows:

> I have reviewed again the Perico Excess Loss Insurance Disclosure Form and I think a decision on this motion can be made by reviewing it, referring to the pleadings, as far as facts which are not in dispute, and of course, looking at the testimony that the parties have pointed to. I think it's important to reiterate some of the statements in this Form.
>
> In part, the Form provides that "the excess loss insurer reserves the right, upon discovery of any omitted information, to revise or otherwise reconsider any underwriting actions that may have been made and any such actions may be retroactive to the effective date of coverage." It "is agreed that the statements in this disclosure form plus any and all materials submitted to Perico for this group are hereby warranted by you [the plan sponsor]. All representations shall be deemed material to acceptance of the risk. And the excess loss contract is to be issued in reliance of the truth and accuracy of such representations." Also, and this is very important in my mind,

the Form provides that "should subsequent information become known, which [if] known prior to issuance of excess loss contract would effect premium rates, facts, terms and conditions or coverage hereunder, the insurer will have the right to revise the premium rates, factors, terms or conditions as of the effective date of the excess loss contract by providing written notice."

In my mind, what Gerber did was exercise its right under the contract and issued an addendum to the policy of insurance specifically excluding coverage for . . . this person that had the renal failure.

Going back to page two of the Excess Loss Disclosure form, [which asks for] benefits paid, pended or denied in the last twelve months, the Court finds that that statement is not ambiguous. It is crystal clear to me after reading the entire document again this afternoon, as I believed it to be before I heard argument today. But it is obvious from — if you look no further than the excess loss insurance disclosure form, that at least one of these companies, Gerber, is making it clear to you, you better tell us everything."

I know Mr. Baker said, "Well, I never give them the information where it says paid, pended or denied, I just give them paid," I think is what he said, "I never give them pended or denied." Well, that may very well be true. I'm not saying that the gentleman isn't telling the truth. But maybe in the past, he never got caught before. And even if — it's still an omission, because . . . when reading the whole document, it's obvious they want everything they can get their hands on to make their decision.

I believe that the phrase "paid, pended or denied in the last twelve months" clearly means all three and not just, "well, you pick which one you want to give us and we'll accept your choice and you don't even have to tell us which one it is." I do not think that makes any sense at all to say that would be the meaning of that phrase.

Multi-Craft and AdminOne, I don't think it is disputed that this information was an omission. True, they say, "well, we've got a custom in the trade for doing that." Again, I disagree with you. It may have been a custom, but the hand got called this time.

Point on Appeal

We now turn to Multi-Craft's point on appeal, that the trial court erred in finding that no issues of material fact existed as to whether appellees Gerber and Perico had adequate grounds to

retroactively exclude a Multi-Craft employee from excess-loss coverage. Multi-Craft asserts that it presented evidence to create five fact issues. We address the first three together.

Multi-Craft first contends that it presented evidence establishing that the application form was susceptible to more than one reasonable interpretation, in that the phrase "benefits paid, pended or denied" has various meanings. Second, Multi-Craft contends that it created a fact issue as to whether the application was completed correctly. Third, Multi-Craft asserts that a fact issue existed as to whether the misrepresentation was material.

Multi-Craft argues that the confusion created by the form is apparent from the deposition testimony of Gary Baker and Mark Kuhls. Perico and Gerber respond that it is clear from the contract itself that the trial court's interpretation of the language is the only practical, reasonable, and fair interpretation consistent with the object and intent of the parties. They urge that we reject a hyper-technical interpretation of the policy as "patently unreasonable." They assert that, as a matter of law, the disclosure form was not ambiguous.

In *Elam v. First Unum Life Insurance Co.*, 346 Ark. 291, 57 S.W.3d 165 (2001), our supreme court examined the question of ambiguity in an insurance contract:

> The law regarding construction of an insurance contract is well settled. If the language of the policy is unambiguous, we will give effect to the plain language of the policy without resorting to the rules of construction. *Norris v. State Farm Fire & Cas. Co.*, 341 Ark. 360, 16 S.W.3d 242 (2000); *Western World Ins. Co. v. Branch*, 332 Ark. 427, 965 S.W.2d 760 (1998). On the other hand, if the language is ambiguous, we will construe the policy liberally in favor of the insured and strictly against the insurer. *Id.* Language is ambiguous if there is doubt or uncertainty as to its meaning and it is fairly susceptible to more than one reasonable interpretation. *Norris*, 341 Ark. 360, 16 S.W.3d 242; *Smith v. Prudential Prop. & Cas. Ins. Co.*, 340 Ark. 335, 10 S.W.3d 846 (2000). Ordinarily, the question of whether the language of an insurance policy is ambiguous is one of law to be resolved by the court. *Norris*, 341 Ark. 360, 16 S.W.3d 242; *Western World*, 332 Ark. 427, 965 S.W.2d 760. Where, however, parol evidence has been admitted to explain the meaning of the language, the determination becomes one of fact for the jury to determine. *See Smith*, 340 Ark. 335, 10 S.W.3d 846; *Southall v. Farm Bureau Mut. Ins. Co.*, 276 Ark. 58, 632 S.W.2d 420 (1982).

> Our case law demonstrates that where there is a dispute as to the meaning of a contract term or provision, be it an insurance or other contract, the trial court must initially perform the role of gatekeeper, determining first whether the dispute may be resolved by looking solely to the contract or whether the parties rely on disputed extrinsic evidence to support their proposed interpretation. As Justice George Rose Smith explained, "[t]he construction and legal effect of written contracts are matters to be determined by the court, not by the jury, *except when the meaning of the language depends upon disputed extrinsic evidence.*" *Id.* at 60, 632 S.W.2d at 421 (emphasis added). Thus, where the issue of ambiguity may be resolved by reviewing the language of the contract itself, it is the trial court's duty to make such a determination as a matter of law. On the other hand, where the parties go beyond the contract and submit disputed extrinsic evidence to support their proffered definitions of the term, this is a question of fact for the jury. In the latter situation, summary judgment is not proper.

346 Ark. at 296-97, 57 S.W.3d 169-70.

We have recently observed that contracts of insurance should receive a practical, reasonable, and fair interpretation, consonant with the apparent object and intent of the parties in light of their general object and purpose. *Ison v. So. Farm Bureau Cas.*, 93 Ark. App. 502, 221 S.W.3d 373 (2006). Further, different clauses in a contract must be read together and construed so that all of its parts harmonize, if that is at all possible, and it is error to give effect to one clause over another on the same subject if the two clauses are reconcilable. *Id.*

Here, the trial court interpreted the phrase "benefits paid, pended or denied" to mean "all three" instances. The court's bench ruling included a discussion of the importance of particular statements in the disclosure form:

> In part, the Form provides that "the excess loss insurer reserves the right, upon discovery of any omitted information, to revise or otherwise reconsider any underwriting actions that may have been made and any such actions may be retroactive to the effective date of coverage." It "is agreed that the statements in this disclosure form plus any and all materials submitted to Perico for this group are hereby warranted by you [the plan sponsor]. All representations shall be deemed material to the acceptance of the risk. And the excess loss contract is to be issued in reliance of the truth and

> accuracy of such representations. Also, and this is very important in my mind, the Form provides that "should subsequent information become known, which is [sic] known prior to issuance of excess loss contract would effect premium rates, facts, terms and conditions or coverage thereunder, the insurer will have the right to revise. . . ."

We agree with the trial court's conclusion that Gerber clearly instructed an applicant to "tell . . . everything." Further, we agree with the court's assessment that the purpose of the form was to permit Perico, as underwriter for Gerber, to assess the risk of the coverage it would undertake on behalf of Multi-Craft's plan participants.

We hold that, as a matter of law, the disclosure form was not ambiguous. Therefore, no genuine issue of material fact was created as to whether Perico and Gerber rightfully excluded the employee from excess-loss coverage under the policy. In light of this determination that the form was not ambiguous, it follows that no fact issue was created to whether the application was completed correctly when AdminOne submitted only the dollar amount of claims paid rather than the total amount of benefits paid, pended, or denied. Additionally, the form specified that all representations "shall be deemed material to acceptance of the risk" and "the excess loss contract is to be issued in reliance of the truth and accuracy of such representations." In light of this language, there was no fact issue as to whether the misrepresentation of "benefits paid, pended, or denied" was material to the determination of policy coverage. Thus, we hold that there is no merit to Multi-Craft's assertions that fact issues were created regarding whether language of the excess-loss disclosure form was ambiguous, whether the application was completed correctly, and whether an alleged misrepresentation was material.

Multi-Craft asserts that it created a fourth issue of fact as to whether Perico and Gerber had knowledge of the employee's medical condition because the "large case management notes" furnished to them provided sufficient information to warrant an investigation of the employee's claims. Multi-Craft complains that Cook, after learning that information about the employee's condition had been disclosed two months before coverage was bound, revised the initial reason for excluding him from coverage. Multi-Craft points to testimony that Cook first denied coverage because the information was not supplied prior to the binding of coverage, yet later said that the basis of denial was because the amount of

"paid, pended, and denied claims" was not accurately reflected on the disclosure form. Thus, it asserts that the alleged misrepresentation was not a valid basis for retroactive exclusion of the employee from coverage. Citing *Old American Life Insurance Co. v. McKenzie*, 240 Ark. 984, 403 S.W.2d 94 (1966), Multi-Craft asserts that any misrepresentation on the application, even if material, was not a proper basis for excluding coverage because the insurer had information sufficient to warrant an investigation.

The present case is distinguishable from *Old American*, which held that an applicant for accident and disability insurance should not be denied benefits of the policy although he did not disclose his complete medical history in his application. The supreme court ruled that when the applicant reported a previous disc operation on the application, he put the insurer upon notice as to his serious back operation; further, when he provided the insurer with the name of his surgeon to whom the insurer could turn for exact and precise information if so desired, "he substantially met all burdens imposed upon him in his relations with [the insurer] under his contracts of insurance." *Old Am.*, 240 Ark. at 987, 403 S.W.2d at 96.

The issue in the present case is not simply whether Gerber and Perico had knowledge of the employee's medical condition. Nor is the issue whether the disclosure form, which was part of the application process, put them on notice of the employee's condition. The issue is whether they were put on notice of the amount of claims being generated against Multi-Craft's health-care plan by the employee, including "benefits paid, pended, or denied." James Cook testified that Perico's concern was the liability of the plan and that the dollar amount of the employee's claims would enable Perico to make an informed decision as to whether to accept the risk of extending coverage to him. We hold that, under the specific terms of the disclosure form, the material misrepresentation of the amount of claims denied to the employee gave Gerber and Perico the right to retroactively exclude this employee from the policy's coverage.

Finally, Multi-Craft asserts that it created a fact issue as to whether it had knowledge of the employee's condition. It cites *Ford Life Insurance Co. v. Samples*, 277 Ark. 351, 641 S.W.2d 708 (1982), for the proposition that an insurer must show that the insured was aware of a misstatement before an insurance policy will be rendered void. Gerber and Perico point to terms of the

"Administrative Services Agreement" under which Multi-Craft delegated to AdminOne the responsibility "to maintain records regarding payments of Claims, denials of Claims, and Claims pended." Because of this delegation, Gerber and Perico assert that any ignorance on the part of Multi-Craft as to the employee's claims history was irrelevant. We agree.

The insured in *Ford Life* purchased a policy of credit term-life insurance in conjunction with the purchase of a pickup truck, first signing an insurance form that included the execution of a "good health" statement. Prior to the signing, the soliciting insurance agent had learned that the insured was in poor health and was drawing disability insurance, which was founded upon an anxiety reaction and chronic brain syndrome. The day after signing the contract, the insured suffered a myocardial infarction that led to his death. Observing that the insured died as a result of a disease not connected to his total disability condition, the *Ford Life* court held that a "good health" statement on the application for life insurance, even if material in some respects, will not void the policy unless the insurer shows a causal relation between the misrepresentation and the loss. The court observed, "The 'good health statement' obviously did not include the condition which allowed him to receive his Veterans Administration benefits because by agreement his disability check was to be used to pay for the pickup truck."

In the present case, Multi-Craft asserts that there was a fact question as to whether it was aware of a material misrepresentation on the application because AdminOne, rather than Multi-Craft, had access to information regarding the amount of claims previously denied to the employee. It is well established, however, that a corporation is affected by knowledge of its agent. In *Hill v. State*, 253 Ark. 512, 521-22, 487 S.W.2d 624, 631 (1972), our supreme court reviewed this rule of agency law:

> [A] corporation, which can act only through its officers and agents, is affected with notice which comes to an officer, agent or employee in the line of his duty and the scope of his powers and authority and . . . knowledge of an officer, agent or employee acquired in the ordinary discharge of his duties is ordinarily to be imputed to the corporation.

Here, the disclosure form specifically asked for information about the employee's condition, and Multi-Craft delegated to AdminOne the responsibility for providing complete

and accurate information. Multi-Craft delegated to AdminOne the responsibility of acquiring knowledge about employee's claims paid, denied, or pended; it therefore cannot claim that it lacked knowledge of this information.

The trial court's grant of summary judgment is affirmed.

Affirmed.

BAKER and ROAF, JJ., agree.

Marandi Shirley BERNAL *v.* James SHIRLEY

CA 06-144 239 S.W.3d 11

Court of Appeals of Arkansas
Opinion delivered September 13, 2006

Darrel Blount, for appellant.

No response.

OLLY NEAL, Judge. Appellant Marandi Shirley Bernal appeals from an order of the Garland County Circuit Court that found her in contempt of the court's last custody order and awarded appellee James Shirley custody of the parties' three children. On appeal, appellant argues that: (1) the trial court erred in changing custody of the children, as it did not find that there had been a material change of circumstances since the last order affecting custody; (2) the trial court erred in changing custody of the children, as it did not consider the best interest of the children; (3) the trial court erred when it used the change of custody to punish appellant for being in contempt of the trial court's order. We reverse and remand.

The facts of this case are as follows. The parties were divorced on March 31, 1996. Three children were born during the marriage, a daughter Cortnie, age ten, and twin sons, Stephan and Shaun, age nine. Appellant was awarded custody of the children subject to appellee's visitation. Both parties have subsequently remarried and appellant has relocated to Louisiana.

Since their divorce, the parties have filed several contempt motions and petitions to change custody. Prior to the current matter, the last order affecting custody was entered on June 29, 2004. That order found appellant to be in "willful and wanton" contempt of the court's previous order. The order provided that the contempt could be purged by allowing appellee to exercise visitation from May 28, 2004, until June 9, 2004. The order further provided that: (a) appellee was to have telephone visitation each Tuesday and Thursday between 6:30 and 7:00 p.m.; (b) for subsequent visitations with appellee, the children were to be exchanged at a gas station in Hope and, during the exchange, the parties were to have no contact; (c) appellant was to provide appellee with a copy of each child's school calendar; and (d) each party was to share information about the children's medical and scholastic activities.

On April 1, 2005, appellee filed a petition for contempt and change of custody. In the petition, appellee alleged that: 1) appellant had moved from her last known residence in Louisiana and had failed to inform appellee of her new address; 2) appellant's phone had been disconnected and he was unable to exercise his telephone visitation; 3) he had been denied spring-break visitation, Easter visitation, and visitation on his birthday; and 4) appellant had failed to keep him abreast of the children's scholastic activities and medical needs. Appellee asserted that due to appellant's contempt, he should be awarded custody of the parties' children. Appellee filed an amended petition for contempt and change of custody on June 3, 2005, alleging that there had been a material change of circumstances and that it would be in the best interest of the children if he were awarded custody.

On June 24, 2005, appellee filed a petition for emergency ex-parte relief. He alleged that he had been denied summer visitation. Attached to the petition was an affidavit from appellee, in which appellee stated that the children's last day of school was May 20, 2005, that his summer visitation was to begin on May 27, 2005, and that appellant refused to meet him on May 27. An emergency ex-parte order, ordering appellant to relinquish the children to appellee's custody, was entered on June 27, 2005. Appellant was served with the order on July 5, 2005. On July 7, 2005, appellant filed a motion to set aside the ex-parte order. That same day an order was entered setting the ex-parte order aside.

A hearing on appellee's petition for contempt and change of custody was held on August 11, 2005. At the hearing, Deputy Harlan Smith of the Garland County Sheriff's Department testified that he assisted in serving appellant with the ex-parte order. He said that the order was served on appellant at the sheriff's office. He testified that appellant became upset when she learned she was being served with the order. Deputy Smith said that appellant used profanity and had to be escorted out of the sheriff's office. He testified that the parties' boys did not want to comply with the order and that the officers had to physically carry one of the boys to appellee's car and force him inside.

Appellee testified that, since the last hearing, appellant had changed residences in Louisiana and had failed to give him her new address and phone number. He said that, as a result, he was unable to exercise his telephone visitation. He later testified that he received appellant's phone number on April 26. Appellee also testified that, since the last order, he had missed seventy days of

visitation with his children. He said that he had been denied spring-break visitation, Easter visitation, and visitation on his birthday. Appellee conceded that some of the days that he missed were the result of his not being able to pick the children up due to work commitments.

Appellee testified that he and appellant do not get along. He said that appellant refuses to discuss why the boys fail to bring their glasses and hearing aids when they visit him. He also said that there was a physical altercation between the parties and their respective spouses during an exchange on October 31, 2004. Appellee later testified that appellant never brings the children to Hope for the exchange. He said that appellant's mother usually brings the children to Hope. He admitted that on May 27, appellant's mother brought the children to Hope. He also admitted, "It could have been misleading to the court when I stated in my affidavit that [appellant] didn't bring the kids for visitation when in fact her mother did bring them." He said that, during the May 27 exchange, one of the boys refused to go with him.

Appellee thought that it would be in the children's best interest if he were awarded custody. He said that, in addition to the child he has with his wife, his wife has three children that live with them. Appellee admitted that he has trouble disciplining the boys and that he sometimes has his brother discipline the boys. Appellee denied making derogatory remarks about appellant in front of the children. He accused appellant of making derogatory remarks about his wife in front of the children.

Appellee testified that, in February 2005, he sent a letter to appellant expressing concern about a date Cortnie was to have. However, he denied writing a letter in which he stated that, if the boys did not want to visit him, then he would no longer make them visit. During his testimony, appellee stated that, since giving the children's school copies of the court orders, he does not have trouble getting reports from their school.

Cindy Shirley, appellee's wife, testified that she kept a calendar of the children's visitation. She said that, since April 2004, Cortnie had only visited ninety-one days, Shaun had visited forty-eight days, and Stephan had visited forty-two days. Mrs. Shirley believed that the children would be better off in her husband's custody. She testified that they live in a mobile home that consist of two single-wides and that the home has four

bedrooms and one bathroom. She said that she was prepared to do whatever it took to make sure the children had a good relationship with appellant.

Mary Cooper, appellant's grandmother, testified that, on July 5, she took the children to meet appellee. She said that, when Cortnie expressed a desire to stay with her, appellee started yelling and cursing at Cortnie. She said that appellee accused her of brainwashing the children and that appellee left without the children. She said that appellant has encouraged the children to visit appellee; however, despite appellant's encouragement, the boys refuse to visit appellee. Ms. Cooper testified that the children loved both parents, but wanted to live with appellant.

Mary Goin, appellant's mother, testified that she had brought the children to Hope every time appellee was to have visitation. She said that, almost every time, the boys refused to go with appellee. Ms. Goin testified that she did not take the children on October 31, because appellee had insisted that appellant bring the children. During her testimony, Ms. Goin explained that one time, prior to his scheduled visitation, appellee told Stephan he could not come because he was grounded for refusing to talk to appellee during his telephone visitation. She said that, when she took the children to Hope, appellee sent Stephan back to her car. Ms. Goin stated that appellant had never discouraged the boys from visiting appellee. She also said that appellee has always had her address and phone number and could have reached appellant through her. She testified that she had mailed a letter to appellee that contained appellant's new address.

Appellant testified that, on the day she was served with the ex-parte order, she had just learned that her father and three other family members had been killed in an accident. She said that she had called appellee and asked to pick up Cortnie. She said that she thought she was at the sheriff's office to pick up Cortnie. Appellant testified that, in the last order, she was ordered to take the children to Hope so appellee could exercise his visitation. She said that, since then, except when appellee was unable to pick the children up, the children had been taken to Hope each time appellee had a scheduled visitation. Appellant said that she had encouraged the children to visit appellee. She testified that if she had known that the order meant that she was to take the children to Hope and force them into appellee's car, she would have done so.

Appellant testified that, in June, she received a letter from appellee saying that, since the children did not want to visit, he was

no longer going to pick them up. Appellant denied refusing to give appellee her new address and phone number. She said that appellee had her mother's address and phone number and that he had called her several times. She said that when she got a phone, she gave appellee her phone number. Appellant explained that, when she moved, the children's spring break changed, so appellee's spring-break visitation was cut short. She pointed out that appellee's birthday was in June, and that his petition was filed in April 2005. She said that appellee did have his birthday visitation in June 2004. She also said that appellee was allowed his Easter visitation. Appellant maintained that she had made every effort to comply with the court's order. She accused appellee's wife of making derogatory remarks about her.

On September 1, 2005, the trial court entered an order finding appellant in "wanton and willful contempt" of the court's orders. The court found that appellant had: (1) refused to allow appellee to exercise his visitation; (2) failed to keep appellee abreast of the children's scholastic activities, growth, and development; and (3) failed to provide appellee with her address and phone number. The trial court sentenced appellant to thirty days in the Garland County Detention Center with twenty days suspended.

In the September 1 order, the trial court also granted appellee's petition for change of custody. The order provided that after thirty days, appellant would have visitation every other weekend and that the parties would continue to exchange the children at the Hempstead County Sheriff's Department. The order also provided that appellant would have telephone visitation every Tuesday and Thursday. From that order, appellant now brings this appeal.

In child-custody cases, the primary consideration is the welfare and best interest of the child involved. *Dansby v. Dansby*, 87 Ark. App. 156, 189 S.W.3d 473 (2004). Custody will not be modified unless it is shown that there are changed conditions demonstrating that a modification is in the best interest of the child. *Id.* In cases involving child custody and related matters, we review the case de novo, but we will not reverse a trial judge's findings in this regard unless they are clearly erroneous. *Jowers v. Jowers*, 92 Ark. App. 374, 214 S.W.3d 294 (2005). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* Because the question of whether

the trial court's findings are clearly erroneous turns largely on the credibility of the witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest. *Id.*

Custody should not be changed unless conditions have altered since the decree was rendered or material facts existed at the time of the decree but were unknown to the court, and then only for the welfare of the child. *Middleton v. Middleton*, 83 Ark. App. 7, 113 S.W.3d 625 (2003). The court must first determine that a material change in circumstances has occurred since the last order of custody, if that threshold requirement is met, it must then determine who should have custody with the sole consideration being the best interest of the child. *Id.* The party seeking the modification has the burden of showing a material change of circumstances sufficient to warrant a change in custody. *Id.*

Appellant argues that the trial court failed to find that a material change of circumstances had occurred and that the trial court also failed to consider the best interest of the children. We agree. A review of the trial court's order reveals that the trial court never made a finding that a material change of circumstances had occurred and based upon the record before us, we are unable to find that a material change of circumstances had occurred. It was undisputed at the hearing that the children were well-cared for and doing well in school. There was no evidence of the children's preference. Furthermore, the living conditions with appellee would be significantly less advantageous — nine people sharing four bedrooms and one bath in two single-wide mobile homes pushed together. Accordingly, we hold that the decision of the trial court to award custody of the parties' children to appellee was clearly erroneous, and we reverse and remand.

Appellant also argues that the trial court erred when it used the change of custody of the children to punish appellant for contempt of the court's orders. A violation of the court's previous directives does not compel a change in custody. *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003). The fact that a party seeking to retain custody of a child has violated court orders is a factor to be taken into consideration, but it is not so conclusive as to require the court to act contrary to the best interest of the child. *Id.* To hold otherwise would permit the desire to punish a parent to override the paramount consideration in all custody cases, *i.e.*,

the welfare of the child involved. *Id.* Instead, to ensure compliance with its orders, a trial court has at its disposal the power of contempt, which should be used prior to the more drastic measure of changing custody. *Powell v. Marshall*, 88 Ark. App. 257, 197 S.W.3d 24 (2004).

Without a finding of a material change of circumstances and a discussion of what was in the best interest of the children, the trial court could not use the mere violation of its previous orders as the sole justification for changing custody of the children. We are unable to say that appellant's contemptuous behavior alone was a material change of circumstance and, accordingly, we reverse and remand the trial court's decision.

Reversed and remanded.

HART and VAUGHT, JJ., agree.

Carmen GRAY *v.* Karl GRAY

CA 06-63 239 S.W.3d 26

Court of Appeals of Arkansas
Opinion delivered September 13, 2006

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

Amy Blackwood, for appellee.

LARRY D. VAUGHT, Judge. This case involves a child-custody dispute between parents who shared legal and physical joint custody of their three children. Appellant Carmen Gray appeals from an order of the Pulaski County Circuit Court specifically finding that there was no material change in circumstances to require a change of custody. The court decided to continue joint-legal custody in both parents but changed physical custody to appellee Karl Gray during the school year. On appeal, Carmen argues that the trial court erred in finding that there was no material change in circumstances to warrant a change of custody. We agree and reverse and remand.

Following their divorce in 2002, Carmen and Karl Gray were awarded joint custody of their three children. They shared a week on/week off visitation schedule that allowed the children to remain in the same school district and daycare facility. In September 2004, Carmen moved to Missouri to live with her parents due to financial problems, and the children stayed with Karl.

Complications arose because of Carmen's relocation. Although Carmen continued to see her children, her time with them was reduced from the previous arrangement due to the fact that the children were in school in Arkansas, and Carmen now lived in another state. When she was able to see the children, Carmen drove eight hours round-trip to pick them up and return them. She testified that, following the move, she was no longer allowed to participate in decisions regarding the children and that Karl made important changes without consulting her, including decisions about the children's extracurricular activities and daycare.

In December 2004, Karl filed a motion seeking sole-legal custody based primarily on Carmen's relocation to Missouri. She responded with a counterclaim asking for sole-legal custody. Both parties alleged that Carmen's move constituted a material change in circumstances that required a change in custody. On August 8, 2005, the trial court held a hearing on the motions and determined that neither party had shown a material change in circumstances to warrant a change of joint-legal custody to sole-legal custody. However, the trial court amended the initial custody arrangement to allow the parties to continue joint-legal custody but to designate Karl as primary custodian for purposes of school attendance, stating

that "true joint physical custody is not possible given the logistics" of Carmen's move.

Carmen now appeals from the trial court's order and contends that the court clearly erred in finding that no material change in circumstances had occurred and requesting that we award her full custody of her three children.

In child custody cases, we review the evidence de novo, but we will not reverse the findings of the court unless it is shown that they are clearly contrary to the preponderance of the evidence. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). We also give special deference to the superior position of the trial court to evaluate and judge the credibility of the witnesses in child custody cases. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999). We have often stated that we know of no cases in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great a weight as those involving children. *Mason v. Mason*, 82 Ark. App. 133, 111 S.W.3d 855 (2003). A finding is clearly against the preponderance of the evidence, when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Mason*, 82 Ark. App. at 140, 111 S.W.3d at 859.

Arkansas law is well settled that a judicial award of custody should not be modified unless it is shown that there are changed conditions that demonstrate that a modification of the decree would be in the best interests of the children. *Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999). Although the trial court retains continuing power over the matter of child custody after the initial award, the original decree is a final adjudication of the proper person to have care and custody of the child, and before that order can be changed, there must be proof of material facts that were unknown to the court at that time, or proof that the conditions have so materially changed as to warrant modification and that the best interest of the child requires it. *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001).

Joint custody or equally divided custody of minor children is not favored in Arkansas unless circumstances clearly warrant such action. *Thompson*, 63 Ark. App. at 92, 974 S.W.2d at 496. The mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare is a crucial factor bearing on the propriety of an award of joint custody, and such an

award is reversible error where cooperation between the parents is lacking. *Remick*, 75 Ark. App. at 395-96, 58 S.W.3d at 426.

In *Lewellyn v. Lewellyn*, 351 Ark. 346, 93 S.W.3d 681 (2002), divorced parents of two children shared joint-legal and joint-physical custody of their two children alternating physical custody on a month-to-month basis. After the mother remarried, she petitioned the court for sole custody of the children so she could move a couple of hours away to take a new job. The father counterclaimed seeking custody of both children. The trial court found that a material change in circumstances had occurred due to the mother's remarriage and move, and it granted sole custody of the children to the father and gave the mother standard visitation. Our supreme court held that the trial court had not erred and stated that "[w]e have no doubt that a material change in circumstances has occurred." The court made it clear that joint-custody-relocation cases are different from custodial-parent-relocation cases, stating:

> Amanda's first contention on appeal is that there was no material change in circumstances from the time of the divorce decree sufficient to set aside joint custody in the parents and to place sole custody in Tim. She argues, as a specific matter, that her relocation, standing alone, cannot constitute a material change in circumstances. For authority, she cites the court to *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). *See also Gerot v. Gerot*, 76 Ark. App. 138, 145-46, 61 S.W.3d 890, 896 (2001) ("[R]elocating in order to obtain better employment itself does not constitute a material change in circumstances."); *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999) (holding that the combined effect of the mother's move, the desires of the children to stay in their original location, and the long passage of time between the divorce decree and the modification, amounted to a material change in circumstances.).
>
> The problem with Amanda's case authority is that the *Jones* case did not involve joint custody in the parents where physical custody alternated on a month-to-month basis. Indeed, the *Jones-Gerot-Hollinger* line of cases all involved mothers with sole custody of a child or children who sought to relocate. That is not what we have in the case at hand. Here, both parents had custody, and each parent petitioned for sole custody, with Amanda being the parent who wished to relocate.

Lewellyn, 351 Ark. at 356, 93 S.W.3d at 686-87.[1] The court concluded that because of the remarriage and relocation, the parties' ability to cooperate and share actual physical custody of the children had eroded to the point that the trial court was correct in finding a material change in circumstances.

In the present case, the parties shared a type of joint custody — true shared legal and physical custody — that was impossible to maintain once Carmen moved several hundred miles away. In addition, Carmen complained that Karl failed to include her in decisions relating to the children, a requirement of their prior custody order. Our case law makes it clear that a joint-custody arrangement requires cooperation by both parents, *see Remick*, 75 Ark. App. at 395-96, 58 S.W.3d at 426, and that an award of joint custody where cooperation is lacking is reversible error. Moreover, both parents agreed that Carmen's relocation materially altered their ability to share joint custody of the children.

This case involved a true joint-custody arrangement, where each parent shared legal and physical custody of the children equally. Once one parent relocated outside of the general area and the parents could no longer cooperate in jointly raising the children, it was clear error for the trial court to find that a material change in circumstances did not exist requiring a change of custody. We, therefore, reverse and remand this case to the trial court to award custody based on its determination of the best interests of the children.

Reversed and remanded.

HART and NEAL, JJ., agree.

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[1] For this same reason, *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), does not apply to this case. In *Hollandsworth*, one parent had sole-physical custody, and the supreme court held that the custodial parent's move could not in and of itself establish a material change in circumstances. *Id.* at 486-87, 109 S.W.3d at 664.

Robert Lee WILLIAMS, Jr. *v.* STATE of Arkansas

CA CR 06-129 239 S.W.3d 44

Court of Appeals of Arkansas
Opinion delivered September 13, 2006

Dudley & Compton, by: *Cathleen V. Compton*, for appellant.

Mike Beebe, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. Appellant Robert Lee Williams Jr. was charged with capital murder, aggravated robbery,

and residential burglary. These crimes were allegedly committed on August 5, 2004, when Robert was sixteen years old. After being criminally charged as an adult in circuit court, he filed a motion to transfer the case to the juvenile division of circuit court. Following a hearing on the matter, the circuit court denied the motion. Williams now appeals, arguing that the circuit court erred in denying his motion to transfer. We affirm.

Testimony at the hearing established that Williams (along with Kevin Barton) entered the home of Alena Tate — a seventy-four-year-old woman with Alzheimer disease — with the intention of stealing her Cadillac. During the robbery, Tate was struck in the face and then fatally shot in the neck area. Williams and Barton waited and watched Tate for about five minutes after they shot her. Williams admitted to being involved but claimed that Barton was the one who actually shot Tate. Conversely, Barton claimed that Williams was the one who shot Tate.

Williams was born July 21, 1988, and — at the time the crime was committed — he had a ninth-grade education. After testing by Dr. Paul Deyoub, it was determined that Williams's I.Q. was somewhere between sixty-five and seventy, but possibly into the seventies.[1] Dr. Deyoub concluded that Williams had no mental disease or defect, was competent to proceed to trial, had no problems understanding the criminality of his actions, and had the ability to conform his conduct to the law. Even though Dr. Deyoub found that Williams had no mental defect, Dr. Deyoub did testify that Williams's I.Q. was "borderline," meaning that Williams was functioning intellectually at a lower-than-average range. Although Williams had no juvenile record in Clark County and his parents both testified that he had been a sweet child and mostly stayed out of trouble, Williams confessed to committing a second robbery-related homicide in Nevada County just prior to the crimes at issue in this appeal.

In its consideration of Williams's motion to transfer, the circuit court found that Williams's offenses were serious; that they were committed in an aggressive, violent, and premeditated man-

[1] Dr. Deyoub originally found that Williams's I.Q. score was fifty-nine, but after further researching Williams's school records and prior I.Q. scores, Dr. Deyoub raised Williams's estimated I.Q. The wide range in the I.Q. estimate is due to Dr. Deyoub's conclusion that Williams was malingering and faking ignorance while taking the examinations.

ner; and that the protection of society required prosecution in the criminal division of circuit court. The court noted that personal injury and death resulted from the crime and that the level of Williams's culpability was great. The court also considered the fact that Williams had committed another capital murder only a few weeks prior to the instant offense. Finally, the court concluded — based on Dr. Deyoub's examination — that at the time of the offense Williams did not suffer from a mental disease or defect, had the capacity to form the culpable mental state required of the crime charged, and had the ability to appreciate the criminality of his conduct and also the capacity to conform his conduct "with the requirements of the law."

A defendant bears the burden of proving the necessity of a transfer from circuit court to juvenile court. *Jongewaard v. State*, 71 Ark. App. 269, 29 S.W.3d 758 (2000). Once the defendant meets this burden, the State must show countervailing evidence that warrants the circuit court retaining the case. *Id.* A circuit court's decision to retain jurisdiction of criminal charges against a juvenile must be supported by clear and convincing evidence. Ark. Code Ann. § 9-27-318(h) (Supp. 2005); *Wright v. State*, 331 Ark. 173, 959 S.W.2d 50 (1998). Clear and convincing evidence is that degree of proof that will produce in the trier of fact a firm conviction as to the allegation sought to be established. *McClure v. State*, 328 Ark. 35, 942 S.W.2d 243 (1997). When reviewing the denial of a motion to transfer a case to juvenile court, we view the evidence in the light most favorable to the State and do not reverse unless the circuit court's decision is clearly erroneous. *Id.*

When determining whether a case should be transferred to the Juvenile Division the circuit court is compelled to consider and "make written findings on all of" the following factors:

> (1) The seriousness of the alleged offense and whether the protection of society requires prosecution as an extended juvenile jurisdiction offender or in the criminal division of circuit court;
>
> (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
>
> (3) Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;
>
> (4) The culpability of the juvenile, including the level of planning and participation in the alleged offense;

(5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against person or property, and any other previous history of antisocial behavior or patterns of physical violence;

(6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;

(7) Whether there are facilities or programs available to the judge of the juvenile division of circuit court that are likely to rehabilitate the juvenile prior to the expiration of the juvenile division of circuit court's jurisdiction;

(8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;

(9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and

(10) Any other factors deemed relevant by the judge.

Ark. Code Ann. § 9-27-318(g). Although the court must consider each of these ten factors, it is not required to give all ten factors equal weight. *Walker v. State*, 317 Ark. 274, 878 S.W.2d 374 (1994). However, following the 2003 amendments to the juvenile-transfer statute, a trial court is now required to make written findings on each of the ten factors set forth above. *See* Ark. Code Ann. § 9-27-318(h) (stating that the "court shall make written findings on all of the factors set forth in subsection (g) of this section").

At the outset we note that the trial court made written findings addressing each of the enumerated factors, save one. The trial court failed to make a written finding on factor seven, which requires the court to consider "whether there are facilities or programs available to the judge of the juvenile division of circuit court that are likely to rehabilitate the juvenile prior to the expiration of the juvenile division of circuit court's jurisdiction." However, the issue has not been raised — either below or on appeal. In reconciling the clear violation of the statutory mandate with Williams's failure to bring to the court's attention the technical inadequacy of its written order, we look to *Box v. State*, 71 Ark. App. 403, 30 S.W.3d 754 (2000). In *Box*, the appellant

argued that a 1999 amendment to the juvenile-transfer statute requiring that the court "shall make written findings" in decisions either to retain jurisdiction or transfer the case to juvenile court applied to his case and that the trial court's failure to make such a written finding amounted to reversible error. *Id.* at 406, 30 S.W.3d at 756. Our court reasoned:

> In our view, this provision can be likened to Ark. Code Ann. § 5-4-310(b)(5) (Repl. 1997), which requires that a court "shall furnish a written statement of the evidence relied upon and the reasons for revoking suspension or probation." It has been held that this right, like any other procedural right, can be waived by the failure to object. *Brandon v. State*, 300 Ark. 32, 776 S.W.2d 345 (1989); *Lockett v. State*, 271 Ark. 860, 611 S.W.2d 500 (1981); *Hawkins v. State*, 270 Ark. 1016, 607 S.W.2d 400 (Ark. App. 1980). We see no reason to apply a different rule here. A timely request or objection would have enabled the trial court to rule on the issue of whether the amendment applied and to correct whatever deficiency there may have been in the order. *See Hawkins v. State, supra.* Additionally, in *Butler v. State*, 324 Ark. 476, 922 S.W.2d 685 (1996), the appellant argued that the trial court was required to make written findings of fact to support its decision to deny a transfer to juvenile court as a matter of due process, based on the decision in *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). The supreme court declined to address the issue because there had been no objection made below, noting that even constitutional issues will not be heard for the first time on appeal. Thus, we conclude that appellant's failure to object precludes consideration of this point on appeal.

Following the sound logic of *Box*, we will not address the technical, statutory non-compliance of the trial court's order in this appeal because Williams's failure to object below precludes consideration of the issue on appeal.

On appeal Williams argues that the circuit court erred in its denial of his transfer motion because the court failed to properly weigh and consider the factors outlined in section 9-27-318(g). Specifically, Williams claims that because of his age, I.Q., immaturity and lack of sophistication, mental retardation, and ability to be rehabilitated, the circuit court's decision to refuse transfer was clearly erroneous.

[redacted] Here, the court's ultimate conclusion to deny transfer was supported by evidence showing that Williams had great

culpability in a serious crime — homicide — and had recently committed a second homicide. Additionally, there was medical testimony that placed Williams's I.Q. in the range of sixty-five to seventy, if not higher into the seventies. Dr. Deyoub testified that Williams was competent to stand trial, had the ability to appreciate the criminality of his conduct, and possessed the capacity to conform to the requirements of the law. *See Otis v. State*, 355 Ark. 590, 142 S.W.3d 615 (2004) (affirming the circuit court's denial of Otis's motion to transfer despite evidence that defendant suffered from borderline intellectual functioning and an I.Q. of sixty-eight based on seriousness of the crime and medical testimony establishing capacity to understand and conform conduct). Finally, the fact that Williams was sixteen years old when the crime was committed, coupled with the fact that he could not remain in the juvenile division past his twenty-first birthday, would result in an extraordinarily short time period for any sort of meaningful rehabilitation.

Therefore, viewing the evidence in the light most favorable to the State, the circuit court was not clearly erroneous in denying Williams's motion to transfer to juvenile division.

Affirmed.

HART and NEAL, JJ., agree.

PRO TRANSPORTATION, INC. *v.*
VOLVO TRUCKS NORTH AMERICA, INC.
and Volvo Truck Corporation

CA 05-1047 239 S.W.3d 537

Court of Appeals of Arkansas
Opinion delivered September 20, 2006

[Supplemental Opinion on Denial of Rehearing
December 6, 2006.]

Randy Coleman, P.A., and *Maynard, Cooper & Gale, P.C.*, by: *W. Percy Badham, III, Robert W. Tapscott, Jr.*, and *Brannon J. Buck*, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *Michael J. Emerson*, for appellees.

JOHN MAUZY PITTMAN, Chief Judge. Appellant Pro Transportation, Inc. (Pro), brings this appeal from a judgment entered on a jury verdict in favor of appellees Volvo Trucks North America, Inc., and Volvo Trucks Corporation (collectively, Volvo) and the denial of its motion for a new trial. We cannot reach the merits of this case because the appeal is not from a final, appealable order as required by Ark. R. App. P.–Civ. 2(a) and Ark. R. Civ. P. 54(b). We therefore dismiss the appeal for lack of finality.

Pro is a long-haul trucking company based in Arkansas. Volvo designs and manufactures trucks and engines. Between 1999 and 2001, Volvo supplied Pro with a number of trucks with model VED-12 C engines. Pro alleged that it had some issues with non-piston/liner components, *e.g.*, fuel-injector cups, valves, turbo-chargers, and other components. After a period of negotiations, Pro and Volvo executed a confidential settlement

and release (the "settlement/release") on June 12, 2002. The settlement/release called for the payment of a certain sum of money by Volvo and an extended service program on those components in exchange for Pro's release of all claims, present and future.

On May 13, 2003, Pro filed suit against Volvo and the dealer, University Truck Center, Inc., alleging causes of action based on fraud, misrepresentation, negligence, breach of express warranty, breach of warranty of fitness for a particular purpose, and breach of warranty of merchantability. The complaint alleged that, after execution of the settlement/release, Pro began experiencing problems caused by the piston/liner components, something not covered by the settlement/release, and that Volvo knew of these problems and concealed them from their customers such as Pro. The complaint alleged that these problems with the piston/liner components caused Pro to suffer lost profits due to increased repair time and costs, loss of value of the trucks, and increased driver costs. The complaint also sought a declaratory judgment that, based on Volvo's concealment of the problems with the piston/liner components, the settlement/release was null and void. Volvo answered, denying the material allegations of the complaint.

By order entered on November 1, 2004, the trial court bifurcated the trial into two stages: first, whether Volvo procured the settlement/release by fraud and, second, the issue of liability and damages caused by the piston/liner failures. The ruling was based on our supreme court's decision in *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992), holding that it was an abuse of discretion to try products-liability claims with a claim for breach of a settlement contract involving settlement of the same products claims.

The piston/liner case on liability and damages was tried to a jury January 10-21, 2005. Prior to the case being submitted to the jury, Pro dismissed via voluntary nonsuit all claims against University Truck Center. It also nonsuited its breach-of-warranty and negligence claims against Volvo. The jury returned a verdict in favor of Volvo and judgment was entered on the jury verdict. Pro filed a timely motion for new trial that the trial court denied. This appeal followed.

The question of whether an order is final and subject to appeal is a jurisdictional question, which we will raise on our own even if the parties do not. *Epting v. Precision Paint & Glass, Inc.*, 353

Ark. 84, 110 S.W.3d 747 (2003). When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the trial court may direct entry of a final judgment as to one or more but fewer than all of the claims only upon an express determination, supported by specific factual findings, that there is no just reason for delay, and upon an express direction for the entry of judgment. Ark. R. Civ. P. 54(b)(1). In the event the court so finds, it shall execute a Rule 54(b) certificate and set forth the factual findings upon which the determination to enter judgment as final is based. *See id.*

The supreme court has held that a party that has several claims against another party may not take a voluntary nonsuit of one claim and appeal an adverse judgment as to the other claims when it is clear that the intent is to refile the nonsuited claim and thus give rise to the possibility of piecemeal appeals. *See Haile v. Arkansas Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995); *Ratzlaff v. Franz Foods of Ark.*, 255 Ark. 373, 500 S.W.2d 379 (1973). *See also Driggers v. Locke*, 323 Ark. 63, 913 S.W.2d 269 (1996). This is so because a voluntary nonsuit or dismissal leaves the plaintiff free to refile the claim, assuming there has been no previous dismissal. *Haile, supra*; Ark. R. Civ. P. 41(a). The above cases were ones where partial summary judgment was granted and the plaintiff attempted to take nonsuits as to the remaining claims in order to appeal. However, there is no logical reason why the same reasoning should not apply in this situation where the case has been tried and certain claims nonsuited prior to submission to the jury. *See John Cheeseman Trucking, Inc. v. Dougan*, 305 Ark. 49, 805 S.W.2d 69 (1991) (holding that appeal from jury verdict on liability was not final where issue of damages and other claims remained to be tried).

Here, Pro has taken a nonsuit on its breach of warranty and negligence claims. Because the nonsuited claims may be refiled, this is an interlocutory appeal that we have no authority to entertain under Rule 2(a). Accordingly, we have no choice but to dismiss this appeal.

Dismissed.

GLOVER, J., agrees.

GLADWIN, J., concurs.

ROBERT J. GLADWIN, Judge, concurring. I concur with the majority because I believe the standard set by the supreme

court requires that we dismiss the appeal. I write separately however, because I believe that this case exemplifies an absurd application of Ark. R. Civ. P. Rule 54(b).

The question of whether an order is final and subject to appeal is a jurisdictional question that we will raise on our own even if the parties do not. *Epting v. Precision Paint & Glass, Inc.*, 353 Ark. 84, 110 S.W.3d 747 (2003). The supreme court has held that a party that has several claims against another party may not take a voluntary non-suit of one claim and appeal an adverse judgment as to the other claims when it is clear that the intent is to re-file the non-suited claim and thus give rise to the possibility of piece-meal appeals. *See Haile v. Ark. Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995). I submit that in the present case it is far from clear that the appellant's intent is to re-file the non-suited claim. Both parties were represented by extremely competent counsel. Prior to the case being submitted to the jury, appellant's counsel made the decision to dismiss all claims against University Truck Center and the breach-of-warranty claims against Volvo. This was a strategic trial decision by appellant's counsel. We can speculate why this decision was made, but it is certainly not clear that appellant's intent was to re-file the claim. I submit that it would be clearer for appellees to raise the affirmative defenses of res judicata and collateral estoppel, arguing both claim and issue preclusion, if appellant attempted to re-file.

I have found no Arkansas cases citing rule 54(b) following a jury trial. All of the cases found arise from motions for summary judgment. It is absurd to believe that appellant would take discovery, prepare for a trial, try the case to a jury verdict, appeal to our court, and conduct oral argument with the idea that it would go back and re-file a claim that was dismissed during trial. The supreme court has stated that a purpose of Rule 54(b) is to avoid the possibility of piece-meal appeals. *See Haile, supra.* This case created the exact piece-meal appeal that we should avoid. Trial counsel throughout Arkansas routinely non-suit claims before issues are submitted to juries. Based upon the current interpretation of Rule 54(b), it appears that they should dismiss with prejudice those claims if they anticipate the possibility of appeal.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
DECEMBER 6, 2006

Appeal from Pulaski Circuit Court, *Chris Piazza*, Judge;

Randy Coleman, P.A., and *Maynard, Cooper & Gale, P.C.*, by: *W. Percy Badham, III, Robert W. Tapscott, Jr.*, and *Brannon J. Buck*, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *Michael J. Emerson*, for appellees.

JOHN MAUZY PITTMAN, Chief Judge. On September 20, 2006, we dismissed this appeal for lack of a final order because appellant Pro Transportation, Inc. (Pro), nonsuited related breach-of-warranty and negligence claims that were subsequently dismissed without prejudice and no Rule 54(b) certification was obtained from the trial court. In its petition for rehearing, Pro argues that the order appealed from should be regarded as final because it would be precluded by the statute of limitations from refiling those claims. We deny the petition for rehearing but issue this supplemental opinion to address Pro's arguments.

Statutes of limitation generally constitute an affirmative defense rather than a jurisdictional bar. *Tatro v. Langston*, 328 Ark. 548, 944 S.W.2d 118 (1997); Ark. R. Civ. P. 8(c). Likewise, res judicata is an affirmative defense that must be raised in the trial court and does not present a question of jurisdiction. *Pryor v. Hot*

Spring Chancery Court, 303 Ark. 630, 799 S.W.2d 524 (1990). Thus, despite Pro's argument to the contrary, there is no jurisdictional impediment to its refiling the claims that it voluntarily nonsuited, and the possibility of piecemeal appeals, mentioned in *Haile v. Arkansas Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995), still exists.

Pro would have us examine, in each case and without benefit of citation or argument, the length and nature of the limitation period (and, presumably, any other affirmative defense that may be applicable) so as to decide the degree of likelihood that a nonsuited claim may be refiled. *Haile* does not require us to research these issues in order to determine our own jurisdiction, and such a procedure would be burdensome to this Court.

To invoke our jurisdiction, Pro was required to demonstrate that the order appealed from was final. This could have been easily done had Pro requested dismissal with prejudice of the nonsuited claims. It did not do so. It could also have been done had Pro obtained the certification of finality that Rule 54(b) requires when issues are outstanding. Pro could also, perhaps, have discussed the nonsuited claims in its brief, providing argument and authority to show that they were no longer viable and that the order appealed from was therefore final. However, even in this petition for rehearing, Pro maintains that the nonsuited claims are immune from the doctrine of res judicata. Here, Pro's case on all claims was fully presented to the jury. It was only after all the evidence was submitted and both sides had rested that Pro moved the trial court for dismissal without prejudice of the outstanding claims. We think that Pro's attempt to preserve these claims evinces a clear intent to refile and, in the absence of any showing to the contrary, its appeal was properly dismissed.

Rehearing denied.

HART, GLADWIN, GLOVER, and NEAL, JJ., agree.

VAUGHT, J., dissents.

LARRY D. VAUGHT, Judge, dissenting. I dissent from the denial of rehearing. Although the reasoning and authority of the majority appears to be sound on its face, I respectfully disagree because I believe that the law must make sense. If the progression of law is not logical it cannot be sustained, and the decision in this case is not a logical extension of prior case law. Like Judge Gladwin in his

concurring opinion, I believe this case mandates an absurd conclusion. However, I would take the next logical step and correct the absurdity, or at least invite the Arkansas Supreme Court to do so.

I am most troubled by the fact that in this case there was no intent to refile shown. The majority, in its initial opinion of September 20, 2006, relies on *Haile v. AP&L*, 322 Ark. 29, 907 S.W.2d 122 (1995), and *Ratzlaff v. Franz Foods of Ark.*, 255 Ark. 373, 500 S.W.2d 379 (1973), for the general rule that a party with several claims against another party may not take a voluntary non-suit on one claim and appeal judgment as to the other claim *when it is clear that the intent is to refile the non-suited claim.*[1] The emphasized language is never again mentioned in the opinion and because the issue was raised sua sponte by the court, neither party addressed its impact in their briefs. This case summarily abolishes the "clear intent to refile" requirement.

Both *Haile* and *Ratzlaff* are clearly distinguishable. *Haile* was a partial summary-judgment case where the appellant's attorney admitted in oral argument that he intended to refile the non-suited claims. Likewise, *Ratzlaff* is also a partial summary-judgment case where the court specifically held that the appellant sought to circumvent the policy of a statute by holding two counts in abeyance while seeking the supreme court's opinion on the validity of the third count. Both of these cases rely on the "clear intent to refile" language, which is completely ignored by the majority here.

The other obvious distinction between *Haile*, *Ratzlaff*, and the case at bar is that this case went to a jury and a judgment was rendered. The majority, citing *John Cheeseman Trucking v. Dougan*, 305 Ark. 49, 805 S.W.2d 69 (1991), concludes that there is no logical reason why the rule of *Haile* should not be applied to jury cases. But again, there is no mention of the "clear intent to refile" language. In *Cheeseman* liability and damages were bifurcated and the appellant sought to appeal the liability judgment before the damages trial. Clearly, such a factual predicate has no logical bearing on the case at bar.

The importance of the "clear intent to refile" language is clarified by a brief look back in history. In *Ratzlaff*, Justice George Rose Smith quoted from *Woodruff v. State*, 7 Ark. 333 (1846):

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[1] In the majority's supplemental opinion, they characterize Pro's dismissal without prejudice of some of its claims as a *clear* intent to refile. This defies logic — a conclusion that requires inference can never be clear.

> It is not in the power of a party to single out a single issue, even by the most solemn contract of record, and submit it to the consideration of the supreme court, so as to elicit the opinion of the supreme court upon the law or the fact of the particular issue. Such a judgment would not be final, as not embracing all the issues in the case, and consequently it could not become the subject of an appeal or writ of error. The real object of the parties was to take the opinion of the supreme court upon the question of law arising upon the demurrer to the second plea, but in order to receive the benefit of that decision it became absolutely necessary that the circuit court should pass upon all the issues joined.

Ratzlaff, 255 Ark. at 375, 500 S.W.2d at 380. Justice Smith also cited *Yell v. Outlaw*, 14 Ark. 621 (1854), which commented upon the quote from *Woodruff*. These two cases are the seminal cases on the issue at hand.

In *Woodruff*, the parties agreed by written contract to demur to a question of law then submit that question only to the supreme court and if reversed, remand the case back to the trial court for trial of the factual issues. The supreme court held that the order was not final and that the parties could not piecemeal the appellate process. Thus, the "clear intent" of the parties was to circumvent the appellate process and to "refile" the factual issues after the legal issues were decided.

In *Yell*, perhaps the only case where an actual jury was seated, several issues were joined for trial with separate defenses to each, but before the evidence was presented to the jury, the defendant raised the legal defense of *nul tiel record* (no such record). The court found for the defendant on this legal issue, and the plaintiff refused to proceed with trial and elected to file a petition for writ of error with the intent to try the factual issues if a reversal was obtained. Judgment was entered for the defendant on the whole case. The supreme court reasoned:

> In this case, where the judgment of the court below, in favor of the defendants, upon one good plea, going to the whole cause of action, was sufficient to bar it, and the plaintiff could not force the defendants, having the right to plead several matters, to withdraw their other defenses, the only course left for the plaintiff was to proceed with the trial, and to obtain or submit to a verdict of a jury upon the issues of fact, which they had been sworn to try.

Yell, 14 Ark. at 624. The court held that the most favorable construction for the plaintiffs was that they elected to take a non-suit although

that may not have been their intention. Although the question of law the plaintiffs attempted to appeal was erroneously decided, the court reasoned that "no writ of error lies to reverse the judgment consequent upon it." *Id.* In other words the plaintiffs, by making a conscious choice to piecemeal the case, lost their right to appeal the judgment of the court.

These two cases are the underpinnings of the rules that we are bound to follow in this case. Both decisions relied on the conscious decisions of parties to piecemeal an appeal. In *every* case cited and *every* case found, the record reflects that there was a clear intent of the party who non-suited a claim to refile that claim. Because that intent is not present in this case, I would grant the petition for rehearing.

Daniel FIELDS *v.* Terri Rankin BYRD

CA 03-711 239 S.W.3d 543

Court of Appeals of Arkansas
Opinion delivered September 20, 2006

Ledbetter, Cogbill, Arnold & Harrison, L.L.P., by: *Ronald D. Harrison* and *Kimberly A. McMillen*, for appellant.

Gregory S. Kitterman, for appellee.

ROBERT J. GLADWIN, Judge. Appellant Daniel Fields filed this appeal disputing the trial court's order denying his motion to set aside default judgment and motion to dismiss, and granting appellee Terri Rankin Byrd's motion to strike appellant's amended answer and her motion to substitute parties. We reverse and dismiss.

Appellee underwent oral surgery performed by appellant on April 6, 1999, which she claims left her with a burning sensation on her tongue. After the alleged malpractice occurred, appellee executed and filed a Chapter 7 voluntary bankruptcy petition on March 24, 2000. The petition did not list or schedule her medical-malpractice claim as an asset or contingent asset of the estate. When appellee testified about her assets in bankruptcy court at the first creditors' meeting, she denied having any claims or litigation against anyone. She never disclosed her medical-malpractice claim

to the trustee. Appellee was discharged from bankruptcy on July 11, 2000. She filed her medical-malpractice claim against appellant on January 29, 2001. No answer was filed. Appellee's motion for default judgment against appellant was filed March 20, 2001. After appellant received the motion, he filed a belated answer on April 9, 2001. The trial court granted a partial default judgment on liability in an order entered January 2, 2002. Appellant filed a motion for continuance and to set aside the default judgment and dismiss, or alternatively to give notice to the United States bankruptcy trustee of the pendency of the action on July 24, 2002. On July 31, 2002, appellant filed an amended answer. Appellee filed a motion to strike the amended answer and a motion to substitute parties, seeking to substitute Richard L. Cox, bankruptcy trustee, as the real party in interest. After a hearing on all the motions, the trial court entered an order on March 10, 2003, denying the appellant's motion to set aside the default judgment and denying his motion to dismiss. Further, the trial court granted appellee's motion to strike the amended answer and her motion to substitute parties. After the trial court ruled in the hearing in favor of the appellee as to liability, the appellant moved for a stay in order to appeal before the hearing on damages, and the trial court allowed it.[1]

Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure – Civil provides that an appeal may be taken only from a final judgment, order, or decree entered by the trial court. *Smith v. Smith*, 337 Ark. 583, 990 S.W.2d 550 (1999). Whether a final judgment, decree, or order exists is a jurisdictional issue that this court has the duty to raise, even if the parties do not, in order to avoid piecemeal litigation. *Id.* Arkansas Rule of Civil Procedure 54(b) states that an order which disposes of fewer than all of the claims of all of the parties is not a final appealable order unless the court makes an express determination that there is a danger of hardship or injustice, which an immediate appeal would alleviate. *See Freeman v. Colonial Ins. Co.*, 319 Ark. 211, 890 S.W.2d 270 (1995). When the trial court does not make the required certification, the order is not final for appellate purposes. *Id.*

Conversely, Arkansas Rule of Appellate Procedure – Civil 2(a)(4) provides that an appeal may be taken from a circuit court to the Arkansas Supreme Court from an order which strikes out an answer, or any part of an answer, or any pleading in an action. The

[1] The trial court's order reflects that the motion for a stay of further proceedings was granted to allow the appellant to file a petition for a writ of prohibition.

Arkansas Supreme Court has held that the specific provision for appeal when an answer is stricken must control over the general provisions contained in Ark. R. App. P.–Civil 2(a)(1) and Ark. R. Civ. P. 54(b). *Arnold Fireworks Display, Inc. v. Schmidt*, 307 Ark. 316, 820 S.W.2d 444 (1991). Therefore, even though the trial court's ruling is not a final, appealable order because damages have not been tried, the specific rule supplied in Ark. R. App. P.–Civ. 2(a)(4) controls.

Appellant's first point on appeal is whether the trial court erred in striking appellant's amended answer to the complaint, denying the motion to set aside default judgment and dismiss, and granting appellee's motion to substitute parties, because appellee did not have standing and the trial court was without jurisdiction due to appellee's failure to follow federal substantive bankruptcy law concerning pre-bankruptcy petition claims. The standard of review for denial of a motion to set aside a default judgment is whether the trial court abused its discretion. *B & F Eng'g, Inc. v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992). Appellant argues that this case is analogous to wrongful-death claims and survival claims in that, where plaintiffs fail to follow substantive procedures for filing, the complaints are a nullity and courts are without jurisdiction to consider them. *Ramirez v. White County Circuit Court*, 343 Ark 372, 38 S.W.3d 298 (2001).

Congress, pursuant to the United States Constitution, Article 1, Section 8, establishes uniform laws on the subject of bankruptcy. The bankruptcy trustee is the primary person responsible for marshaling the assets of the bankrupt estate and for administering the claims and debts of the debtor. 11 U.S.C. § 541(a) (1994). The debtor has the duty to schedule assets and to cooperate with the trustee in the performance of his statutory duties. 11 U.S.C. § 521(1), (3) (1994). The estate encompasses all legal or equitable interest of the debtor in property as of commencement of the case. 11 U.S.C. § 541(a)(1).

All property of the estate remains in the estate and does not vest in the interest of the debtor unless: (1) after notice and hearing the trustee abandons the property; (2) the court orders abandonment of property that is burdensome to the estate or of inconsequential value and benefit; or (3) the property is scheduled as an asset and is not otherwise administered in the bankruptcy. 11 U.S.C. § 554(a)-(c) (1994). However, unscheduled assets never

vest in the debtor and the property remains in the estate even after the bankruptcy case is closed for all other purposes. 11 U.S.C. § 554(d).

When a trustee is appointed to administer the property of the estate in bankruptcy, he has the exclusive right to prosecute causes of action that are the property of the bankrupt estate. 11 U.S.C. §§ 323(a)-(b), 704(1) (1994). Causes of action that accrue prior to the filing of a petition for relief under the Bankruptcy Act are property of the estate. *Bratton v. Mitchell, Williams, Selig, Jackson & Tucker*, 302 Ark. 308, 788 S.W.2d 955 (1990). These claims include those that were filed by the debtor after discharge, as long as the cause of action had accrued prior to the filing of bankruptcy. *U.S. ex rel. Gebert v. Transport Admin. Servs.*, 260 F.3d 909 (8th Cir. 2001). The cause of action must have been abandoned by the trustee in order for it to be pursued by the debtor. *Bratton, supra.*

Appellant argues that, like a wrongful-death action, bankruptcy law is statutory, and thereby strictly construed. *Cockrum v. Fox*, 359 Ark. 508, 199 S.W.3d 69 (2004). Failure to follow the proper procedures prevents the court from having jurisdiction over the claims. *Ramirez, supra.* Here, the claim could only have been brought by the trustee of the estate in bankruptcy. Appellee's failure to follow federal law renders her initial complaint void ab initio. By substituting the trustee, she attempts to save her claim from being time barred. However, the Arkansas Supreme Court has held that a complaint filed by a party who did not have standing at the time the complaint was filed does not interrupt the statute of limitations, and motions to substitute the real party in interest are treated as the filing of a new suit. *See St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County,* 348 Ark. 197, 73 S.W.3d 584 (2002); *Ark-Homa Foods, Inc. v. Ward*, 251 Ark. 662, 473 S.W.2d 910 (1971); *Floyd Plant Food Co. v. Moore*, 197 Ark. 259, 122 S.W.2d 463 (1938).

The court in *Floyd Plant Food Co., supra,* held that because the corporation named as the plaintiff in the lawsuit had dissolved before the complaint was filed, and the Federal Chemical Company took over all its assets, including the notes that were the subject of the lawsuit, the statute of limitations was not tolled by the filing of the suit by a party with no interest. An actual party in interest cannot be substituted for one who has no cause of action at a time when the action would have been barred by limitations but for the previous institution of proceedings. *Floyd Plant Food Co.,*

supra. Further, the Eighth Circuit Court of Appeals held in *U.S. ex rel. Gebert, supra*, that a debtor is judicially estopped from pursuing pre-petition claims where the debtor failed to disclose the claim in the bankruptcy.

Here, the cause of action accrued on the date of the oral surgery, April 6, 1999. Appellee filed her bankruptcy petition on March 24, 2000, and obtained discharge on July 11, 2000. She did not list the alleged malpractice claim as an asset or contingent asset of the estate. Therefore, the alleged medical-malpractice claim accrued before appellee filed for bankruptcy relief and she was required to disclose the claim to the trustee. Appellee did not have standing to file the lawsuit against appellant, only the trustee did. Appellee did not petition the bankruptcy court to obtain an order abandoning the property under 11 U.S.C. § 554. When, after appellant's objections to her standing, appellee filed a motion to substitute the bankruptcy trustee as the real party in interest, the statute of limitations for medical-malpractice claims had run. Therefore, appellee did not having standing to file the complaint, and the trial court erred in granting the motion to substitute the trustee as the real party in interest, as the statute of limitations prevents a medical-malpractice claim from being filed more than two years after the alleged wrongful act. Ark. Code Ann. § 16-114-203 (Supp. 2001). Further, the court erred in denying the appellant's motion to set aside default judgment and dismiss based upon the appellee's lack of standing.

Because the malpractice claim was void ab initio, this court does not address the remaining points on appeal.

We reverse and dismiss.

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

RIVER VALLEY MOTORS, INC. d/b/a Honda World *v.* Peggy RAMEY

CA 05-1410 239 S.W.3d 555

Court of Appeals of Arkansas
Opinion delivered September 20, 2006

Perkins & Trotter, PLLC, by: *Julie DeWoody Greathouse* and *James D. Rankin, III,* for appellant.

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

SAM BIRD, Judge. Appellant River Valley Motors, Inc., d/b/a Honda World (Honda World), appeals from both a judgment ordering it to pay compensatory and punitive damages to appellee Peggy Ramey and the subsequent denial of its motion for judgment notwithstanding the verdict and a new trial. Honda World contends (1) that the evidence at trial was insufficient to support the jury's verdict; (2) that the jury's verdict was against the preponderance of the evidence; (3) that the reinstatement of Ramey's revocation claim after the trial court granted Honda World's motion for a directed verdict was in error; and (4) that the punitive damages award without compensatory damages for fraud was improper. Because Honda World failed to challenge the trial court's ruling that its motion for judgment notwithstanding the verdict and a new trial was untimely, and because the filing of its notice of appeal was also untimely, we dismiss the appeal.

On July 19, 2004, Ramey filed an action for fraud against Honda World after becoming unhappy with a car that she had purchased at the dealership. In her complaint, Ramey alleged that she had revoked acceptance of the vehicle and she sought to be restored to "her position prior to the contract." She also tendered return of the vehicle and sought a refund of the $14,000 contract price for the vehicle. In addition, she claimed that Honda World "intentionally pursued a course of conduct for the purpose of causing damage" and requested punitive damages.

At trial, Ramey explained that she purchased the car on March 29, 2003, and, at that time, the salesperson told her that the car had not been "wrecked." Within two weeks of purchasing the car, Ramey experienced problems with it, discovered that it had previously been involved in an accident, and returned to Honda World to say that she "wanted out of the car." She claimed that Honda World promised to help her find another car, but they were "unable to find another car to meet [her] satisfaction." Ramey admitted that she had a minor accident after purchasing the car. She also admitted that, for the two-and-a-half years prior to the time of the trial, she had kept the car, made payments on it, and treated it as her own. Ramey put approximately 26,000 additional miles on the car during this time.

Honda World subsequently moved for a directed verdict on Ramey's revocation claim and fraud claim. The trial court granted the motion with respect to the revocation claim, but denied the motion on the fraud claim.

Several employees of Honda World testified that they did not know the car had previously been involved in an accident. Darrell Gill, the sales manager at Honda World, testified that he did his "best" to find a new car for Ramey and that she never said, "Here's the car. Give me my money back."

After Honda World rested, Ramey asked the court to reconsider its ruling on the directed-verdict motion for the revocation claim, asserting that Honda World "opened the door" when it asked Gill whether Ramey had ever asked for her money back. The trial court reinstated the revocation claim, and Honda World objected. Honda World then moved for a directed verdict on the issue of punitive damages, and the court denied the motion.

The jury awarded Ramey $13,500 in compensatory damages for revocation of acceptance and $20,000 in punitive damages, but did not award compensatory damages for fraud. Judgment against

Honda World for these sums was entered on August 3, 2005. On August 18, 2005, Honda World filed a "Motion for Judgment Notwithstanding the Verdict and New Trial," claiming, among other things, that the jury's verdict was clearly contrary to the preponderance of the evidence presented during trial and that the award of punitive damages was contrary to law. Ramey responded, arguing that Honda World's motion was not timely filed, noting that the lapse of time between the filing of the judgment (August 3) and the filing of Honda World's motion (August 18) was more than ten days, excluding weekends and holidays. Ramey also argued that, even if Honda World's motion was timely, the motion should be denied on its merits.

At a hearing on Honda World's motion, Honda World presented evidence that, although its motion was not file-marked until August 18, 2005, the motion was actually delivered to and received in the circuit clerk's office at 2:26 p.m. on August 17 but, due to a "clerical oversight," was not file-marked until August 18. Honda World argued that under these circumstances, its JNOV and new-trial motion should be treated as timely filed and considered by the court on its merits. In ruling on Honda World's motion, the court made two findings: first, that Honda World's motion, having not been file-marked until eleven days after the entry of judgment, was not timely filed as required by Rules 50 and 59 of the Arkansas Rules of Civil Procedure; and second, that Honda World's JNOV and new-trial motion was without merit.

On appeal, Honda World contends (1) that the evidence at trial was insufficient to support the jury's verdict; (2) that the jury's verdict was against the preponderance of the evidence; (3) that the reinstatement of the revocation claim after the trial court granted Honda World's motion for a directed verdict was in error; and (4) that the punitive damages award without compensatory damages for fraud was improper. Ramey argues in her responsive brief that Honda World's notice of appeal was untimely because it was not filed within thirty days following the entry of the judgment from which it appeals.

Significantly, Honda World has failed to challenge on appeal the trial court's conclusion that its JNOV and new-trial motion was not timely filed. Consequently, as a preliminary matter, we must determine whether this court has jurisdiction to consider this appeal. Ramey claims that Honda World's appeal should be dismissed because its notice of appeal was not timely filed. As Ramey points out, a notice of appeal must be filed within thirty

days of the entry of judgment appealed from. *See* Ark. R. App. P. – Civ 4(a). However, the time to file a notice of appeal is extended upon the *timely* filing of a motion for judgment notwithstanding the verdict pursuant to Rule 50(b) of the Arkansas Rules of Civil Procedure or the *timely* filing of a motion for a new trial pursuant to Rule 59(a). *See* Ark. R. App. P.–Civ. 4(b) (emphasis added). Specifically, when such a motion is timely filed, the notice of appeal must be filed within thirty days from the entry of the order disposing of the motion or from the date the motion is deemed denied. *See* Ark. R. App. P.–Civ. 4(b). Ramey claims that, because Honda World failed to file a *timely* motion for judgment notwithstanding the verdict and new trial in this case, the time to file its notice of appeal was not extended under Rule 4(b), and the failure to file a notice of appeal within thirty days of the August 3, 2005 judgment requires us to dismiss the appeal. We agree.

While we express no opinion as to whether the trial court erred in ruling that Honda World's JNOV and new-trial motion was untimely, it cannot be disputed that Honda World has not challenged the trial court's ruling on appeal. Because of the trial court's unchallenged ruling that Honda World's motion was not timely, the filing of the motion could not have the effect of extending beyond thirty days the time for filing the notice of appeal. Therefore, Honda World's notice of appeal would have been required to be filed not later than thirty days after the judgment was entered on August 3, 2005. The record reflects that Honda World's notice of appeal was not filed until October 3, 2005, clearly more than thirty days after the entry of judgment. Therefore, we must dismiss the appeal because we lack jurisdiction to consider it.

Appeal dismissed.

BAKER and ROAF, JJ., agree.

Kendrick C. STORY *v.* STATE of Arkansas

CA CR 06-101 239 S.W.3d 558

Court of Appeals of Arkansas
Opinion delivered September 20, 2006

David W. Talley, Jr., for appellant.

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

SAM BIRD, Judge. Kendrick C. Story appeals the revocation of his suspended imposition of sentence in the Columbia County Circuit Court. He contends 1) that the trial court erred in permitting the State to reopen its case after he moved for a directed verdict, and 2) that the evidence presented before the reopening of the case was insufficient to find that he violated the terms and conditions of the suspended imposition of sentence. We affirm the revocation.

In February 1999 Story was convicted of two felony counts of theft pursuant to a negotiated plea; he was sentenced on each count to a term of imprisonment and to a suspended imposition of

sentence. The State filed a petition for revocation on June 2, 2005, and an amended petition on July 1, 2005, which read in part:

> *Amended Petition for Revocation of Suspended Imposition of Sentence*
>
> . . . .
>
> 1. That on February 25, 1999, the defendant was found guilty of Theft of Property (2 Counts) and was sentenced to a term of ten (10) years on each count in the Department of Correction and a term of five (5) years suspended imposition of sentence on each count.
>
> 2. Since that date, it is alleged that the defendant has violated the terms and conditions of his suspended imposition of sentence as follows:
>
> (a) The defendant has tested positive and admitted use of controlled substances on numerous occasions since his release.
>
> (b) The defendant committed the offense of Aggravated Robbery, at gunpoint, in Magnolia, Arkansas on May 11, 2004.

At a revocation hearing before the trial court on July 8, 2005, the State presented evidence that Story had violated the terms and conditions of the suspended imposition of sentence. Several witnesses testified regarding the robbery of the Sonic Drive In restaurant in Magnolia on May 11, 2004. Burt Errington, a parole/probation officer in Columbia County, testified as follows:

> I have records from '98 through the present indicating that Mr. Story has violated the terms and conditions of the S.I.S. by using controlled substances. He either admitted or was tested and/or tested positive for the use of drugs on 4-25-01, 2-24-03, 3-17-03, 5-22-03, 5-29-03, 2-2-04 and 5-12-04. Over that period of time it's been marijuana, cocaine and methamphetamine.

The State rested its case at the conclusion of Errington's testimony.

Story moved for a directed verdict, stating the following basis:

> An essential element of the case for the prosecution would be that [Story] is in fact, still under the terms and conditions of his

> suspended imposition of sentence. That would have been five years. That five years would begin on the day that he was released from prison. There has been no testimony by the State of what that day was[.]

The State responded that it was incumbent upon the defense to show that he had been out of prison for five years, and Story countered that the burden was on the State to show the day of release.

After hearing further argument, the court announced that it was taking the motion for a directed verdict under advisement. Story made a second motion for a directed verdict, this time on the basis that the State had not met its burden of proving that he had committed aggravated robbery. The trial court denied the second motion. Story presented his defense, renewed both motions for a directed verdict, and asked for a ruling. Again, the trial court announced that it would take under advisement the issue regarding the date of Story's release from prison.

On August 24, 2005, the State filed a motion to reopen the record "to enable the State to present additional testimony substantiating the fact that the State of Arkansas did file a Petition to Revoke Suspended Sentence within a time frame not exceeding five years from the date the Defendant was released on parole." By written order of October 5, 2005, the trial court granted the motion and noted the State's failure to establish at the earlier hearing the precise periods of time during which Story had been incarcerated.

The hearing to allow the State to present additional testimony was conducted on October 14, 2005. Officer Errington again was called by the State. He stated that he had reviewed the records from the Arkansas Department of Correction. He testified that Story "was released on parole on 3-27-01. If we were to go five years and we said that's the date, then the Petition to Revoke on S.I.S. would have been to 3-27-06. The Petition . . . has been filed certainly within that five years."

At the conclusion of the hearing, the court found from the additional evidence and the evidence presented at the previous hearing that Story had violated the terms and conditions of his suspended imposition of sentence by using drugs and by committing armed robbery. In a written judgment and commitment order of October 17, 2005, the trial court revoked Story's suspended imposition of sentences on the two underlying convictions of

felony theft and sentenced him to five years' imprisonment in the Arkansas Department of Correction.

Story submits in his first point on appeal that the State should not have been permitted to correct its initial failure to establish the period of time that he was incarcerated, a deficiency of proof that he had raised in a motion for a directed verdict. We agree with the State that no error occurred.

A motion for a directed verdict allows the trial court the option of either granting the motion or allowing the prosecution to reopen its case to supply the missing proof. *McClina v. State*, 354 Ark. 384, 123 S.W.3d 883 (2003). When specific grounds are stated in a directed-verdict motion and absent proof is pinpointed, the trial court can either grant the motion, or, if justice requires, allow the State to reopen its case and supply the missing proof. *Id.* (citing *Webb v. State*, 327 Ark. 51, 938 S.W.2d 806 (1997); *Walker v. State*, 318 Ark. 107, 883 S.W.2d 831 (1994); *Brown v. State*, 316 Ark. 724, 875 S.W.2d 828 (1994); *Standridge v. City of Hot Springs*, 271 Ark. 754, 756, 610 S.W.2d 574 (1981)). The trial court's power to permit the State to reopen its case after the parties have rested is discretionary, and the decision to reopen will not be reversed absent an abuse of that discretion. *Holloway v. State*, 312 Ark. 306, 849 S.W.2d 473 (1993). The reasoning behind this rule is to permit omitted or overlooked evidence to get to the fact-finder before it reaches a decision, when the defendant is not surprised by the introduction or otherwise prejudiced or placed at a disadvantage that cannot be overcome. *Id.*

The additional evidence that the prosecution sought to introduce included dates of Story's sentencing and release on parole, a deficiency noted by Story in his motion for a directed verdict and an essential element of the timeliness of the State's filing its revocation petition. We hold that the trial court did not abuse its discretion in reopening the case to allow the additional evidence. Furthermore, we agree with the State that Story cannot claim that he was surprised or prejudiced by this additional evidence, as it related to dates of which he surely was keenly aware.

Story asserts in his second point on appeal that the State failed to timely present evidence at the first hearing that he was still subject to the period of suspended imposition when the State filed its revocation petition. However, evidence on this issue was presented at the subsequent hearing when the State was allowed to

present additional testimony. In light of our holding that reopening the case for the presentation of additional evidence was not in error, this point becomes moot.

Affirmed.

BAKER and ROAF, JJ., agree.

James HUEY *v.* Sandra HUEY (SHEIRON)

CA 05-1254 239 S.W.3d 547

Court of Appeals of Arkansas
Opinion delivered September 20, 2006

[Rehearing denied October 25, 2006.*]

* CRABTREE, J., would grant fees.

Gibson & Hashem, P.L.C., by: *C.C. Gibson, III*, for appellant.

Sara Hartness, for appellee.

WENDELL L. GRIFFEN, Judge. This is the second appeal in this child-support modification case. Appellant James Huey is the custodial parent of the parties' daughter, Lauren (d.o.b. 3/2/87). Appellee Sandra Huey (Sheiron) is the noncustodial parent. The procedural history of this case was briefly recited in the previous appeal as follows:

> The parties were divorced in December 2001. Appellant is retired and receives social security income for himself and Lauren. He also owns stocks valued at approximately two million dollars. Appellee is a physician with her own family practice. In addition, she owns a chicken farm and numerous stocks. Appellant was initially awarded custody of Lauren, and appellee was ordered to pay child support of $132 per week and to pay an additional $85 per month for one-half of Lauren's health-and dental-insurance premiums.

See Huey v. Huey, 90 Ark. App. 98, 204 S.W.3d 92 (2005).

After appellee's request for reconsideration was denied on December 12, 2001, she filed a motion to reduce her child-support obligation and to abate her obligation to pay insurance premiums. Appellant thereafter filed a motion for contempt for appellee's failure to pay any child support after the entry of the divorce decree and for failure to pay her share of Lauren's health costs. Appellee was determined to be in contempt for failure to pay these costs as ordered.

In the first appeal, we affirmed the trial court's findings that a change of circumstances occurred warranting modification of child support, but reversed the trial court's reduction of child support from $132 per week to $24 per week. We reversed because the trial court failed to consider appellee's income for the first quarter of 2003, as mandated by Administrative Order Number 10 of the Child Support Guidelines. In reversing, we cited to authorities that made it clear the trial court was to consider all sources of appellee's income.

On remand, the trial court considered appellee's income and expenses for the first quarter of 2003, concluded that appellee's medical practice and horse farm operated at a loss during that period, and thus, determined that child support should remain at

$24 per week, the minimum allowed pursuant to the Child Support Chart. Appellant again appeals based on the amount of child support awarded.

We affirm that portion of the trial court's order awarding child support of $24 per week for part of 2002. However, we reverse the trial court's order of child support and remand for the trial court to enter an award of $135 per week beginning January 2003. We hold that the trial court erroneously concluded that appellee experienced a negative income during the first quarter of 2003 and improperly assessed additional expenditures that had already been accounted for in appellee's income report.

On remand after the first appeal, the trial court entered "additional findings" in letter form on July 14, 2005, as follows:

> I. Findings of Fact
>
> *A careful review of [appellee's] income and expenses for the first quarter of 2003 indicate she continued to suffer a net loss.* The "Deposit Detail" exhibit indicates income during that period of $64,500.00. The "Expenses by Vendor Summary" exhibit indicates those expenses to be $39,238.61, after deduction of chemotherapy incurred by the husband of [appellee]. *However, the "Payroll Summary" exhibit indicates expenses of $18,160.17, after deduction of chemo-related payments. This amount is not included in the "Expenses by Vendor Summary." Further, a comparison of those income and expenses with the 2002 income tax return convinces the Court that many other expenses were not included in the "Expenses by Vendor Summary" exhibit. Those include insurance other than health, telephone, utilities, postage and legal and professional services. These items above amounted to $28,000.00 in 2002, one-fourth of which would be $7,000.00. In fact, if the first quarter of [appellee's] 2003 income and expenses are multiplied by four, there is very little difference from the totals indicated in the 2002 tax return. [Appellee's] medical practice suffered a loss that year, even after subtracting depreciation.*
>
> It is not disputed that [appellee's] medical practice suffered losses in 2001 and 2002. *The Court finds that losses continued through the first quarter of 2003.*
>
> II.
>
> The 2002 tax return indicates [appellee's] farm suffered a loss in 2002, even after excluding depreciation. She testified that the farm continued to lose money in 2003, and no evidence to the contrary was submitted.

III.

> The evidence submitted does not indicate there is equity in either the medical practice or the farm. [Appellee] is operating on borrowed money and owed approximately eight hundred thousand dollars at the time of the trial.

IV.

> The only other asset of [appellee's] is the Edward Jones account in the amount of ninety thousand dollars. She received several hundred thousand dollars of her portion of marital property. Only $90,000.00 is left and she hopes to use that for retirement. There is no evidence that such account is producing any income.

Conclusions of Law

I.

> The Supreme Court's Administrative Order No. 10 requires this Court to consider every resource available to appellee. It has done so, and *finds no resources with positive values.*

(Emphasis added.) These findings were later adopted in a written order dated October 18, 2005, from which appellant now appeals.

Child-support cases are reviewed *de novo* on the record. *Cole v. Cole*, 89 Ark. App. 134, 201 S.W.3d 21 (2005). It is the ultimate task of the trial judge to determine the expendable income of a child-support payor. *Id.* When the amount of child support is at issue, the appellate court will not reverse the trial judge absent an abuse of discretion. *Id.*

We recognized in the first appeal, and appellant does not dispute, that appellee experienced a negative income during 2001 and 2002. Accordingly, we affirm that portion of the trial court's order awarding child support of $24 per week from December 6, 2002, through the end of December 2002. However, we reverse that portion of the trial court's order relating to the child support award for 2003, and remand for the court to order an award of $135 per week beginning the first week of January 2003.

The trial court first erred in determining that appellee continued to suffer a negative income during the first quarter of 2003. In the prior appeal, we expressly recognized appellee's

testimony that her medical practice would experience a loss in 2003 was speculative and contrary to the information regarding her expenses and receipts during the first quarter of 2003. Nonetheless, on remand, the trial court failed to recognized that appellee's own evidence demonstrates that she had a positive income for the first quarter of 2003.

In determining appellee's income on remand, the trial court examined appellee's 2002 tax return and improperly determined that certain expenses that were present on the tax return were not present on appellee's expense summary for the first quarter of 2003, entitled "Expenses by Vendor Summary." The Vendor Summary was prepared by appellee for the purpose of obtaining a $600,000 loan from the Portland Bank, and on its face, included expenses that the trial court stated it did not contain — namely, payroll expenses and nonpayroll expenses, such as telephone services, utilities, postage, and professional services.

The trial court erroneously extrapolated and added approximately $7,000 in additional expenses that were *already accounted for* in the Vendor Summary report. The effect was to artificially inflate appellee's expenditures and, as a result, to artificially reduce her income. Once the duplicated expenses are removed from the calculation, appellee's records clearly demonstrate that her medical practice produced *positive* income for the first quarter of 2003. Further, common sense dictates that a person does not secure a $600,000 loan based on *negative* income.

Moreover, we are not inclined to agree with the trial court that the fact that appellee's horse farm operated at a loss warrants a decrease in child support where she otherwise has positive income from her medical practice. We cannot overlook the fact that appellee's farm is a voluntary operation on which she expended a substantial amount of money, while at the same time she failed to pay child support, failed to pay her share of the cost of her daughter's health insurance, and failed to even offer her daughter free medical care in her own clinic. For example, according to appellee's tax return, in 2002, she spent $43,075 on supplies for her horses and $1,106 on veterinary fees during the same time period in which she asserted that she could not pay child support. We cannot affirm an order that allows discretionary expenditures to circumvent the noncustodial parent's child-support obligation.

Based on our *de novo* review of appellee's proof of her actual income and expenses, and taking into consideration appellant's concession during oral arguments regarding a calculation error, we

determine appellee's income for the first quarter of 2003 to be $791.32 per week. According to the Child Support Chart, the presumptive amount of weekly child support for that income is $135.[1] Thus, we remand for the trial court to enter an order awarding child support beginning January 2003 in the amount of $135 per week.

Finally, both parties in this case request attorney's fees and costs. As appellee did not prevail, she is not entitled to attorney's fees or costs. We agree that appellant should be awarded $1,000 in attorney's fees for prevailing on this appeal.

Affirmed in part; reversed and remanded in part.

ROBBINS and CRABTREE, JJ., agree.

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[1] In his brief, appellant asserted that appellee's income was $2,282.07 per month, as follows:

First Quarter 2003 receipts	$64,500.00
Less nonpayroll expenses	-39,238.61
Less payroll expenses	-18,160.17
Less one-half of Lauren's health insurance ($85/month)	-255.00
First Quarter 2003 net income	$ 6,846.22
Divided by three for monthly income	$ 2,282.07

As appellant correctly notes, child support at this level would be set at $99 per week because the weekly income would be $526.55 ($2,282.07/4.334 = $525.65). However, during oral arguments, appellant noted that a mistake was made in these calculations because the full expense for ten months of the State Volunteer Mutual Insurance Company was listed as $4,918, instead of the quarterly amount of $1,475.40 ($491.80 x 3=$1,475.40).

Accordingly, assuming this insurance costs is a nonpayroll expense, the figures should be adjusted as follows:

First Quarter 2003 receipts	$64,500.00
Less nonpayroll expenses	-35,796.01
Less payroll expenses	-18,160.17
Less one-half of Lauren's health insurance ($85/month)	-255.00
First Quarter 2003 net income	$10,288.82
Divided by three for monthly income	$ 3,429.60

The monthly income of $3,429.61, in turn, equals $791.32 weekly. The presumptive weekly child support at this income level is $135.00. *See* Admin. Order No. 10, Child Support Chart.

Randy TUCKER *v.* Regina TUCKER
and Office of Child Support Enforcement

CA 05-1144 239 S.W.3d 532

Court of Appeals of Arkansas
Opinion delivered September 20, 2006

Tripcony Law Firm, P.A., by: *Heather M. May*, for appellant.

G. Keith Griffith, for appellee.

WENDELL L. GRIFFEN, Judge. Randy Tucker appeals from the order of the Pope County Circuit Court that increased his child-support obligation from $45 per week to $1,809.92 per month, based on a net-worth approach, and argues three points for reversal. Office of Child Support Enforcement (OCSE) cross-appeals from the trial court's refusal to make the modification retroactive to the date of the filing of the petition for modification. We affirm on the direct appeal and reverse and remand on the cross-appeal.

Tucker and his ex-wife, appellee Regina Tucker, were divorced by decree of the trial court on April 30, 1997. The decree awarded Regina Tucker custody of the parties' minor child and ordered Tucker to pay child support of $45 per week.

On October 2, 2003, OCSE intervened and filed a motion to modify Tucker's child-support obligation. The motion alleged that, since the entry of the decree in 1997, Tucker's income had increased by more than twenty percent or by more than $100 per month, thereby constituting a material change in circumstances. Tucker denied the material allegations of the motion.

A hearing was held on March 16, 2005. William Lawton, a certified public accountant, testified that he reviewed Tucker's tax returns and other information as requested by OCSE. From that information, he prepared a worksheet showing Tucker's monthly expenses to be $8,084. He also said that Tucker's 2003 Schedule C appeared reasonable, but that it could be used to hide income. According to Lawton, it appeared that Tucker paid his personal living expenses out of his business accounts. He also testified that Tucker may be living on borrowed money because his liabilities (such as loans and lines of credit) increased dramatically over the past five years.

Randy Tucker testified that he was a self-employed contractor and that he had been in the business since 1997. He acknowledged that his financial situation had "substantially changed" since that time. Tucker testified that he paid all of his bills, both business and personal, at the end of each month and that, if he needed money to make the payments, he drew from one of three bank loans or two lines of credit for his business. He also had three credit

cards that he used for both business and personal expenses. He stated that he updated his financial statements with the banks at the start of every year and periodically throughout the year, such as when he was going to purchase property for development as a subdivision. Tucker stated that the banks had a lot of faith in his ability to repay the debt.

Tucker listed his family's monthly expenses as $4,101 and explained that, after his wife's contributions, he needed to contribute $576 per week to meet the monthly expenses. He said that he tithed approximately $20,000 per year to his church, which was more than ten percent of his income, and that this figure was based on what he made three or four years prior to trial. In an answer to interrogatories, Tucker listed seven vehicles he owned, including two tractors and two all-terrain vehicles. He also testified that he owned two boats, purchased on the lines of credit. He denied having a lavish lifestyle, stating that, other than going to Branson to purchase school clothes, he had taken only one vacation in the last four years.

Ricky Taylor, Tucker's certified public accountant, testified that he generated a worksheet showing Tucker's 2003 net income as $509.46 per week, not including losses from Tucker's farming operation. He said that the calculation of Tucker's expenses was based on averages of what he spent each month, as well as the tax returns. He confirmed that Tucker paid all of his bills, business and personal, once a month, from one of his lines of credit, adding that he did not believe that Tucker made as much as he spent.

The trial court issued a letter opinion announcing its decision on July 15, 2005, in which it found that there was a material change in circumstances. The court found that there were discrepancies between Tucker's testimony and his tax returns to the extent that use of the returns to compute Tucker's income and child-support obligation would be unreliable. The court then proceeded to use the net-worth approach found in *Holland v. United States*, 348 U.S. 121 (1954). In using such an approach, the trial court relied on three financial statements, dated August 2003, April 15, 2004, and January 19, 2005, that Tucker issued to banks in the ordinary course of business. The court found that Tucker's net worth had increased by $214,000 over that period and calculated Tucker's average monthly income, after excluding income from Tucker's current wife, to be $12,066.11. Because Tucker's income exceeded the child-support chart levels, the court applied the child-support guidelines' percentage for one child (15%), to

arrive at a monthly obligation of $1,809.92. The court made the modification retroactive to January 19, 2005, instead of October 3, 2003, as sought by OCSE, because there was no proof offered to enable the court to conduct a net-worth analysis for the two-year period prior to the petition's filing. This resulted in an arrearage judgment of $9,689.52. Tucker was to pay this arrearage off at the rate of $200 per month. Judgment was entered accordingly.

Tucker argues three points on appeal: (1) that the trial court erred in disregarding his tax returns and applying Internal Revenue Code standards and procedures in determining his disposable income for child-support purposes; (2) that, if the net-worth approach in determining child support is used, this court should clarify or modify the method used by the trial court because it did not present the entire picture, and because the standards and procedures used produced erroneous and unreliable results; and (3) that the trial court erred in awarding an increase in support because such a ruling is clearly contrary to the preponderance of the evidence and creates an undue hardship on Tucker. On cross-appeal, OCSE argues that the trial court erred in not making the modification retroactive to October 2, 2003, the date the motion for modification was filed.

Child-support cases are reviewed de novo on the record. *Cole v. Cole*, 89 Ark. App. 134, 201 S.W.3d 21 (2005). It is the ultimate task of the trial judge to determine the expendable income of a child-support payor. *Id.* This income may differ from income for tax purposes. *See id.*; *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); *Cole*, *supra*.

Although Tucker argues that the trial court erred in disregarding his tax returns and applying Internal Revenue Code standards and procedures in determining his disposable income for child-support purposes and contends that the trial court has no discretion to ignore the tax returns, we disagree. The net-worth approach is specifically authorized by the guidelines.

Administrative Order Number 10, Section III(c), concerning child-support guidelines, provides that, for self-employed payors,

> support shall be calculated on the last two years' federal and state income tax returns and on the quarterly estimates for the current

> year. A self-employed payor's income should include contributions made to retirement plans, alimony paid and self-employed health insurance paid. . . . Depreciation should be allowed as a deduction only to the extent that it reflects actual decrease in value of an asset. Also, a *court shall consider the amount the payor is capable of earning or a net worth approach based on property, life style, etc.*

(Emphasis added.) Thus, by the plain terms of Administrative Order No. 10, a trial court is *required* to consider, in addition to a self-employed payor's tax returns, either his capacity to earn or a net-worth analysis based on factors such as the payor's lifestyle and property. However, a net-worth analysis should not be used interchangeably with a payor's tax returns. Rather, the net-worth method should be used only after a finding that the returns are unreliable. The trial court made such a finding in the present case.

Tucker also argues that, because the *Holland* Court recognized that the net-worth method was fraught with dangers, that method should not be used in calculating income for child-support purposes. However, the dangers to which the Court was alluding concern its use in criminal cases rather than any inherent flaws in the method itself. We cannot say that the trial court abused its discretion in calculating Tucker's income by the net-worth method.

In his second point, Tucker contends that, if the net-worth method in determining child support is used, this court should clarify or modify the method used by the trial court because it did not present the entire picture and because the standards and procedures it used produced erroneous and unreliable results. We disagree. We are not required to adopt a specific net-worth analysis or set of factors to be used in such an analysis in order to affirm the trial court in this case. As set forth in *Holland*, the net-worth method involves establishing a beginning net worth at the start of the relevant period and an ending net worth at the end of the relevant period, and considers living expenses and allowable deductions for the same period. 348 U.S. at 125. Tucker offers no persuasive argument why the same method cannot be used to establish the expendable income of a child-support payor. Nor does he point to any specific errors in the use of that method.

Tucker argues that the trial court should take into account certain items such as depreciation and the fact that he is living on borrowed money. However, these items presumably *are* considered in the net-worth approach. Any depreciation to vehicles or

equipment is taken into account over time as the value of the assets declines. The amount of depreciation deduction to be allowed is within the discretion of the trial court. *Gray v. Gray*, 67 Ark. App. 202, 994 S.W.2d 506 (1999). Likewise, the use of loans and other forms of credit is also considered in a net-worth approach because the amount of the loan indebtedness, along with all other liabilities, is deducted from the value of Tucker's assets in arriving at his net worth.

Finally, Tucker argues that the trial court's ruling is clearly contrary to the preponderance of the evidence and creates an undue hardship on him. The first part of the argument is simply a re-argument of the earlier points that the net-worth approach used by the trial court ignored the tax returns and did not consider certain deductions. As such, it need not be addressed. In the second part of the argument, Tucker, citing *Howard v. Wisemon*, 38 Ark. App. 27, 826 S.W.2d 314 (1992), argues that the amount of the increase in child support is "devastating" to his family and his business. However, he did not make this argument below. We do not address arguments made for the first time on appeal. *Sweeden v. Farmers Ins. Group*, 71 Ark. App. 381, 30 S.W.3d 783 (2000).

On cross-appeal, OCSE argues that the trial court erred by not making the modification retroactive to October 3, 2003, the date the petition was filed. This issue is reviewed for an abuse of discretion. *Heflin v. Bell*, 52 Ark. App. 201, 916 S.W.2d 769 (1996). Arkansas Code Annotated section 9-14-107(d) (Supp. 2005) provides that "[a]ny modification of a child-support order that is based on a change in gross income of the noncustodial parent *shall* be effective as of the date of filing a motion for increase or decrease in child support, *unless otherwise ordered by the court.*" (Emphasis added.)

The trial court decided not to make the modification retroactive to the date of the petition because, in its view, there was no evidence that enabled it to calculate Tucker's income for the two-year period prior to the petition's filing. This view is erroneous. First, there was evidence of the change in Tucker's income that predated the filing of the petition in the form of financial statements from January 2003 and earlier; however, that evidence was not necessary to perform a net-worth analysis. Second, the trial court's reasoning that the net worth was not established until January 19, 2005, is inconsistent with using *each* month within the relevant period to determine the average increase in net worth. It

is true that Tucker's *full* increase in net worth was not "realized" on his financial records until January 19, 2005, but he presumably enjoyed the benefits of the *incremental* increases in his income during the months in which they arose.

Thus, logic dictates that the averaging of the increased net worth over the entire calculation period must mean that the average increase applied to each month within the calculation period. To hold otherwise would penalize the child by denying increased support for a period of time in which Tucker actually enjoyed the benefits of his increased net worth, even if that increase did not materialize "on the books" until a later date. Therefore, we reverse the trial court's decision concerning the effective date of the modification and remand the case to the trial court with instructions to the trial court to enter an order making the modification retroactive to October 3, 2003.

Affirmed on direct appeal; reversed and remanded on cross-appeal.

ROBBINS and CRABTREE, JJ., agree.

Tina ENGLE *v.* THOMPSON MURRAY, INC.
and Continental Casualty Company

CA 06-81 239 S.W.3d 561

Court of Appeals of Arkansas
Opinion delivered September 20, 2006

Bassett Law Firm LLP, for appellant.

Laser Law Firm, P.A., by: *Frank B. Newell*, for appellees.

TERRY CRABTREE, Judge. Appellant Tina Engle was injured on August 7, 2003, while she was attending an offsite work event. Her claim for benefits was denied by the administrative law judge (ALJ), who determined that appellant had failed to prove that she sustained compensable injuries as defined by Ark. Code Ann. § 11-9-102(4)(B)(iii) (Supp.2005) because she was not performing employment services at the time of her accident. The Workers' Compensation Commission affirmed and adopted the decision of the ALJ by an opinion filed November 30, 2005. Appellant challenges the decision of the Commission, and she argues that it was error for the Commission to hold that she was not performing employment services at the time of her injury. Further, she contends that the Commission's decision is not supported by substantial evidence. We reverse and remand the decision of the Commission.

At the time of her injury appellant was employed with appellee as the executive coordinator for Charlie Anderson, the vice-president of the account service department. Appellee Thompson Murray encouraged each department to have an offsite event annually or biannually to promote team bonding and to set goals for the department. As the executive coordinator, it was appellant's responsibility to plan the offsite event for the account service department. Appellant met with Mr. Anderson to determine where the event would be held, what presentations would be delivered, and in what activities they would engage. During this meeting they reviewed a document prepared by Mr. Anderson entitled "Needed for Account Management Offsite," which outlined the schedule, responsibilities, and activities planned for the two-day event.

The group was scheduled to meet at the office and the company-provided vehicles were to be loaded by 8:30 a.m. At 8:30 a.m., the group would watch a video of company CEO Andy Murray before departing from the office at 9:00 a.m. for Gaston's Resort and Bull Shoals Lake. The schedule prepared by Mr. Anderson reflects that from 12:30 p.m. until 6:30 p.m. the group was going to be on a pontoon boat and WaveRunners at the lake. More specifically, the schedule directs that appellant was responsible for directing the group to the dock, checking in at the dock, nominating a driver for the boat, and obtaining a map of the lake with directions to a beach and "cliff/rocks to jump off." Appellant was expected to keep the event running smoothly and handle unanticipated issues that might arise. Participation in the retreat was mandatory and participants were paid while attending the event.

On the morning of August 7, 2003, the group met, loaded the rented vehicles, and watched the video of CEO Andy Murray. In the video, Mr. Murray congratulated and thanked the team for their work over the past year. Mr. Murray encouraged the group to return with a refined sense of what it means to be a leader, to use the offsite event to "recharge," and "most importantly have fun." The group departed as scheduled and after arriving at Gaston's Resort they went to Bull Shoals Lake. Appellant obtained maps of the lake as instructed by her supervisor so that they could find rocks or a cliff to jump off into the lake. After locating a bluff from which others were jumping, Mr. Anderson and another member of the team, Molly Anders, jumped from the bluff. While attempting a jump, appellant fell from the edge striking the rocks protruding from the cliff face below.

In appeals involving claims for workers' compensation, we review the evidence in a light most favorable to the Commission's decision and affirm the decision if it is supported by substantial evidence. *Hapney v. Rheem Manufacturing Co.*, 341 Ark. 548, 26 S.W.3d 771 (2000). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Searcy Industrial Laundry, Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003). The court will not reverse the Commission's decision unless it is convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Id.* When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of

review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Clardy v. Medi-Homes LTC Serv. LLC,* 75 Ark. App. 156, 55 S.W.3d 791 (2001).

In order for an accidental injury to be compensable, it must arise "out of and in the course of employment." Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2005). A compensable injury does not include injuries "inflicted upon the employee at a time when employment services were not being performed." Ark. Code Ann. § 11-9-102(4)(B)(iii). By adoption of the ALJ's opinion, the Commission reasoned that "employment services" are the activities and services "actually inherently necessary for the performance of the job for which the employee was hired. These activities must also either directly or indirectly advance the interest of the employer." Further, the Commission found that because appellant was not "expressly directed by her employer to attempt to jump from the cliff on Bull Shoals Lake" it is "obvious that this activity was neither directly nor indirectly necessary for her to perform her job duties." The Commission also held that the activity did not benefit the employer or advance its interests. We disagree.

An employee is performing "employment services" when he or she is "doing something that is generally required by his or her employer." *Pifer v. Single Source Transportation,* 347 Ark. 851, 69 S.W.3d 1 (2002). We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." *Id.* The test is whether the injury occurred "within the time and space boundaries of employment, when the employee was carrying out the employer's purpose or advancing the employer's interest either directly or indirectly." *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999). The strict construction requirement of Act 796 does not require that we review workers' compensation claims and appeals as simply a matter of determining whether the worker was performing a job task when the accident occurred. *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 225 S.W.3d 361 (2006) (citing *Matlock v. Arkansas Blue Cross Blue Shield,* 74 Ark. App. 322, 49 S.W.3d 126 (2001)). Whatever "employment services" means must be determined within the context of individual cases, employments, and working relationships, not generalizations made devoid of practical working conditions. *Matlock, supra.*

Appellant was indeed acting within the course of her employment and providing employment services at the time of her

accident. The purpose of the offsite meeting was for employees to bond, refresh, set new goals, and have fun. As long as the participants were advancing the purpose of the meeting, they were furthering the interest of their employer. Moreover, because appellant was required to plan and facilitate the events, her job duties required an even more active participatory role. The company hosted the event, considered it mandatory, and paid employees to attend. Appellant's supervisor compiled a schedule and list of responsibilities for her that included renting a boat, WaveRunners, and obtaining a map that included the locations of cliffs and rocks to jump off. It defies reason to assert that appellant was required by her employer to find a place from which to jump, but was not expected to participate in jumping. The employer designated a block of time during which employees were expected to engage in activities at the lake. The record before us supports the assertion that appellant was engaging in conduct permitted and anticipated by the employer; therefore, it was erroneous for the Commission to conclude that appellant was not engaged in employment services because the employer did not expressly direct appellant to jump from the cliff. Because we find there was not a substantial basis for the denial of relief, we reverse the Commission's decision and remand for a determination of benefits.

Reversed and remanded.

ROBBINS, J., agrees.

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring.

"We should not forget as judges what we know as intelligent human beings."
– Matlock v. Arkansas Blue Cross Blue Shield,
74 Ark. App. 322, 341, 49 S.W.3d 126, 140 (2001).

I write separately to state that employers and their carriers should fully expect workers' compensation law to cover injuries to employees on company retreats and similar outings. It is disingenuous for an employer to set up a company outing, require that its employees attend said outing, then refuse to compensate an employee for injuries sustained at the outing. The denial of benefits is more egregious in the present case because appellant was responsible for planning the very activity that led to her accident.

Put simply, employees may be engaged in employment services and covered under workers' compensation law even outside the confines of the actual workplace.

Recreational or social activities, such as company retreats, are within the course and scope of employment when "[t]he employer, by expressly or impliedly requiring participation, . . . brings the activity within the orbit of the employment." Arthur Larson, *Larson's Workers' Compensation Law*, § 22.01, at 22-2. As Professor Larson elaborates:

> The most direct way of associating the recreational or social activity within the employment is to make its performance an actual part of the job. As employment-related recreation and teams become more elaborately organized, a certain amount of work has to be done to keep the play going. So when an employer ordered the claimant to organize a ball team, he was held to have made that activity a part of his duties for which the claimant was employed. The same result was reached as to a trip by the captain of the bowling team to confer with the president of the league. Other examples of recreation-associated activities that are more like hard work to the actor would include those of a volunteer fireman who was injured putting up Christmas decorations or tending bar at an open house pursuant to orders of the firechief, of a country club corporation president participating in a fund-raising golf tournament and banquet, and of a football coach traveling to observe a football game in which his team was not playing.

Larson, *supra*, § 22.04[1][b], at 22-11–12 (footnote references omitted). Professor Larson references a number of cases in the above paragraph: *Higgins v. Ronkonkoma Fire District, Volunteer Fire Co.*, 439 N.Y.S.2d 459, 81 A.D.2d 721 (1981) (injuries suffered by a volunteer firefighter who had slipped and injured his wrist while acting as a bartender at a open house commemorating the district's seventy-fifth anniversary held to be compensable; the fire chief ordered the firefighter to be at the festivities in uniform and to act as a host); *Huber v. Eagle Stationary Corp.*, 4 N.Y.S.2d 272, 254 A.D. 788 (1938) (injuries suffered by an employee who was struck in the head with a baseball held to be compensable; the employee was ordered to organize and manage the team); *Highlands County School Board v. Savage*, 609 So. 2d 133 (Fla. Ct. App. 1992) (injury sustained by a teacher in a charity teacher-student basketball game to be compensable; the teachers were required to participate in the game as either

spectators or players held to be compensable); *Trent v. Employers Liability Assurance Corp.*, 178 So. 2d 470 (La. Ct. App. 1965) (holding that a football coach who was en route to a football game in which his team was not playing was engaged in employment services when school policy encouraged coaches to attend other games when they were free).

The instant case follows this established precedent. The cliff-jumping activity was contemplated by her employer and was specifically included as an activity. Appellant's direct supervisor was involved in the activity and encouraged her to participate. Appellant was expected to be an "employee" at the retreat. She was the coordinator for the entire event. She would have been required to resolve any issues at the office via cell phone. Her employer received a benefit by her attendance, as not only was she there in an effort to build team morale at the office, but she would have also been there (had she not been injured) to discuss the current and future status of her department. Out of the six factors this court outlined in *Matlock v. Arkansas Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001), five of them are applicable. Appellant was facilitating her employer's interests while at the retreat; she was engaged in an activity that was an expected part of her employment; the activity constituted a known (in fact, planned) departure from her work activities; she was compensated while at the retreat; and she would have been expected to cease what she was doing to advance employment objectives. In other words, appellant was clearly engaged in employment services at the time of her injury.

In *Matlock*, this court remarked, "We should not forget as judges what we know as intelligent humans." *Id.* at 341, 49 S.W.3d at 140. Company retreats and similar outings are a popular way of building morale at the workplace. Neither the Commission nor this court should endorse the argument that employees who participate in these activities, particularly when they are mandated by the employer, are not engaged in employment services when they are injured while at the activity. To decide otherwise not only goes against the law, but common sense as well.

Jerry BRASFIELD *v.* Jacqueline MURRAY

CA 06-52 239 S.W.3d 551

Court of Appeals of Arkansas
Opinion delivered September 20, 2006

Burns Law Firm, by: *Thomas Burns*, for appellant.

Sharon M. (Fortenberry) Nichols, for appellee.

PER CURIAM. This appeal is from a partial summary judgment entered in favor of appellee Jacqueline Murray on her claim for usury. The court found that the contract for sale of real property that she entered into with appellant was usurious and awarded her $58,690.90 in interest and $3,000 in attorney's fees. Because the judgment from which appellant appeals does not resolve all the claims brought in this lawsuit, we dismiss the appeal.

In June 2001, the parties entered into a contract for appellee to purchase a home financed by the builder, appellant Jerry Brasfield. Appellee filed suit against appellant in June 2003, alleging that the contract was usurious and seeking an order voiding the contract as to the unpaid interest and for her attorney's fees. Appellee also alleged breach of contract and sought damages for work that was not completed on her home and repair of appellant's "shoddy construction." Appellant filed a general denial to the complaint and, in February 2004, filed a separate complaint against appellee for foreclosure and termination of their contract. The two lawsuits were consolidated in March 2005. The trial court granted appellee a partial summary judgment on her claim for usury, and it is this judgment that appellant appeals, contending that the trial

court erred in granting appellee a partial summary judgment, in refusing to estop appellee from raising the defense of usury, and in its calculation of interest due the appellee and its award of attorney's fees. Appellant states that the remaining issues involving foreclosure, quiet title, and termination of the land sale contract remain unresolved. From our review of the record, it also appears that appellee's claims for breach of contract and damages for uncompleted work remain pending.

Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure – Civil provides that an appeal may be taken only from a final judgment or decree entered by the trial court. The question of whether an order is final and subject to appeal is a jurisdictional question that this court will raise on its own. *Moses v. Hanna's Candle Co.*, 353 Ark. 101, 110 S.W.3d 725 (2003). Arkansas Rule of Civil Procedure 54(b) provides that, when more than one claim for relief is presented in an action or when multiple parties are involved, an order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not a final, appealable order. *See Hambay v. Williams,* 335 Ark. 352, 980 S.W.2d 263 (1998); *South County, Inc. v. First W. Loan Co.,* 311 Ark. 501, 845 S.W.2d 3 (1993).

■ Rule 54(b) allows a trial court, when it finds no just reason for delaying an appeal, to direct entry of a final judgment as to fewer than all the claims or parties by executing a certification of final judgment as it appears in Rule 54(b)(1). However, absent this required certification, any judgment, order, or other form of decision that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action. *See Jackson v. Delis,* 76 Ark. App. 436, 67 S.W.3d 596 (2002). No such certification was made in this case.

Accordingly, we do not have jurisdiction to decide this case, and the appeal is dismissed without prejudice.

Dismissed.

Willie MENZIES *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 03-1237

Court of Appeals of Arkansas
Opinion delivered September 20, 2006

DeeNita D. Moak, for appellant.

No response.

PER CURIAM. Appellant Willie Menzies appealed to this court from an order terminating his parental rights entered by the Sixth Division Circuit Court of Jefferson County, Arkansas, and counsel was appointed to represent him. We affirmed the decision of the trial court.

Appellant's counsel now moves for an award of attorney's fees of $3,585.00 and expenses of $1,724.92. The expenses sought by counsel include $907.50 attributable to abstracting costs. We grant attorney's fees to counsel for appellant in the amount of $1,400.00 and costs of $500.00.

IT IS SO ORDERED.

GRIFFEN, J., concurs.

PITTMAN, C.J., HART, ROBBINS, BIRD, and GLOVER, JJ., dissent.

WENDELL L. GRIFFEN, Judge, concurring. Appellate counsel DeeNita Moak filed a motion for attorney's fees

and costs for her appellate representation of appellant Willie Menzies in this termination of parental rights/dependency-neglect case. Counsel requests $3585 in attorney's fees and $1724 in costs, including $907.50 for the cost of abstracting. This court agreed to award counsel $1400 for attorney's fees and $500 for costs, the maximum fees and costs that we award for appellate attorney's fees and costs in this type of civil case.

I agree with the court's award of fees and costs, but write separately to explain why counsel's request for greater fees and costs was rejected. Counsel correctly asserts that it is an unconstitutional taking of personal property, in this case, counsel's services, for a court to appoint counsel and then to refuse to pay reasonable compensation for those services. *See, e.g., Baker v. Ark. Dep't of Human Servs.*, 340 Ark. 42, 8 S.W.3d 499 (2000) (regarding representation at the trial level for termination cases); *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991) (regarding representation in criminal trials). She also correctly observes that in 2003, in a case in which she also served as appellate counsel, this court ordered that the Arkansas Claims Commission (Claims Commission) should determine the amount of attorney's fees to be paid in dependency-neglect appeals because the Arkansas General Assembly had not appropriated any money for payment of attorney's fees and costs for work performed on appeal in civil cases. *See Walters v. Ark. Dep't of Human, Servs.*, 83 Ark. App. 85, 118 S.W.3d 134 (2003). Further in 2003, the Arkansas Claims Commission determined in another case involving counsel that $75 per hour was a reasonable attorney's fee for dependency-neglect appeals. *See Moak v. Arkansas,* Claim No. 04-0359. This represented an increase from the previously determined rate of $55 per hour.

Counsel maintains that in reliance on the Claims Commission's decision in her previous case, she accepted the appointment for the instant appeal based on what she terms the "historical fact that payment would be made at the rate of $75 per hour and that expenses would be reimbursed in accordance with Arkansas case law and the previous rulings of the Claims Commission." She insists that she would not have accepted the appointment in this case had she known that her payment would be retroactively modified and decreased to a flat-fee payment, and that it is unjust to dramatically reduce payment after the work has been performed when she had an expectation of reasonable compensation. Thus, she argues that she should be awarded fees at the rate of $75 per hour, or alternatively, $55 per hour, and asserts that any lesser

payment is an unconstitutional taking of her services because trial attorneys are typically paid $75 per hour for their services.

Counsel's arguments are unpersuasive for several reasons. First, her reliance argument fails because we are not bound in any manner by the Claims Commission's determination of what constitutes a reasonable attorney's fee, either generally, or in a specific prior case concerning counsel. It is true that in *Walters, supra,* we determined that claims for attorney's fees must be submitted to the Claims Commission because this court had not been appropriated any money by the Arkansas General Assembly for payment of attorney's fees in dependency-neglect appeals. However, the Arkansas General Assembly in 2005 appropriated money to this court for the award of attorney's fees in such cases decided by this court during the 2005-2007 biennium. *See* 2005 Ark. Acts 99. Thus, it is for this court, not the Claims Commission, to determine what constitutes reasonable attorney's fees and costs in cases before this court.

Second, while we are sensitive to the need to adequately compensate attorneys for their services, we are guided by the precedent that attorney's fees and costs in criminal cases, which are generally more complex than termination cases, are similarly limited. In fact, we have awarded a lesser attorney's fee on appeal in a termination, case than counsel will receive in this case. *See Cobbs v. Ark. Dep't of Human Servs.*, 87 Ark. App. 274, 190 S.W.3d 274 (2004) (awarding appellate attorney's fees of $1,200 in a termination case).

Third, counsel is mistaken in asserting that the fee she paid to outsource the abstracting of the record in this case is a "cost" that is to be awarded in addition to the cost of printing the record, copying the briefs, and postage. Brief costs are limited by rule to $3.00 per page, not to exceed $500. *See* Ark. Sup. Ct. R. 6-7(a)(b). Separate costs for abstracting are awarded only to an appellee to reimburse appellee's counsel for the cost of submitting a supplemental abstract or addendum. *See* Ark. Sup. Ct. R. 4-2(9)(b)(1). Counsel is not requesting such reimbursement in this case.

Fourth, we are mindful that the appointment of counsel for indigents is no longer coercive as in the past, where any attorney who happened to be present when a case was called could be pressed into service. Now the acceptance of an indigent client is the attorney's choice, that is, an ethical obligation that attorneys are encouraged to accept. *See* Arkansas Rule of Professional Conduct 6.1.

Finally, while the Arkansas Supreme Court adopted new Arkansas Supreme Court Rules 6-9 and 6-10, which govern appeals in dependency-neglect cases, these new rules do not apply to the instant case. Rule 6-10, in particular, addresses motions for attorney's fees. However, these rules did not take effect until July 1, 2006, well after December 14, 2005, the date the mandate in this case was handed down. *See Per Curiam* Opinion issued May 18, 2006. Accordingly, the new rules in no way affect our determination of attorney's fees and costs in the instant case.

JOHN MAUZY PITTMAN, Chief Judge, dissenting. I disagree with the court's decision to award a flat fee of $1400 in termination-of-parental-rights cases. I would award an attorney's fee that took into consideration factors such as the hours reasonably claimed, the difficulty of the case, and the attorney's skill.

I respectfully dissent.

JOHN B. ROBBINS, Judge, dissenting. I disagree with the majority's action today because this motion should be decided by our supreme court. The movant vigorously advances an argument that to compensate her with a flat fee award, as the majority has done, is a violation of due process pursuant to Ark. Const., art. 2, §§ 8 & 22, and equal protection of the laws pursuant to Ark. Const., art. 2, § 3. Arkansas Supreme Court Rule 1-2(a)(1), excepts from our jurisdiction and reserves to the supreme court all appeals involving the interpretation or construction of the Constitution of Arkansas. While movant's request for an award of an attorney's fee is technically not an appeal, but rather a request for compensation for legal services rendered the appellant in an appeal before our court, it nevertheless requires a decision addressing the construction of the Arkansas Constitution. Consequently, we should comply with the spirit of Rule 1-2 and defer to the supreme court by certifying this motion.

HART, BIRD and GLOVER, JJ., join in this dissent.

CITY of HUNTINGTON, and Craig Cotner, Individually and in His Official Capacity as Mayor of the City of Huntington *v.* Robert T. MIKLES

CA 06-66 240 S.W.3d 138

Court of Appeals of Arkansas
Opinion delivered September 27, 2006

[Rehearing denied October 25, 2006.]

James O. Cox, for appellant.

Kevin Hickey, for appellee.

JOHN B. ROBBINS, Judge. Appellant City of Huntington ("the city") appeals a jury verdict entered against it and in

favor of appellee Robert Mikles. Mikles was formerly the chief of police for the city from late August 2003 to November 2004 when he was terminated. Mikles sued the city in April 2004, first alleging breach of contract regarding his employment agreement with the city, and later amending the complaint to add an allegation of wrongful termination after he was fired.[1] The city moved for directed verdict at the appropriate times, which motions were denied. The jury found in his favor on both counts, awarding $5832 in damages for breach of contract and awarding $14,057.69 for wrongful termination, plus costs and attorney fees. The city moved for judgment notwithstanding the verdict, which was denied, and this appeal followed. Appellant contends on appeal that the jury's verdicts on breach of contract and on wrongful termination are not supported by substantial evidence. We reverse the verdict on breach of contract, and we affirm the verdict on wrongful termination.

Our standard of review of the denial of a motion for directed verdict is whether the jury's verdict is supported by substantial evidence. *Stewart Title Guar. Co. v. Am. Abstract & Title Co.*, 363 Ark. 530, 215 S.W.3d 596 (2005); *Ethyl Corp. v. Johnson*, 345 Ark. 476, 49 S.W.3d 644 (2001). Similarly, in reviewing the denial of a motion for judgment notwithstanding the verdict, we will reverse only if there is no substantial evidence to support the jury's verdict, and the moving party is entitled to judgment as a matter of law. *Id.* Substantial evidence is that which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. *Id.* It is not this court's place to try issues of fact; rather, this court simply reviews the record for substantial evidence to support the jury's verdict. *Id.* In determining whether there is substantial evidence, we view the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *Id.*

Appellant argues that (1) there is no substantial evidence to support the jury's finding that the city breached an employment contract with Mikles by ceasing to allow him permission to drive a city vehicle using the city's fuel and insurance, and (2) there is no substantial evidence to support the jury's finding that the city wrongfully discharged Mikles for filing suit against the city. To

[1] The mayor was also a named party because he was sued in his official capacity. However, for ease of reading, we refer only to the city as a named party and the primary appellant.

determine whether appellant's arguments hold any merit, we review the relevant testimony in the light most favorable to Mikles as the prevailing party.

Mikles, a man in his late fifties, testified that he was looking for a job when his wife found an advertisement seeking a chief of police in Huntington, a town about forty miles away from his residence in Magazine. Mikles contacted the mayor, Craig Cotner, and they met for an interview.

When they agreed that Mikles was suited for the job, they negotiated compensation. Mayor Cotner could not offer the per-hour pay rate that Mikles requested. Mikles asked if there was another means to add to the per-hour pay rate to compensate him, such as the use of a city vehicle to drive to and from home, with the attendant gasoline and insurance coverage provided by the city. This was important to Mikles, given the eighty-mile round-trip commute. The mayor agreed with the base hourly rate plus use of the city vehicle, subject to the city council's approval at the next meeting. Mikles's official hiring date was in late August 2003. Mikles drove his own vehicle to work for a couple of days, but shortly thereafter, he was given a city vehicle.

Mikles said he began work right away to slow down speeders driving through the middle of town on Highway 71 by writing warnings and citations; he arrested several drug manufacturers in the area; he started a youth program; he had offenders provide improvements to the jail facility; and he wrote two successful grant applications to acquire more equipment for police officers. The reviews of Mikles's performance were mixed: the mayor was pleased with the job being done, but a few city council members were not. Mikles said that the mayor "always backed me."

In March 2004, a city council meeting was convened, and councilman Parish moved to take the city car privilege from Mikles. The motion was seconded and approved in that meeting. Mikles was present, shocked, and had to get a ride home because the council's action took effect immediately. Councilman Rammings drove Mikles home that night. Mikles filed a breach of contract action in April 2004. Mikles said that relations with four of the six council members "really started to get bad" after he filed suit. Mikles said that the mayor was being pressured to fire him. Mikles did not want to quit, given that he enjoyed his job and was in his late fifties at the time.

On May 15, 2004, a city council meeting was conducted during which the sole issue was Mikles's lawsuit for breach of

contract. Councilman Bates moved that Mikles be suspended without pay until his lawsuit was resolved. The city attorney urged the council not to support that motion, and it was not seconded, such that the motion died. Mikles noted that during his tenure, the council overrode his decision regarding work schedules for himself and other officers. Mikles abided by the new schedule, despite it being "all these wild hours."

During the summer of 2004, Mikles terminated policeman Ryan Stephens from the force because the background check on Stephens indicated that he had a mental disorder. Mikles believed that Arkansas State Police protocol required termination for this reason. However, Mikles's decision to fire Stephens was not well received, especially by Stephens's wife, who was a councilwoman and one of the four councilpersons who were opposed to Mikles. Stephens appealed that decision and was ultimately returned to the force with back pay.

By October 2004, Mikles was of the impression that the mayor was "constantly upset . . . getting phone calls constantly from the city council, the same four, that he needed to get rid of me." At a meeting conducted on October 14, 2004, the council voted four-to-two to terminate Mikles. This had no effect because the council did not have the authority to hire and fire department heads; that authority rested with the mayor. After that meeting, the mayor told Mikles to take three weeks of accrued vacation and not come to town, during which the mayor urged Mikles to find another job. Mikles said he would look for another law-enforcement job, but if no job was available, he would not resign and would have to be fired to leave. When Mikles returned from vacation, the mayor told him he was fired. After that, Mikles added the allegation of wrongful discharge to his complaint. Mikles applied for and received unemployment benefits after his termination.

The mayor testified at trial on Mikles's behalf. He stated that he was the one who interviewed Mikles and negotiated the salary with the car allowance, agreeing that "that's what I offered him. He accepted it." The mayor remembered that it was several months later that the council voted to take the city vehicle away from Mikles. The mayor commented that the council had authority over the city's finances.

The mayor said that he was satisfied with Mikles's work and, if it were up to him, Mikles would probably still be the chief of police, though he agreed that Mikles was "hard-headed." The

mayor thought that the council members had personal vendettas against Mikles, in part because Mikles was a very assertive person. The mayor agreed that the council passed a motion to terminate Mikles's employment, but the motion was ineffective. This was in October 2004, after Mikles filed his lawsuit in April 2004. The mayor was very upset by the friction between Mikles and the council. The mayor acknowledged that the friction existed from the very beginning.

Steve Rammings, a councilman for six years, testified that he understood that the pay package for the chief of police was a salary and the city furnishing a car. Rammings was present for a city council meeting convened shortly after the mayor hired him where this was discussed, and Rammings believed that the city had an agreement with Mikles on those terms. Rammings said that in March 2004 when the car was taken away, the council acted in the absence of the city attorney, and it was a typical four-to-two vote. Rammings said that after the majority took the car away, he presented a motion to allow Mikles mileage, which was rejected. Rammings took Mikles home that night. Rammings believed that a month or two later, Mikles filed suit against the city. Rammings remembered that Melissa Stephens was on the council and that her husband was terminated by Chief Mikles. He believed that this was part of the animosity between her and Mikles. Rammings thought that Mikles did an excellent job as chief of police. Rammings knew that the city council was pressuring the mayor to fire Mikles, and he said that the four council members filed a frivolous lawsuit against the mayor, which was dropped after the mayor fired Mikles.

Motions for directed verdict regarding breach of contract and wrongful termination were denied. Councilman Parish testified that he did not understand that the council was agreeing to the full compensation package, but Parish conceded that no one objected to the terms at the next regular meeting after Mikles was hired. Parish thought that Mikles fired Officer Stephens shortly after Mikles came on the job and that he did not agree that Stephens should be fired for lack of information in his personnel file. Parish said that the council members received citizen complaints about Mikles, in part regarding the use of a city vehicle that was costing the townspeople. Parish said he was the one who made the motion to disallow Mikles the use of the vehicle because it was more expensive than he had originally thought when Mikles was hired. Parish believed that they made an alteration to his employ-

ment, which Mikles accepted by staying on the job. Parish was the one who made the motion to fire Mikles, which was passed by a majority vote, to show those council members' feelings about Mikles. Parish said the vote was a reaction to Mikles continuing to use the city vehicle on occasions when he had been disallowed that privilege.

Parish testified that he had crafted the city's employee handbook, and it specifically referred to at-will employment status. Parish believed that the car allowance had nothing to do with his employment status. However, Parish agreed that he had thought Mikles and the mayor had an agreement regarding the car, which the council ratified by not acting on that provision at the next council meeting after his being hired.

After renewed motions for directed verdict were denied, the trial judge instructed the jury. The jury was to determine whether a contract existed between the city and Mikles and whether it was breached. The jury was given definitions of contract, offer, acceptance, consideration, and modification. The judge told the jury that Mikles was an at-will employee, terminable at will by either party, except that if the discharge was based solely on filing a lawsuit, then that would be a violation of public policy. The jury found in favor of Mikles on both counts and awarded damages. The present appeal is before us for consideration.

Appellant first contends that there is no substantial evidence to support the jury's finding that the city breached a contract of employment by taking away privileges to use a city vehicle. Appellant acknowledges that there was an initial agreement to allow use of the city vehicle and that the city modified the terms of the agreement when it halted permission to use the vehicle in March 2004. Appellant contends that it unilaterally changed the terms of appellee's employment, which appellee accepted by staying on the job after the change was instituted. We are persuaded by this argument.

■ Appellant cites to *Crain Indus., Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991). Our supreme court held in *Crain* that accepting changes in an employment agreement may constitute part of an altered agreement. The *Crain* opinion went on to state that an employee's retention of employment constitutes acceptance of the offer of a unilateral contract; the retention of employment being the necessary consideration to support the "new deal." *See id.* at 573. The problem with Mikles's proof was that even

though the compensation was agreed upon, it was not for a time certain. No doubt that an employee at will has a right to compensation upon the performance of services. *See Boatmen's Ark., Inc. v. Farmer*, 66 Ark. App. 240, 989 S.W.2d 557 (1999). The term or duration of the agreed-upon compensation was not part of the contract, and it was therefore subject to prospective alteration at any time. There is no substantial evidence to support the jury's verdict on the breach-of-contract claim. We reverse and dismiss the breach-of-contract verdict.

We next consider whether there was substantial evidence to support the jury's verdict that appellee Mikles was wrongfully discharged. The general rule is that "when the term of employment in a contract is left to the discretion of either party, or left indefinite, or terminable by either party, either party may put an end to the relationship at will and without cause." *Marine Servs. Unlimited, Inc. v. Rakes*, 323 Ark. 757, 763, 918 S.W.2d 132, 134-35 (1996) (quoting *City of Green Forest v. Morse*, 316 Ark. 540, 546, 873 S.W.2d 155, 158 (1994)). Stated another way, an employer may terminate the employment of an at-will employee without cause. *See Faulkner v. Ark. Children's Hosp.*, 347 Ark. 941, 69 S.W.3d 393 (2002); *Crain Indus., Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991); *Gladden v. Ark. Children's Hosp.*, 292 Ark. 130, 728 S.W.2d 501 (1987). However, an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state. *Northport Health Svcs. v. Owen*, 356 Ark. 630, 158 S.W.3d 164 (2004). The public policy exception presents an exclusive contract cause of action. *See* Howard Brill, *Arkansas Law of Damages* (3d ed.) § 19-2; *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988). The exception is limited and not meant to protect merely private or proprietary interests. *Sterling Drug, Inc. v. Oxford, supra.* The burden of establishing a prima facie case of wrongful discharge is upon the employee, but once the employee has met his burden, the burden shifts to the employer to prove that there was a legitimate, nonretaliatory reason for the discharge. *Gen. Elec. Co. v. Gilbert*, 76 Ark. App. 375, 65 S.W.3d 892 (2002).

Mikles alleged that he was fired because he had filed suit for breach of contract, and therefore, his termination was solely in retaliation. The city responded that Mikles was an at-will employee subject to dismissal at any time for any reason, and further that there was no retaliatory reason for discharge. The jury was instructed that if the discharge was based solely on filing a lawsuit,

then that would be a violation of public policy.[2] There was no objection to this jury instruction. The jury found that Mikles had proven that he was fired in retaliation for his lawsuit.

The city argues that there is ample evidence of other reasons for Mikles's being terminated, unrelated to his filing a lawsuit. However, this is not the focus of appellate inquiry. We determine whether there was substantial evidence upon which the jury could base a decision that the reason for Mikles's termination was because he filed a lawsuit against the city. There was such substantial evidence, and therefore we affirm this point.

The jury verdict for breach of contract is reversed. The jury verdict for wrongful discharge is affirmed.

GLADWIN and BAKER, JJ., agree.

PEST MANAGEMENT, INC., et al. *v.*
Alfred D. LANGER, et al.

CA 05-1387 240 S.W.3d 149

Court of Appeals of Arkansas
Substituted Opinion on Denial of Rehearing
September 27, 2006

[2] The supreme court in *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988), held that an employer should not have an absolute and unfettered right to terminate an employee for an act done for the good of the public. No party challenged the trial court's rendering of a jury instruction that if Mikles was fired solely in retaliation for filing his lawsuit, this constituted a violation of public policy. While it would be for a jury to determine the reason for the plaintiff's termination, the question of whether the reason asserted by the plaintiff was in violation of a well-established public policy of the state is ordinarily a question of law for the court. *Koenighan v. Schilling Motors, Inc.*, 35 Ark. App. 94, 811 S.W.2d 342 (1991). We render no opinion on the legal soundness of this jury instruction regarding whether a violation of public policy occurred.

Roberts Law Firm, P.A., by: *Jeremy Sweringen, Mike Roberts*, and *Emily A. Neal*, for appellants.

David H. Williams Law Firm, PLLC, by: *David H. Williams*, for appellees.

SAM BIRD, Judge. Appellants Pest Management, Inc., Elaine Goode, and Grant Goode (collectively, Pest Management) appeal from an order of the Faulkner County Circuit Court denying their motion to arbitrate claims asserted against them by appellees Alfred Langer and James Stalnaker (collectively, Langer). The trial court found that, although the parties' agreement specified that any dispute would be arbitrated under the provisions of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 through 16 (2000 & Supp. III 2003), Langer's claims sounded in tort and were not subject to arbitration under the Arkansas Uniform Arbitration Act (AUAA), Ark. Code Ann. §§ 16-108-201 through 16-108-224 (Repl. 2006). We reverse and remand.

On September 17, 2003, Langer purchased a home located in Conway, Arkansas. Before the closing, Pest Management inspected the home and issued a clearance letter dated September 15, 2003, stating that it had inspected the home and reporting its findings. Neither the clearance letter nor a graph attached to the clearance letter indicated any current termite damage, any past damage, or any other problems with the home. As part of the closing, Langer and Pest Management entered into a contract for Pest Management to inspect the premises and to provide for annual treatment. Elaine Goode signed the contract on September 12, 2003, on behalf of Pest Management, and Langer signed the contract on September 17. The contract contained a section entitled "ARBITRATION," which provided:

> Customer and Pest Management agree that any claim, dispute or controversy between them or against the other or the employees, agents or assigns of the other, and any claim arising from or relating to this Contract or the relationships which result from the Contract, no matter against whom made, including the applicability of this arbitration clause and the validity of the entire Contract, shall be resolved by neutral binding arbitration by the National Arbitration Forum . . . under the Code of Procedure of the National Arbitration Forum in effect at the time the claim is filed. . . . Each party shall be responsible for paying its own fees, costs and expenses and the arbitration fees as designed by the Code of Procedure. The decision of the arbitrator shall be a final and binding resolution of the disagreement that may be entered as a judgment by a court of competent jurisdiction. The arbitration agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16. Each party consents to the personal jurisdiction and venue of the courts in which the property is located and the courts of the State of Arkansas and the U.S. District Court for the Eastern District of Arkansas. Judgment upon the award may be entered in any court having jurisdiction. Neither party shall sue the other party with respect to any matter in dispute between the parties other than for enforcement of this arbitration provision or of the arbitrator's decision, and a party violating this provision shall pay the other party's costs, including but not limited to attorney's fees, with respect to such suit and the arbitration award shall so provide. THE PARTIES UNDERSTAND THAT THEY WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT AND TO HAVE A JUDGE

OR JURY DECIDE THEIR CASE, BUT THEY CHOOSE TO HAVE ANY DISPUTES DECIDED THROUGH ARBITRATION.

The contract specifically provides that the arbitration provision and the inspection graph are part of the contract.

On March 1, 2005, Langer filed suit, later amended, against Pest Management and Daryl Little, in his official capacity as director of the Arkansas State Plant Board, alleging that Pest Management was negligent in the conduct of its inspection. The complaint alleged that the Plant Board conducted an inspection of Langer's home and found several problems that Pest Management had to correct. The complaint also alleged that Pest Management violated the Arkansas Pest Control Act. In its first amended answer, Pest Management denied the allegations of the complaint and asserted that the dispute was subject to arbitration under the FAA. Pest Management also filed a separate motion to dismiss or, in the alternative, to compel arbitration.

At the hearing on the motion, there was argument about whether Langer's cause of action sounded in tort or in contract because tort claims would not be subject to arbitration under the AUAA. Langer argued further that the claims were not subject to arbitration because Pest Management's negligence occurred prior to the execution of the termite contract. Pest Management's position was that the original inspection was part and parcel of the termite contract and, therefore, Langer's claim should be subject to arbitration.

The trial court issued a letter opinion in which it found that the supreme court's decision in *Terminix International Co. v. Stabbs*, 326 Ark. 239, 930 S.W.2d 345 (1996), was controlling. The court noted that, although application of the FAA was sought, the complaint's allegations of a tort claim would not be subject to arbitration under the AUAA. In its written order, the trial court found that the termite contract expressly provided that the parties agreed to submit to binding arbitration, in accordance with and under the provisions of the FAA, of any claim, dispute, or controversy between them arising from or relating to the termite contract or the inspection of the property. The court also found that the causes of action alleged in Langer's complaint sounded in tort, rather than in contract, and were not subject to arbitration under the AUAA and that the AUAA was not pre-empted by the FAA in the present case. The court also found that the arbitration

clause of the parties' termite contract did not control disputes relating to the performance of the inspection of Langer's house or the reporting of its condition in the clearance letter, both occurring prior to the execution of the termite contract. Finally, the court concluded that the case law and statutory scheme in Arkansas did not compel the mandatory, binding arbitration sought by Pest Management in this case. The trial court accordingly denied the motion to compel arbitration. This appeal followed.

An order denying a motion to compel arbitration is an immediately appealable order. Ark. R. App. P. – Civ. 2(a)(12); *IGF Ins. Co. v. Hat Creek P'ship*, 349 Ark. 133, 76 S.W.3d 859 (2002). We review a circuit court's order denying a motion to compel arbitration de novo on the record. *IGF Ins.*, *supra.*

Pest Management raises one point on appeal — that the trial court erred in not compelling arbitration of Langer's claims. Specifically, it contends that the FAA, rather than the AUAA, applies to this dispute and calls for arbitration between the parties. In arguing for the application of Arkansas law, Langer relies, as did the trial court, on the supreme court's decision in *Stabbs*, *supra.* That case involved a suit against Terminix and others for fraud, deceit, and breach of a federal VA/HUD loan "contract" that arose from a faulty termite inspection and repair job. The supreme court held that tort claims were not subject to arbitration under the AUAA, "regardless of the language used in an arbitration agreement." *See* Ark. Code Ann. § 16-108-201(b)(2). Langer's reliance on the phrase "regardless of the language used" in *Stabbs* is misplaced because that case involved only the AUAA.[1] Here, the parties specifically agreed that the FAA would apply. Where the parties designate in the arbitration agreement which arbitration statute they wish to have control, the court should apply their choice. *Geosurveys, Inc. v. State Nat'l Bank*, 143 S.W.3d 220 (Tex. App. 2004); *In re Van Blarcum*, 19 S.W.3d 484 (Tex. App. 2000).

The FAA provides that a written provision in a contract evidencing a transaction involving commerce to arbitrate a controversy arising out of that contract is valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of

[1] To the extent that our decision in *Hawks Enterprises, Inc. v. Andrews*, 75 Ark. App. 372, 57 S.W.3d 778 (2001), can be read as precluding arbitration of tort claims under the FAA, it is erroneous.

any contract." 9 U.S.C. § 2 (2000). The FAA, instead of the AUAA, applies when the underlying dispute involves interstate commerce. *Walton v. Lewis*, 337 Ark. 45, 987 S.W.2d 262 (1999). Section 1 of the FAA defines "commerce" as "commerce among the several States. . . ." 9 U.S.C. § 1 (2000). State and federal courts have concurrent jurisdiction to enforce an arbitration agreement pursuant to the terms of the FAA. *Walton, supra.*

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

The arbitration clause in the present case is quite broad and provides that any claim, dispute or controversy between Langer and Pest Management and any claim arising from or relating to the contract or the relationships which result from the contract shall be subject to arbitration. Langer argues that their claims are not subject to arbitration because they arose prior to the signing of the termite contract that contains this arbitration clause. Though Langer contends that the arbitration clause does not apply to its claims, Pest Management contends that it does. The federal policy favoring arbitration requires that any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Walton, supra*; *Neosho Constr. Co., supra.* However, we do not decide whether the arbitration clause applies to Langer's claims, inasmuch as any dispute over the applicability of the arbitration clause is itself made subject to arbitration, to-wit:

> ARBITRATION. [Langer] and [Pest Management] agree that any . . . dispute . . . between them . . . including the applicability of this arbitration clause . . . shall be resolved by neutral binding arbitration.

Consequently, we must reverse and remand for arbitration the issue of whether this arbitration clause is applicable to Langer's claims against Pest Management.

Langer also argues that the FAA does not apply because there is no evidence that this transaction involved interstate commerce. The FAA applies if the transaction involves "interstate commerce, even if the parties did not contemplate an interstate commerce connection." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995); *see also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (*per curiam*). The termite contract states that "it is being made pursuant to a transaction involving interstate commerce. . . ." This is, in effect, a stipulation that removes the requirement for proof of connections with interstate commerce. In *Allied-Bruce*, the Supreme Court held that the FAA applied to a similar termite protection agreement and required enforcement of its arbitration provision, stating that the language of section 2 of the FAA, making enforceable an arbitration provision in "a contract evidencing a transaction involving commerce," is applicable "to the limits of Congress' Commerce Clause power."

The parties clearly and unambiguously agreed to arbitration under the FAA. We reverse and remand to the trial court for entry of an order compelling the parties to submit to arbitration the issue of the applicability of the arbitration clause to Langer's claims against Pest Management.

Reversed and remanded.

This opinion is substituted for the opinion of our court in this appeal that was delivered on June 21, 2006. Langer's petition for rehearing is denied.

GLADWIN, ROBBINS, GLOVER, NEAL and ROAF, JJ., agree.

POCAHONTAS ELECTRONICS *v.* DIRECTOR, DEPARTMENT of WORKFORCE SERVICES, and Dotty Davis

E 05-257 240 S.W.3d 130

Court of Appeals of Arkansas
Opinion delivered September 27, 2006

Joseph Grinder, for appellant.

Allan Pruitt, for appellees.

DAVID M. GLOVER, Judge. Appellee Dotty Davis was employed by appellant, Pocahontas Electronics, as a data-entry clerk. The history of appellee's claim for unemployment benefits was as follows: she was initially disqualified by the Department of Workforce Services because it found that she left her work voluntarily and without good cause connected to the work; she appealed to the Appeal Tribunal, which affirmed the initial denial of benefits; and she then appealed to the Board of Review, which reversed the Appeal Tribunal and concluded that appellee voluntarily left her job with good cause connected to the work. Appellant challenges the Board of Review's conclusion. We affirm.

The facts of this case are essentially undisputed. Davis explained at the hearing before the Appeal Tribunal that in the spring of 2005, she became aware that Nancy Geelhoed, one of the owners of Pocahontas Electronics, suspected her of using methamphetamine, and that Geelhoed had talked to her own ex-son-in-law about those suspicions. Davis confronted Geelhoed about

the situation. Geelhoed confirmed not only that she had talked to her ex-son-in-law about her suspicions, but also that she believed them to be true. Davis denied that she was using drugs, and Geelhoed called her a "f - - - ing liar." Approximately fifteen minutes later, Davis turned in her keys to the building and left. She did not speak to the other co-owner, Zachary Geelhoed, who was her day-to-day supervisor, because he was not on the premises at the time. Apparently, cell-phone reception was poor, and appellee's efforts to call him, as well as his efforts to return her calls, were unsuccessful.

Nancy Geelhoed explained that she spoke to her ex-son-in-law at her daughter's suggestion because he had formerly used methamphetamine and the daughter thought that he could help identify the signs or indications of meth use. She acknowledged that when appellee confronted her and denied using drugs that she called appellee a liar and might have used the phrase "f - - - ing liar."

Standard of Review

As this court explained in *Perdrix-Wang v. Director*, 42 Ark. App. 218, 221, 856 S.W.2d 636, 638 (1993):

> Arkansas Code Annotated § 11-10-513 (1987) provides in pertinent part that an individual shall be disqualified from receiving unemployment benefits if she left her last work "voluntarily and without good cause connected with the work." Ark. Code Ann. § 11-10-513(a)(1). A claimant bears the burden of proving good cause by a preponderance of the evidence. *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Tate v. Director*, 267 Ark. 1081, 593 S.W.2d 501 (Ark. App. 1980). Good cause has been defined as a cause that would reasonably impel the average able-bodied, qualified worker to give up his or her employment. *Teel v. Daniels*, 270 Ark. 766, 606 S.W.2d 151 (Ark.App. 1980). It is dependent not only on the good faith of the employee involved, which includes the presence of a genuine desire to work and to be self-supporting, but also on the reaction of the average employee. *Id.* In determining the existence of good cause for voluntarily leaving one's work under § 11-10-513, factors to be considered include the degree of risk to one's health, safety, and morals, and her physical fitness, prior training, and experience. Ark. Code Ann. § 11-10-515(c) (Supp. 1991). What constitutes good cause is ordinarily a question of fact for the Board to determine from the particular circumstances of

each case. *Roberson v. Director*, 28 Ark. App. 337, 775 S.W.2d 82 (1989); *Rose v. Daniels*, 269 Ark. 679, 599 S.W.2d 762 (Ark. App. 1980).

On appeal, the findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. Ark. Code Ann. § 11-10-529(c)(1) (1987); *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Victor Industries Corp. v. Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Feagin v. Everett, supra.* 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.*

Appellant's argument on appeal is that the Board's decision is not supported by substantial evidence and that the Board failed to take into consideration appellee's failure to take appropriate steps to rectify the problem, which appellant contends would have included an offer to submit to a drug test. The Board, however, did not base its decision upon the fact that Geelhoed talked to her ex-son-in-law about her suspicions of appellee's drug use. Rather, it was the fact that when Geelhoed accused appellee of using methamphetamine and appellee denied such use, Geelhoed then called her a "f- - - ing liar," which convinced the Board that such a confrontation would reasonably impel an average able-bodied, qualified worker to give up his or her employment. According to the Board's opinion:

> There is nothing particularly wrong with the co-owner asking her former son-in-law about the symptoms of illegal drug use or revealing that she "suspected" the claimant of using [methamphetamine]. However, the co-owner accused the claimant of using [methamphetamine] and when the claimant denied using the illegal drug, the owner called her a "f[- - -]ing liar." . . . The evidence does not establish that the claimant used the illegal drug, although it is understandable that the employer might have suspected it. The claimant acted in good faith when she confronted the co-owner to deny the allegation and try to prevent the spread of such an allegation. The employer's response (calling the claimant a 'f[- - -]ing liar') would have impelled the average, able-bodied, qualified individual to give up the job.

Viewing the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings, we hold that they are supported by substantial evidence.

Affirmed.

HART and CRABTREE, JJ., agree.

HOT SPRING COUNTY SOLID WASTE AUTHORITY *v.* HOT SPRING COUNTY, Raymond Yerby, and Harold Thornton

CA 06-38 240 S.W.3d 144

Court of Appeals of Arkansas
Opinion delivered September 27, 2006

[Rehearing denied November 1, 2006.]

Wilson, Engstrom, Corum & Coulter, by: *Gary D. Corum*, and *Shirley E. Jones*, for appellant.

Ralph C. Ohm, for appellees.

OLLY NEAL, Judge. The issue in this case is which of two governmental entities has the right to certain tax revenues. In 1991, Hot Spring County voters approved a one percent sales and use tax, to be used primarily to fund the operation of the

appellant, Hot Spring County Solid Waste Authority (the SWA). By 2003, the total income generated by the tax exceeded SWA expenditures by $3,440,339.23, and, in 2004, the appellee, Hot Spring County, transferred that amount, plus an additional $59,660.77 (for a total of $3.5 million), to its "Future Jail Construction Fund." The SWA asked the circuit judge to order the money returned to it. Following a hearing, the judge ruled that the County was entitled to the money, although he required the County to reimburse the SWA $59,660.77. The SWA now brings this appeal. We affirm.[1]

The County established the SWA by ordinance in 1985, pursuant to the Joint County and Municipal Solid Waste Disposal Act. *See* Act 699 of 1979. The Act permits municipalities and counties to create and become members of a sanitation authority, *see* Ark. Code Ann. § 14-233-104 (Supp. 2005), and recognizes the sanitation authority as "a public body and body corporate and politic." *See* Ark. Code Ann. §§ 14-233-102(12), -105(c)(3) (Supp. 2005). Our supreme court has described an authority created pursuant to the Act as a "separate governmental entity." *See Barnhart v. City of Fayetteville*, 321 Ark. 197, 204, 900 S.W.2d 539, 542 (1995).

In the early years of the SWA's operation, it was funded by a flat user fee assessed to each household, to be collected annually with personal-property tax. However, in December 1990, the County repealed the user fee and called for an election to levy a one-percent county-wide sales-and-use tax. The Ordinance, using the following pertinent language, established the manner in which the tax proceeds would be used:

> Section 2. The Quorum Court of Hot Spring County, Arkansas hereby calls for an election for the levy of a one percent (1%) county-wide sales and use tax to be in effect for a period beginning February 1, 1991, and the revenues derived from the sales and use tax shall be used as hereinafter provided.
>
> a. The entire per capita share of Hot Spring County's sales and use tax shall be deposited into the Hot Spring County General Fund as

[1] The other named appellees are Raymond Yerby and Harold Thornton, citizens of Hot Spring County and members of the County quorum court. For convenience, we will refer to all appellees as the County.

the same may be received from the State Treasurer and thereafter appropriated by the Quorum Court for the following designated purposes:

> (i) 95% shall be appropriated annually to pay the existing indebtedness of SWA to FmHA and Bank of Malvern, Malvern, Arkansas, and the annual operation and maintenance of SWA and upon the retirement of the debt to FmHA and Bank of Malvern, Malvern, Arkansas, these revenues may be appropriated by the Quorum Court:
>
> (A) FIRST: To fund the annual operation and maintenance of SWA, and;
>
> (B) SECOND: To fund other general needs of the County as authorized by law.
>
> (ii) 5% shall be appropriated into a reserve fund to be used for the purchase, acquisition and/or construction of landfills and recycling facilities, all for the purpose of solid waste disposal and/or recycling.

The voters approved the levy in 1991, and collection of the tax began. The SWA's debts to FmHA and the Bank of Malvern were satisfied in 1993.

Beginning in 1994, the sales-tax proceeds, which were placed in the SWA Fund 3500 in the county treasurer's office, were made available to the SWA for annual operation and maintenance. On a yearly basis, the SWA would prepare a budget for the County quorum court, and the court would generally make an appropriation. The SWA would then submit claims for the money as needed (although in more recent years the County simply transferred a set amount each month to the SWA). Between 1994 and 2003, the SWA's expenditures from the 3500 Fund were, as a rule, considerably less than the amount of tax proceeds available. As a result, unspent money began to accumulate, and by December 2003, that amount totaled $3,440,339.23.

In 2003 and 2004, budgetary disputes arose between the SWA and the County, and the SWA began to realize that the County had its eye on the unspent tax revenues. In order to stake its own claim to those revenues, it submitted 2004 and 2005 budget requests of approximately $4.2 million and $3 million,

respectively, which considerably exceeded 2003's request of about $1.5 million. The County declined to appropriate those amounts. Then, on November 15, 2004, the County, by Ordinance 04-37, established a "Future Jail Construction Fund" to be funded with $3.5 million appropriated from the unspent tax revenues.

In response, the SWA moved for a temporary restraining order enjoining the transfer of the funds.[2] Its primary contentions were that the SWA, as an independent body politic, was in charge of its own budget and the County had no power to modify or reject the budget; that the County could use the tax revenues for its own purposes only if there were "excess" funds available; and that the $3.5 million taken by the County was not excess money but the result of 1) prudent long-term management by the SWA, and 2) the County's refusal to appropriate the full amount of SWA's 2004 and 2005 budget requests. The County, on the other hand, claimed that the SWA had been able to operate within its budget and accumulate a sizeable excess, which, under the terms of the tax ordinance, could be used for other County needs, such as a new jail.

Following a hearing on September 25, 2005, the trial judge entered an order containing numerous findings of fact and conclusions of law. Many of the findings and conclusions favored the SWA, for example, that the SWA was a separate governmental entity; that the County had no authority to supervise the SWA operations or exercise any hold over the SWA's "budgetary purse strings"; that the County's appropriation of funds to the SWA from the tax revenues was a purely ministerial act; that the County quorum court had no authority to reject or modify the SWA's budget; and that funds collected for 2004 and 2005 were to be "rebudgeted."[3] However, as pertinent for our purposes, the court ruled that: 1) the structure of the sales tax approved by voters envisioned the possibility that the sales tax could generate more funds than were necessary to fund the SWA; 2) only in such event would there be "excess funds" to be used for non-SWA purposes; 3) at the end of 2003, there was a "surplus of money" that had

[2] The County had actually filed suit in October 2003, seeking a declaratory judgment regarding its ability to use the tax revenues. The trial judge declined to make a complete ruling on the issue since the County had not, at that time, tried to use any of the revenues. The SWA's motion for a restraining order was simply a continuation of that action.

[3] These conclusions were not appealed by the County and will not be addressed further except as they relate to points raised by the SWA.

accumulated since 1994 in the amount of $3,440,339.23; 4) no one had used these "excess funds" for ten years, and it was obvious that the money was not needed by the SWA; 5) the County was entitled to transfer the $3,440,339.23 to the Jail Fund; 6) because the County had transferred $3.5 million, it must reimburse the SWA $59,660.77.

Following entry of the trial court's order, the SWA filed a timely posttrial motion to amend the findings or for a new trial, which was denied. This appeal followed.

Our standard of review from a bench trial is well established. 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). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the firm conviction that a mistake has been committed. *Cole v. Cole*, 89 Ark. App. 134, 201 S.W.3d 21 (2005).

The SWA argues first that the trial court's use of December 31, 2003, as the date for determining the amount of excess funds was clearly erroneous. The trial court used the 2003 date despite the fact that the County made the actual transfer of revenue in December 2004 — a time by which, according to the SWA, it had established its entitlement to the money through the 2004 and 2005 budget requests.

We see no clear error in the court's use of the 2003 date. From 1994 to 2003, unspent tax money accumulated without regard to whom it belonged. Controversy began to simmer in the latter part of 2003, when the County made a budget cut and the SWA requested $4.2 million for the upcoming 2004 budget year. The trial court may therefore have concluded that the 2003 year-end represented the last, most accurate accounting of the unspent tax revenue prior to the controversy being joined in earnest the following year. Moreover, the trial court required the 2004 and 2005 SWA funds to be re-budgeted, and therefore, by its use of the December 2003 date, created a new starting point for the parties beginning in 2004. Thus, the court's use of the December 2003 date is logical in light of its ruling as a whole, and certainly cannot be considered arbitrary, as the SWA suggests.

Next, the SWA contends that the trial court clearly erred in characterizing the unspent revenues as "excess." This contention

is based on the SWA's claims that, over the years, the County treated those revenues as belonging to the SWA; that the County could not unilaterally take such revenues without first making a determination that the revenues were "excess" in nature; and that such revenues could not be denied once the SWA expressed a need for them, unless the request was arbitrary, which has not been shown here. We find no merit in any of these points.

The language of the County's levying ordinance in the case at bar states that, once the SWA's debts are paid and five percent is set aside for a reserve fund, the object of the tax is: "(A) FIRST: To fund the annual operation and maintenance of SWA, and; (B) SECOND: To fund other general needs of the County as authorized by law." The ballot title from which the voters approved the tax, stated that the tax was "for the benefit of SWA, Hot Spring County and the several municipalities therein . . . ." Words in an ordinance are generally given their natural and obvious import and their ordinary and commonly accepted meaning. *See Thompson v. Younts*, 282 Ark. 524, 669 S.W.2d 471 (1984). Moreover, electors have a right to look to the ordinance and ballot title to ascertain what they are being asked to approve, and the ballot title is the final word of information and warning to which the electors have the right to look as to what authority they are being asked to confer. *See Daniel v. Jones*, 332 Ark. 489, 966 S.W.2d 226 (1998).

With these precepts in mind, we observe, as the trial court did, that the ordinance and the ballot title clearly contemplated that the tax might raise revenues over and above what was needed for the SWA's annual operation and maintenance. Moreover, the ordinance established a priority for such an eventuality, that is, that the money would go "first" to the SWA and "second" to the County's other needs. Common sense, then, would dictate that tax revenues not spent on the SWA's annual operation and maintenance could be used by the County. Nowhere do we find a requirement, as urged by the SWA, that, before the County could receive the tax proceeds at issue here, an express determination must have been made that excess funds existed; nor do we believe that the arbitrariness or lack thereof of the SWA's purported need for the tax revenues has any bearing on the trial court's award of the particular funds at issue here. Further, even if we agreed with the SWA that the County historically regarded the unspent funds as belonging to the SWA, we do not agree that such actions can serve to alter the manner in which the voters intended to spend the

tax proceeds. Instead, we simply express our accord with what we believe is the essence of the trial court's ruling: that, under the taxation scheme in the present case, the revenues that accumulated over the years were not spent on the tax's "first" object, the SWA's annual operation, and were therefore available to be spent on the "second" object, the County's general needs. We thus conclude that the trial court's declaration that the $3,440,339.23 was available for the County's use is not clearly erroneous.

Finally, as an alternative argument, the SWA avers that the trial court should have awarded it a reimbursement of $520,000 rather than $59,660.77. This argument is based on the fact that, in 2003, the SWA had been appropriated approximately $1.56 million dollars. In August 2003, by which point the County had transferred to the SWA approximately $1.04 million, the County stopped transferring money for the remainder of the year. Thus, $520,000 of appropriated money was never transferred to the SWA, and, according to the SWA, that resulted in the 2003 year-end excess fund being artificially inflated by that amount.

[redacted] As the trial court observed, there was evidence that the County's decision to stop transferring money to the SWA came about not of the County's own accord but at the behest of the Bureau of Legislative Audit. According to witnesses, Legislative Audit required this action because the SWA had accumulated a large amount of funds in its own operating account. Thus, the trial court may well have reasoned that the budget cut was not the result of the County exercising improper authority over the SWA's budget but rather an auditor determining that the SWA should operate with the money it had on hand. Under these circumstances, we do not agree that the figure of $3,440,339.23 was artificially inflated — it represented money that, as of December 31, 2003, had not been spent on the annual operation and maintenance of the SWA.

In light of the foregoing, we affirm the trial court's order.

Affirmed.

PITTMAN, C.J., and BIRD, J., agree.

OFFICE of CHILD SUPPORT ENFORCEMENT *v.*
Grant E. GOFF

CA 06-119 240 S.W.3d 133

Court of Appeals of Arkansas
Opinion delivered September 27, 2006

Melinda J. Warren, OCSE Attorney Specialist and *J. Shane Baker*, OCSE Attorney Supervisor, for appellant.

Lody & Arnold, by: *Wesley G. Lody*, for appellee.

KAREN R. BAKER, Judge. Appellant, Office of Child Support Enforcement (OCSE), asserts two points of error in

the trial court's decision in this case. It alleges that the trial court erred in remitting or voiding the arrears that accrued under the parties' divorce decree for the time that appellee did not have physical custody of the dependents. Appellant also alleges that the trial court erred in not properly offsetting the support owed by the appellee while he had physical custody of the dependents pursuant to Arkansas Code Annotated section 9-14-234, which provides that a court may offset against future support to be paid those amounts accruing during time periods . . . in which the noncustodial parent had physical custody. We affirm as modified.

The trial court in this case refused to find appellee in contempt for failure to pay child support and found that appellee was entitled to a credit of child support from June 24, 1999, through August 1, 2002. The divorce decree between appellee, the payor father in this case, and the mother was filed on June 25, 1999. The decree awarded the mother custody of the parties' two minor children (then three and one years of age), and ordered appellee to pay child support to the mother through the clerk's office at the rate of $85 per week. The decree also granted a judgment against appellee for retroactive child support in the amount of $1050 toward which the court ordered appellee to pay an additional $20 per week until the entire amount was paid.

Subsequent to the filing of the decree, no other action or filing was taken until July 26, 2005, when appellant filed its motion to intervene simultaneously with a motion for citation alleging that appellee had willfully refused and failed to comply with the support order and should be jailed. The motion alleged that appellee had accrued an arrearage in the amount of $24,125 as of May 27, 2005, and that the State of Arkansas was entitled to judgment. The motion also requested affirmative relief, asking the court to order appellee to secure and maintain health care insurance coverage as available through his place of employment, or another group plan, if not already provided by appellee.

The circuit court granted intervention and issued an order to appear and show cause. Appellee timely answered and filed his motion for contempt and for credit for child support provided by him. He asserted that he had provided support for the children by allowing the children and mother to live in housing provided to him as part of his compensation for labor to his employer, valued at $350 a month, and for providing the sole support for the children for a year when the children lived with him. The testimony at trial supported these allegations.

At trial, the OCSE's attorney informed the court that it had intervened in the action and was pursuing the payment of the support by, and an arrears judgment against, appellee upon the request of the Attorney General's Office of the State of Texas, made pursuant to the Uniform Interstate Family Support Act. Counsel explained that the mother of the parties' two children and the children had moved their residence to Texas. With this explanation, OCSE called its only witness, an investigator employed by OCSE whose job included the monitoring and tracking of appellee's payment history of child support and calculation of arrearages.

The trial court ruled from the bench and stated that it was giving appellee credit from the date of the divorce through the end of July 2002, finding support paid in full for that time period, with any arrearage accruing from August 1, 2002. The court explained to appellee that he must understand that his future support payments were to be tendered through the appropriate administrative agency in order to properly obtain credit for future payments. The court also found that appellee was not in contempt of the court's prior orders and denied attorney fees and costs. The written order was filed on November 7, 2005. Rather than stating that the court had found that appellee had paid support, thus finding the child-support judgment satisfied, the order stated that appellee was entitled to "an abatement" of child support from June 24, 1999, through August 1, 2002.

The standard of review for civil contempt is whether the finding of the circuit court is clearly against the preponderance of the evidence. *See Omni Holding & Dev. Corp. v. 3D.S.A., Inc.*, 356 Ark. 440, 156 S.W.3d 228 (2004). Our standard of review for an appeal from a child-support order is de novo on the record, and we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *Ward v. Doss,* 361 Ark. 153, 205 S.W.3d 767 (2005). A finding is clearly erroneous when, even though there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Adametz v. Adametz,* 85 Ark. App. 401, 155 S.W.3d 695 (2004). In reviewing a circuit court's findings, we give due deference to that court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Evans v. Tillery*, 361 Ark. 63, 204 S.W.3d 547 (2005).

Appellant concedes that it can make no argument that the circuit court clearly erred in finding that appellee supported the

children during the time they were in their mother's custody by providing their housing with its rental value. Neither can it challenge the finding that appellee provided the sole support for the children for the year they were in his sole custody. Therefore, appellant presents no argument that the trial court erred in finding that appellee had provided support for the children, although the provision of the support was non-conforming with the court's decree that ordered the support to be paid through the court clerk.

Although appellant makes no challenge to the trial court's finding that the child support was paid, appellant nevertheless asserts that the trial court erred, insisting that appellee never filed any affirmative pleading to modify his support obligation under the decree and argues that he failed to properly plead and prove one of the equitable defenses. Appellant sets forth no argument or law supporting the proposition that a trial court's finding that a child-support obligation has been satisfied through a non-conforming payment somehow modifies the original judgment.

Appellant's confusion may arise from the use of the word "abatement" in the written order. The term "abatement" includes the definition of "[t]he suspension or cessation, in whole or in part, of a continuing charge." *Black's Law Dictionary* 4 (6th ed.1990). The retroactive suspension or cessation of a validly entered continuing support order would qualify as a retroactive modification and is prohibited:

> It is well settled that a parent has a legal duty to support a minor child regardless of the existence of a support order. *Pender v. McKee,* 266 Ark. 18, 582 S.W.2d 929 (1979); *Nason v. State,* 55 Ark. App. 164, 934 S.W.2d 228 (1996); *Dangelo v. Neil,* 10 Ark. App. 119, 661 S.W.2d 448 (1983). Moreover, retroactive support is not illegal, and is often awarded when an initial support order is entered. *See, e.g., Nason, supra; Pardon v. Pardon,* 30 Ark. App. 91, 782 S.W.2d 379 (1990). *See also Wilder v. Garner,* 235 Ark. 400, 360 S.W.2d 192 (1962) (mother awarded back child support where divorce decree granting custody made no provision for support).
>
> However, retroactive modification of a court-ordered child support obligation may only be assessed from the time that a petition for modification is filed. Ark. Code Ann. § 9-14-234 (Supp.1995); *Grable v. Grable,* 307 Ark. 410, 821 S.W.2d 16 (1991); *Heflin v. Bell,* 52 Ark. App. 201, 916 S.W.2d 769 (1996). Additionally, it is well settled that a support order by a court of competent jurisdiction remains in force until modified by a subsequent decree, or in limited

> situations by operation of law. *Burnett v. Burnett,* 313 Ark. 599, 855 S.W.2d 952 (1993); *Laroe v. Laroe,* 48 Ark.App. 192, 893 S.W.2d 344 (1995).

Yell v. Yell, 56 Ark. App. 176, 178-79, 939 S.W.2d 860, 862 (1997).

Once a child-support payment falls due, it becomes vested and a debt due the payee. *Chitwood v. Chitwood,* 92 Ark. App.129, 211 S.W.3d 547 (2005). However, enforcement of child-support judgments are treated the same as enforcement of other judgments, and a child-support judgment is subject to the equitable defenses that apply to all other judgments. *Id.*

In its argument, appellant claims that appellee cannot prevail because he failed to use the terms "estoppel," "waiver," "laches," or any other term recognized as an equitable defense in his pleadings, nor did he prove that he relied to his detriment on any agreement or discussion between him and the mother that his payment of rent would stand in lieu of paying support under the decree. While appellant does not reference the doctrine of satisfaction in equity in its argument, appellant's reasoning incorporates the basic tenets of that doctrine. The doctrine is stated as follows:

> The doctrine of satisfaction in equity is somewhat analogous to performance in equity, but differs from it in this respect: that satisfaction is always something given either in whole or in part as a substitute or equivalent for something else, and not (as in performance) something that be may be construed as the identical thing covenanted to be done.

Black's Law Dictionary 1342 (6th ed.1990).

Appellant's argument is based upon the premise that appellee's provision of child support through means other than through the clerk's office was a substitution for the original obligation. However, the trial court in this case found that the original child-support judgment had been paid through a non-conforming payment, not that appellant was relieved from his original obligation in any way. Although appellant argues that no equitable defenses were proven to the trial court, this is not a situation where the court declined to permit enforcement of the child-support judgment finding that appellee had proved an equitable defense. Instead, the trial court found that the judgment itself

had been satisfied; therefore, no arrearage had accrued. The directive in the decree to pay the judgment through the clerk's office was, as the trial court recognized in its admonition to appellee, merely a means to help ensure proper credit for payments.

Accordingly, the use of the term "abatement" in the written order was improper. The order should be modified to replace the phrase, "That the Defendant is entitled to an abatement of child support from June 24, 1999, through August 1, 2002," to read, "That the Court finds that Defendant has satisfied the child-support judgment from June 24, 1999, through August 1, 2002, by providing support through non-conforming child-support payments . . . ." With this modification, we affirm the trial court's decision.

Affirmed as modified.

BIRD and ROAF, JJ., agree.

ARKANSAS DEPARTMENT of HUMAN SERVICES *v.* Shelly HOLMAN

CA 05-1197 240 S.W.3d 618

Court of Appeals of Arkansas
Opinion delivered October 4, 2006

Arkansas Department of Human Services, Office of Chief Counsel, by: *Gray Allen Turner*, for appellant.

Taylor Law Firm, by: *Russell C. Atchley*, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The Division of Children and Family Services found that appellee, assistant principal at Berryville Elementary School, committed child maltreatment when she caused bruises on D.B. while disciplining him. Appellee requested an administrative hearing. The administrative law judge found that appellee committed child maltreatment while disciplining D.B. and ordered that appellee's name be placed on the Central Registry of Child Abusers. Appellee then sought judicial review. After reviewing the record, the circuit court found that the administrative law judge's opinion was not supported by substantial evidence and ordered that appellee's name be stricken from the Central Registry. The Arkansas Department of Human Services brought the present appeal seeking reinstatement of the administrative decision. The Department argues that there is substantial evidence to support the administrative law judge's findings that appellee committed child maltreatment. We disagree.

A decision by the Department of Human Services is governed by the Administrative Procedure Act, Ark. Code Ann. § 25-15-212 (Supp. 2005). The appellate court's review is directed not toward the circuit court, but instead toward the decision of the agency. *Batiste v. Arkansas Department of Human Services*, 361 Ark. 46, 204 S.W.3d 521 (2005). Review of administrative decisions is limited in scope; the agency's decision will be upheld if there is any substantial evidence to support it. *Id.*; *Teston v. Arkansas State Board of Chiropractic Examiners*, 361 Ark. 300, 206 S.W.3d 796 (2005). Substantial evidence is evidence that is valid, legal, and persuasive and that a reasonable mind might accept to support a conclusion and force the mind to pass beyond speculation and conjecture. *Arkansas Board of Examiners v. Carlson*, 334 Ark. 614, 976 S.W.2d 934 (1998). The question is not whether the testimony would have supported a contrary finding, but whether it would support the finding that was made. *Id.* It is the prerogative of the board to believe or disbelieve any witness and to decide what weight to accord the evidence. *Id.*

At the hearing, held on January 25, 2005, it was uncontested that D.B. had been disciplined for fighting at school; that D.B.'s parents were given the choice of a three-day suspension or corporal punishment; that the parents opted for corporal punishment; that the punishment consisted of spanking with a paddle approximately two and one-half inches wide and two feet in length; that both of the parents were present when the punishment was administered, as was school administrator Matt Summers; that D.B. was wearing jeans during the punishment; that the punishment consisted of three swats with the paddle; that none of the witnesses told appellee to stop or that she was hitting D.B. too hard; that D.B. did not cry out during the punishment; that D.B. expressed no pain to anyone; that D.B.'s mother disagreed with the concept of corporal punishment; that D.B.'s mother photographed D.B.'s buttocks several times approximately ninety minutes after the paddling; that the photographs showed some bruising; that D.B.'s mother took D.B. to a physician for examination two days later; and that the physician was of the opinion that the bruises did not suggest child abuse.

Pursuant to Arkansas Code Annotated § 12-12-503(2)(a)(v) (Repl. 2003), "abuse" includes infliction of a nonaccidental physical injury by any person who is entrusted with the juvenile's care by a parent, guardian, custodian, or foster parent, including an agent or employee of a public or private school. However, the

School Discipline Act authorizes every teacher to hold every pupil strictly accountable for any disorderly conduct in school or on the playground of the school, and provides that any teacher or school administrator in a school district that authorizes use of corporal punishment in the district's written student discipline policy may use corporal punishment against any pupil in order to maintain discipline and order within the public schools, provided only that the punishment is administered in accord with the district's written student discipline policy. Ark. Code Ann. § 6-18-505(b) and (c)(1) (Repl. 1999). A school district discipline policy authorizing the use of corporal punishment must include provisions for administration of the punishment, including that it be administered only for cause, be reasonable, follow warnings that the misbehavior will not be tolerated, and be administered by a teacher or a school administrator and only in the presence of a school administrator or his designee. Ark. Code Ann. § 6-18-503(b)(1) (Repl. 1999).

The disciplinary policy in effect in the Berryville Elementary School when D.B. was disciplined authorized reasonable corporal punishment of unruly students with the caveat that such punishment should be administered with extreme care and caution. The administrative law judge's finding that appellee abused D.B. was based solely on his finding that the punishment she administered was not reasonable or exercised with extreme care and caution. That finding, in turn, was expressly founded on the following reasoning:

> The punishment administered by the petitioner was not reasonable, because it was not administered with extreme care and caution. The lack of care and caution is evidenced by D.B.'s injuries. The injuries sustained as a result of the discipline are excessive. D.B. sustained [a] very large and very intensely red bruise on his right buttock and a smaller red bruise on the left buttock. Due to their size, these bruises were more than mere minor marks.

Based on our review of the record, including the photographs, we conclude that the circuit court correctly reversed the agency's determination of abuse. It is true that photographs taken less than two hours after the paddling display bruising that is clearly visible. However, we have held that evidence of bruising, standing alone, cannot be used as a legal litmus test for abuse to the exclusion of all other attendant circumstances. *Arkansas Department of Human Services v. Caldwell*, 39 Ark. App. 14, 832 S.W.2d 510 (1992). Here, the punishment was approved by the child's parents

and was conducted according to the procedures set out in the school handbook in the presence of both of the child's parents and a school administrator. The child, a 90-pound boy, was given three swats with a paddle by the 110-pound teacher. The boy did not cry out, no one complained or attempted to stop the punishment, and the child returned to class immediately afterward without complaint or incident. We are especially impressed with the evidence that the physician who examined D.B. two days afterward was of the opinion that the marks still visible were not indicative of abuse and, above all, by D.B.'s candid testimony at the hearing that:

> Last April, I got in trouble at school. Ms. Holman spanked me. When she spanked me, I just felt a sting. It hurt a couple of minutes afterwards but that's all.

Finally, we note that appellant relies on several other items of testimony that, if found to be true by the agency, might arguably have supported its decision. However, courts may not accept the appellate counsel's post hoc rationalizations for an agency action; an agency's action must be upheld on a basis articulated by the agency itself.

Circuit court affirmed; agency decision reversed.

GLADWIN and GLOVER, JJ., agree.

Amanda YARBOROUGH *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 05-1014 240 S.W.3d 626

Court of Appeals of Arkansas
Opinion delivered October 4, 2006

Glen Hoggard, for appellants.

John J. Petruccelli, attorney ad litem for the juveniles.

JOSEPHINE LINKER HART, Judge. Amanda Yarborough and George Yarborough appeal from an order of the Faulkner County Circuit Court terminating their parental rights to their three minor children, A.Y., J.Y., and S.Y. On appeal, they argue that the trial court erred in finding that there was sufficient clear and convincing evidence to terminate their parental rights. We affirm.

At the hearing on the petition to terminate the Yarboroughs' parental rights, forensic psychologist Dr. Paul DeYoub testified that he conducted psychological evaluations of Amanda Yarborough in 2002 and 2005. The trial court took judicial notice of the December 17, 2002, report, because it had previously been admitted into evidence. Dr. DeYoub stated that in 2002, he

diagnosed Amanda with a "personality disorder" and a "mood disorder," but in 2005 "upgraded" his diagnosis of a "mood disorder" to "bi-polar disorder." He noted that the combination of a personality disorder and bi-polar disorder are "very resistant to treatment." Amanda's I.Q. in both evaluations was tested to be 85, which Dr. DeYoub assessed to be "low average." He opined that while that level of intelligence allows her to "function," her home schooling her children was a "terrible idea" because while Amanda could handle the task "academically," she was "unstable," and the children would "need time to be away from her." Dr. DeYoub noted that her mental condition was worse because the environmental stressors — her children, her husband, and the continued DHS involvement — were still present. Further, testing revealed that Amanda perceived her children as being mentally ill, and she was prone to "over-medicate" them. He opined that the children have "become disturbed because she is disturbed." He also noted a pattern where as her children get older, she "finds reasons to get them out of the house."

Regarding George, whom Dr. DeYoub noted that he did not evaluate, he expressed uncertainty about whether George was a "stabilizing influence on the family." While Amanda anticipated reuniting with him, she nonetheless claimed that George was an alcoholic, a methamphetamine addict, and an "abuser." Amanda acknowledged that one of her older daughters had alleged that George had sexually abused her, but Amanda blamed the daughter for being a "seductive teenager." Dr. DeYoub noted that since the 2002 evaluation, Amanda had increasingly come to regard "the children as the problem and herself as capable and competent." He opined that generally Amanda's situation with respect to her children and husband had gotten "worse," there was little prospect for improvement, and she was "largely unfit as a parent because of her own . . . mental health problems." Dr. DeYoub stated that Amanda's prognosis in 2002 was "poor" and that it was borne out by the persistence of her problems in 2005. Regarding Amanda's relationship with George, Dr. DeYoub stated that while he was "sure" that the children were "connected to their father," the "dysfunctional marital relationship" had created a problem for the children.

DHS caseworker Laura Rogers testified that she first became involved with the Yarboroughs' case in August of 2003 when five-year-old A.Y. was found at a convenience store, unsupervised. That began a case that was closed on July 13, 2004, but

subsequently reopened on August 30, 2004, when it was reported that A.Y. had not been enrolled in school. Rogers stated that three separate reports were "found true for environmental neglect" on the family, as well as the educational neglect of A.Y. Despite being ordered by the court not to home school A.Y., Amanda had held the child out of school and had been found in contempt. Rogers noted that when A.Y. and J.Y. were taken into foster care, they were on seven and three psychotropic medications, respectively; but currently A.Y. required only three medications and J.Y. only one. Rogers recalled that the Yarboroughs had received parenting classes, and Amanda was getting counseling. Amanda told her that she moved from Conway to Jonesboro to get away from George, although she indicated that she was planning to move back in with him.

Rogers noted that Amanda seemed disinterested in interacting with her children during the visits, often spending much of the eighty minutes allotted for weekly visits talking on the telephone or with case workers. Rogers opined that Amanda had gotten "worse" since the children were first identified as being "at risk." Rogers testified that she agreed with Dr. DeYoub's opinion that Amanda was "largely unfit as a parent." According to Rogers, since the children had been in foster care, they were "better off."

Rogers opined that the boys were "more bonded" with George, and S.Y. was "more bonded" with Amanda. Nonetheless, she noted that there was still need for DHS involvement after four years, and the parents were "worse" than they were a year or two earlier. Rogers testified that the Yarboroughs had been provided with parenting classes twice, and subsequent to completing the classes, the children were again taken into DHS custody.

Michelle Whatley, a DHS child-abuse investigator, testified that she investigated the Yarboroughs pursuant to a report of child maltreatment in August 2004. She found the home "filthy," "unsanitary," and "unsafe." She noted that the home was in substantially the same condition when similar complaints were lodged in 2003.

Amanda testified on her own behalf. She stated that she moved to Jonesboro "to get away from my husband, and also to get away from my family." She stated that she currently lived in a three-bedroom apartment that was being paid for by George. Amanda admitted that she had been in counseling for nine years and that she was currently in counseling in Jonesboro. She stated

that she was currently taking three medications for depression. Amanda attributed much of her problems as a parent to George, whom she accused of undermining her attempts to discipline the children. She stated that at times she was afraid of George and that there had been physical altercations in the past.

George testified that he was living in Greenbrier and was currently employed. He admitted that he had been incarcerated for committing domestic battery against Amanda. He testified that the domestic-battery charge arose from an incident when he came home from work and discovered that Amanda was playing computer games, a situation that he encountered "constantly." He stated that he put a firecracker on her computer and told her that she needed to either cook supper or let him know. According to George, Amanda got angry and grabbed his shirt. The two scuffled and fell. Amanda took two of the children and left. J.Y. did not have a shirt and shoes on, so she left him, and George cooked supper. The police subsequently arrived and arrested him despite the fact that Amanda started the fight. He conceded, however, that he had consumed a "couple of beers" and "had been out in the sun too long" that day. George also admitted to previously being arrested for domestic violence in 2001, although he claimed that he was falsely accused because Amanda hit him with a telephone while he was trying to take it away from her. George stated that it was a "constant problem" to get Amanda to clean the house and wash clothes. George testified that he believed that Amanda "needs to stay in counseling" and become more "motivated" to take care of the house. He also admitted that his drinking accounted for some of the previous problems in his family but claimed he was now a "recovering alcoholic." George conceded that his relationship with Amanda was "dysfunctional" but stated that he would give up the relationship in order to get his children back. He claimed that he was the parent that took care of the children for the last nine years.

Jaime Moore, Amanda's twenty-four-year-old daughter, testified that she would be willing to take custody of the three minor children. She stated that she had been inappropriately touched by George when she was thirteen years old. Jaime also claimed that she had been "raped and molested" by friends of her mother's, beginning when she was seven. She stated that she told her mother about the abuse, but her mother did not always believe her. When George molested her, she left the home. She claimed that although she told Amanda about the molestation, Amanda

married George approximately two weeks later. Moore stated that when she lived with Amanda, she was placed on psychotropic medication and was currently taking Zoloft for depression. She stated that her younger sister, Jennifer, was also put on medication. Moore described the condition of her home when she was growing up as "horrible," and she claimed that she took care of her younger sibling, including changing and feeding her, even though she herself was only five years old. She stated unequivocally that Amanda put her interests ahead of the interests of her children.

In her order terminating the Yarboroughs' parental rights, the trial judge found "there is little likelihood that services to the family will result in successful reunification" and substantiated her conclusion based on the following specific reasons:

> a. there have been multiple prior true reports of child maltreatment of these and older siblings by the parents;
>
> b. there have been multiple prior protective services cases open on the family for environmental and educational neglect;
>
> c. the psychological evaluations by Dr. Paul Deyoub concluded that the parents were chronically unfit and not likely to respond to treatment;
>
> d. that the mother has been in counseling for nine (9) years to no effect;
>
> e. the parents refuse to accept responsibility for their actions;
>
> f. that the previous dependency/neglect case was open for 11 months and had to be reopened one month after it was closed;
>
> g. the long-term history of alcohol and drug abuse; and
>
> h. the pattern of domestic violence between the parents while the children were present.

On appeal, the Yarboroughs argue that the trial court erred in finding that there was sufficient clear and convincing evidence to terminate their parental rights. They contend that there was insufficient evidence that the children were out of their custody for twelve months, that they had failed to rehabilitate the home

and correct the condition that caused the removal, and that they subjected the children to aggravated circumstances.

The grounds for termination of parental rights must be proven by clear and convincing evidence. *M.T. v. Arkansas Dep't of Human Servs.*, 58 Ark. App. 302, 305, 952 S.W.2d 177 (1997). When the burden of proving a disputed fact is by clear and convincing evidence, the question on appeal is whether the trial court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). This court reviews termination of parental rights cases de novo. *Id.*

We note first that DHS has conceded two of the Yarboroughs' subpoints, acknowledging that the children were not out of the home for more than twelve months and declining to challenge whether or not the environmental neglect had been remedied. DHS asserts, and we agree, that the grounds for termination were that the parents have subjected the children to aggravated circumstances. The Yarboroughs' attempt to characterize this as merely "an additional ground" that was "duplicative to the ground that the parents did not remedy their home nor their parental behavior" is simply mistaken—it was the entire basis for the termination of their parental rights. Accordingly, our focus will be on whether the trial court's findings relative to this ground are supported by the evidence.

In this case, the trial court terminated the Yarboroughs' parental rights pursuant to Arkansas Code Annotated section 9-27-341(b)(3)(A) and (b)(3)(B)(*ix*)(*a*)(3) (Repl. 2002). The relevant subsections of the statute provide as follows:

> (3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:
>
> (A) That it is in the best interest of the juvenile, including consideration of the following factors:
>
> (i) The likelihood that the juvenile will be adopted if the termination petition is granted; and

(ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by continuing contact with the parent, parents, or putative parent or parents;

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

. . .

(ix)(a) The parent is found by a court of competent jurisdiction, including the juvenile division of circuit court, to:

. . .

(3) Have subjected the child to aggravated circumstances;

In our juvenile code, "aggravated circumstances" means that "a child has been abandoned, chronically abused, subjected to extreme or repeated cruelty, or sexually abused, or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification[.]" Ark. Code Ann. § 9-27-303(6) (Repl. 2002). In the instant case, the trial court focused on the last definition of aggravated circumstances, that there is little likelihood that the services to the family will result in successful reunification. Because it is well-settled law that termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents, and will only be used where it is necessary to prevent the "destruction of the health and well-being of the child," *Johnson v. Arkansas Department of Human Servs.*, 78 Ark. App. 112, 119, 82 S.W.3d 183, 187 (2002), there must be more than a mere prediction or expectation on the part of the trial court that reunification services will not result in successful reunification. We hold that in this case, there was sufficient evidence that reunification services were unlikely to succeed.

[redacted] With regard to Amanda, there was considerable expert testimony that she had deep-seated psychological problems, described by Dr. DeYoub as "very resistant to treatment." These psychological problems prevented Amanda from becoming a fit parent in that they caused her to refuse to accept responsibility for her actions and seek inappropriate treatment for the behavior of her children that Dr. DeYoub believed that she engendered. Moreover, due to the long-term involvement of DHS with the

Yarborough family, we have before us a record of repeated failures to remedy the problems that had required DHS involvement with the family. The Yarboroughs twice received parenting classes, yet still exhibited inappropriate parenting. Amanda admitted to receiving counseling for more than nine years; however, in the expert opinion of Dr. DeYoub, Amanda was getting "worse." Dr. DeYoub's assessment was shared by caseworker Laura Rogers, who had significant on-going contact with Amanda in the course of her long association with the Yarborough family. Given this long history of failure, we cannot help but conclude that the trial court did not err in finding that "there is little likelihood that services to the family will result in successful reunification." Ark. Code Ann. § 9-27-303(6).

We are mindful that the trial court's findings with regard to Amanda do not apply with equal force or validity as to George. George, however, was not represented by separate counsel either at the termination hearing or on appeal, and no argument was made either at the trial-court level or to this court that he should be treated differently. It is axiomatic that we will not make an appellant's argument for him.

Further, we note that the Yarboroughs fail to effectively challenge most, if not all, of the eight specific findings of fact that the trial court made in support of termination. The one finding that they specifically attack, "that the mother has been in counseling for nine (9) years to no effect," is challenged by way of an assertion that DHS did not offer "one shred of evidence related to Mrs. Yarborough's counseling" and is simply not well grounded in fact. Amanda's counseling was addressed by the testimony of Dr. DeYoub and Laura Rogers, as well as Amanda herself. Nowhere can we find that counseling was judged to be effective. Furthermore, while the Yarboroughs attempt to challenge on appeal Dr. DeYoub's qualifications to give expert testimony on this issue, we note that his credentials were not challenged at that hearing. Failure to timely raise this argument to the trial court waives this argument on appeal. *J. E. Merit Constructors, Inc. v. Cooper*, 345 Ark. 136, 44 S.W.3d 336 (2001).

Affirmed.

CRABTREE and GLOVER, JJ., agree.

Edward Franklin HALEY *v.* STATE of Arkansas

CA CR 06-20 240 S.W.3d 615

Court of Appeals of Arkansas
Opinion delivered October 4, 2006

Bradley D. Sipe, Public Defender, for appellant.

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

ROBERT J. GLADWIN, Judge. Appellant Edward Franklin Haley appeals from the Izard County Circuit Court's order revoking his probation. On appeal, he claims that the circuit

court erred in allowing an uncounseled plea to form the sole basis for the revocation of his probation. We affirm.

Appellant pleaded guilty to sexual abuse in the first degree on August 1, 2002. He was placed on probation for sixty months. One condition of his probation was that he not commit a criminal offense punishable by imprisonment.

On or about April 22, 2005, appellant committed the crime of theft of property. Appellant, who was not represented by counsel, pleaded guilty in district court to the theft-of-property charge and was ordered to pay a fine. On May 27, 2005, the State filed a petition in circuit court for revocation against appellant based upon the theft-of-property charge.

At the hearing on the revocation petition, the circuit court heard testimony from Liz Lay, a Mountain View, Arkansas, police officer regarding the theft charge. Officer Lay testified that she had received a complaint regarding pictures of a teenage girl taken from a Wal-Mart store. Officer Lay explained that she confirmed with the store that appellant had wrongfully removed the pictures. When the officer contacted appellant, appellant stated that if he had pictures that were not his, he took them by mistake. Officer Lay further testified that when she advised appellant she would send someone to pick up the pictures, he objected, stating that some of the pictures were of a woman who knew he had taken the pictures. Officer Lay stated that she advised appellant at that time that he was not to have pictures of children. Appellant responded that the pictures were not of a child, but of a young woman. Officer Lay testified that appellant told the Wal-Mart photographer, when she asked if the pictures were of his granddaughter, that the pictures were of his helper. The pictures were subsequently retrieved from appellant, and he did not resist.

Appellant testified he would not have pleaded guilty to the theft charge had he known it would be used against him in the revocation hearing. He further testified that the prosecuting attorney told him it would be best for him to plead guilty.

By order of September 13, 2005, the circuit court found that the State proved by a preponderance of the evidence that appellant violated the terms of his probation, and appellant was sentenced to five years in the Arkansas Department of Correction. It is from this order that the appeal is taken.

In a probation-revocation hearing, the State must prove its case by a preponderance of the evidence. *Smith v. State*, 9 Ark.

App. 55, 652 S.W.2d 641 (1983). To revoke probation or a suspension, the circuit court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. Ark. Code Ann. § 5-4-309 (Supp. 2001); *Rudd v. State*, 76 Ark. App. 121, 61 S.W.3d 885 (2001). The State bears the burden of proof, but need only prove that the defendant committed one violation of the conditions. *Id.* When appealing a revocation, the appellant has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. *Id.* Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Lamb v. State*, 74 Ark. App. 245, 45 S.W.3d 869 (2001). Since the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial judge's superior position. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

The Arkansas Rules of Criminal Procedure require that a defendant be afforded counsel unless the judge in a misdemeanor proceeding determines that there is no possibility of imprisonment. Ark. R. Crim. P. 8.2(b) (2003). Appellant contends that even though he pleaded guilty to the theft of property misdemeanor, he did not violate the terms of his probation because he was not subject to imprisonment. He reasons that because he had not been appointed counsel, in district court he could not have been sentenced to prison under Rule 8.2(b). Further, because his probation condition only prohibited him from committing a criminal offense "punishable by imprisonment," he remained in compliance. However, it was possible, based upon the offense of theft of property, for appellant to have been imprisoned had he competently waived counsel, or if counsel had been appointed pursuant to Rule 8.2(b). Therefore, to claim that appellant could not violate his probation by committing the offense of theft of property is incorrect.

Also, appellant claims that the circuit court based its decision to revoke solely on an uncounseled misdemeanor conviction. He argues that in *Alexander v. State*, 258 Ark. 633, 527 S.W.2d 927 (1975), the Arkansas Supreme Court, quoting the United States Supreme Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), stated that an uncounseled municipal court conviction cannot be used for the purpose of revoking a suspended sentence as the net effect thereof is "the actual deprivation of a person's liberty" without "the guiding hand of counsel." *Alexander*, 258 Ark. at 635, 527

S.W.2d at 929. However, the Arkansas Supreme Court went on to state, "Of course, this does not mean that the responsible officials cannot show that the facts giving rise to the municipal court conviction are sufficient themselves to revoke the suspended sentence." *Id.* at 637, 527 S.W.2d at 930.

Here, the State presented evidence of the facts giving rise to the district court conviction sufficient to revoke the suspended sentence. This court will defer to the circuit court's superior position in determining the credibility of the witnesses, which included both the police officer and the appellant. The circuit court heard the testimony regarding the guilty plea, along with the testimony that led to appellant's arrest for theft of property. There was evidence before the circuit court that appellant, a registered level-three sex offender, took photographs of a teenage girl from a Wal-Mart store. The circuit court also heard evidence that appellant had seen the pictures at the store and told the Wal-Mart photographer that they were of appellant's helper who had worked for him earlier that morning. Therefore, we cannot say the circuit court solely relied upon the district-court judgment, and we hold that the circuit court's findings are not clearly against the preponderance of the evidence.

Affirmed.

ROBBINS and BAKER, JJ., agree.

Mark SIMMONS *v.* Angie DIXON

CA 05-1398 240 S.W.3d 608

Court of Appeals of Arkansas
Opinion delivered October 4, 2006

[Rehearing denied November 1, 2006.*]

Hoskins & Harris, P.A., by: *James W. Harris*, for appellant.

Legal Aid of Arkansas, Inc., by: *Andrea Walker*, for appellee.

SAM BIRD, Judge. Appellant Mark Simmons appeals the trial court's entry of a protective order against him after his ex-girlfriend, appellee Angie Dixon, filed a petition for the order based on allegations that Simmons had threatened her and her dog. On appeal, Simmons contends that the trial court's decision was both an error of law and was unsupported by the evidence. We affirm.

* ROAF, J., would grant rehearing.

On September 20, 2005, Dixon filed a "Petition for Order of Protection" on behalf of herself and "an adjudicated incompetent person whose name is Dog Mojo," alleging that Simmons had committed domestic abuse by sending text messages in which he threatened to harm her and to kill her dog. The petition also alleged that Simmons had been "cussing" Dixon and "beating on [her] car" during an incident at Sonic. Furthermore, the petition alleged that Simmons called Dixon's place of employment and made derogatory comments about Dixon.

At a hearing held on September 30, 2005, Dixon testified that she was Simmons's girlfriend for eighteen months and that she lived with him for fifteen of those months. She claimed that, during this time, Simmons became physically abusive when he drank. She said that "when he got drunk a jealousy streak would come out" and that he would "push [her] or pull [her] out of places."

Dixon further testified that she filed for the order of protection after an incident at Big Daddy's nightclub in June 2005, claiming that Simmons walked in while she was dancing and called her a "whore." She said that he pushed her while she was on the dance floor.

Dixon also described a series of text messages that she received from Simmons. She claimed that she received the messages during the period from April 22, 2005, to May 22, 2005. According to Dixon, in these messages, Simmons called her a "lying whore" and threatened to kill her dog.

Dixon explained that the reason she waited until September 2005 to file the petition for a protective order was because she was waiting for a court date, and the Mississippi County Sheriff's Department had never received a faxed copy of the police report that she made "in April and in May." She claimed that, since the "incidents back in May,"[1] the only other incidents with Simmons were "catty remarks" and "the flipping of the finger." She said that if she was walking to someone's house, he would scream out obscenities and "flip [her] off." She agreed that this was "not really a clear and present danger of bodily harm" and said that she "just want[ed] him to leave [her] alone, keep his comments to [himself,] and keep his finger to [himself]." She said that the last time the two went out together on a date was March 18, 2005.

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[1] We are uncertain as to which incidents Dixon is describing here. In any event, Dixon's testimony was that she received text messages from Simmons during the period from April 22, 2005, to May 22, 2005, and that an incident at Big Daddy's nightclub occurred in June 2005.

Dixon denied stating that Simmons "beat on her car." She claimed that officers asked her if he touched her car, and she said that he "shook it." She said that she was "confused." She said that she went to the police after the incident at Big Daddy's and was "afraid" because Simmons said in his text messages that "if he caught me out . . . he [would] whip me and . . . I would find my dog dead in my backyard."

Simmons also testified at the hearing. He claimed that he had a relationship with Dixon from October 2003 to March 2005 and that they lived together for "roughly five to six months" during the time that they were dating. He said that the last time he spoke to Dixon was in June 2005 when she walked up to him at the Holiday Inn (where Big Daddy's nightclub was located) and "started cussing [him]." He said that she then went to the dance floor and told some friends "some stuff that wasn't true." He said that he went to "confront" her on the dance floor and that she pushed him. When she did, he "went to slap her hands down" and her current boyfriend "jumped in the middle of it." Simmons stated that the bouncers at the club asked Dixon and her boyfriend to leave, and that he had not had any contact with Dixon since. He denied any physical abuse during his relationship with Dixon and specifically said that he "never touched her." He claimed that he had never hit a woman. He explained that he slapped Dixon's hands down at Big Daddy's to keep her from hitting him. He said that he contacted her place of employment in September 2005 to inquire about whether she had a restraining order against him.

Simmons admitted to sending text messages when he and Dixon first broke up because "she was telling people that she was going to make [him] lose [his] job and that [he] beat her and everything." Simmons also admitted that he threatened to kill Dixon's dog, but never did so. He explained that he bought the dog for her and would never hurt the dog. He said he told Dixon that if she kept telling people that he beat her, he would. He opined that she knew that he did not mean what he was saying in the text messages because he "never followed through with it" and it was "four or five months later before she worried about it."

Following the hearing, the court stated as follows:

> All right. Thank you. I have a sheet that I follow, and it's taken directly from the Arkansas code as to the requirements for the issuance of an Order of Protection. And basically everything has been met except the one point of contention as to whether or not

> there has either been physical harm, bodily injury, assault, so forth. And one of those requirements is the infliction of fear of imminent physical bodily harm or assault.
>
> The Defendant admitted that he made a text message to her saying, if you don't quit telling people this, I am going to beat your — da da da. And that was clearly intended to scare her into quit [sic] bad-mouthing him. And that is the element that's required for the issuance of an Order of Protection. It's the infliction of fear of physical assault.
>
> So the Order of Protection is issued. It will expire December the 31st of 2006. The request for payment of attorney fees is denied.

Simmons presents two arguments on appeal. First he claims that "under any reasonable interpretation of the legislative enactments relating to protective orders the allegations made by Ms. Dixon do not give rise to a valid cause of action against Mr. Simmons." Second, he asserts that "even if Ms. Dixon's allegations set forth in her petition could be remotely considered sufficient to come within the applicable statutes the evidence that was presented was simply not sufficient to meet her burden of proof."

Whether Simmons's Actions Fell Within Statutory Parameters

Simmons first argues that we should reverse the trial court's decision because his actions did not fall "completely within the words" of the statutes relating to protective orders. Orders of protection are governed by The Domestic Abuse Act of 1991, codified as Ark. Code Ann. § 9-15-101 – 9-15-303 (Repl. 2002 and Supp. 2005) (collectively, the Act). The purpose of the Act is "to provide an adequate mechanism whereby the State of Arkansas can protect the general health, welfare, and safety of its citizens by intervening when abuse of a member of a household by another member of a household occurs or is threatened to occur, thus preventing further violence." Ark. Code Ann. § 9-15-101 (Repl. 2002). The Act defines domestic abuse as "[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members[.]" Ark. Code Ann. § 9-15-103(a)(1) (Repl. 2002). Under the Act, a petition for relief "shall allege the existence of domestic abuse and shall be accompanied by an affidavit made under oath stating the

specific facts and circumstances of the domestic abuse and the specific relief sought." Ark. Code Ann. § 9-15-201(e) (Repl. 2002). A circuit court may provide the following types of relief in response to such a petition:

> (1) Exclude the abusing party from the dwelling which the parties share or from the residence of the petitioner or victim;
>
> (2) Exclude the abusing party from the place of business or employment, school, or other location of the petitioner or victim;
>
> . . .
>
> (6) Prohibit the abusing party directly or through an agent from contacting the petitioner or victim except under specific conditions named in the order; and
>
> (7)(A) Order such other relief as the court deems necessary or appropriate for the protection of a family or household member.
>
> (B) The relief may include, but not be limited to, enjoining and restraining the abusing party from doing, attempting to do, or threatening to do any act injuring, mistreating, molesting, or harassing the petitioner. . . .

Ark. Code Ann. § 9-15-205(a) (Repl. 2002).

Simmons points out that, in the petition for the order of protection, Dixon requested that Simmons be excluded from an apartment that neither of them occupied and that Simmons be excluded from a bar in Blytheville, and Dixon also asked the court to protect her dog Mojo. Simmons claims that "none of those requests fit within any of the types of relief authorized by A.C.A. 9-15-205." We note that this argument was not raised below and that Simmons is therefore precluded from raising it on appeal. *See Jordan v. Diamond Equip. & Supply Co.*, 362 Ark. 142, 207 S.W.3d 525 (2005). Even were we to address this argument, we would also note that the trial court did not grant the requested relief except to the extent that Simmons was "excluded from the residence occupied by Petitioner [Dixon] either at the address shown in the petition . . . or at any other residence in which the petitioner children [sic] may be present." This relief was clearly permitted under the statute, regardless of whether Dixon's petition indicated an incorrect address. We therefore fail to see how Simmons was

prejudiced by Dixon's requests for relief; as a result, we could not reverse on this point. *See Pablo v. Crowder*, 95 Ark. App. 268, 236 S.W.3d 559 (2006) (recognizing that this court will not reverse in the absence of a demonstration of prejudice).

Simmons further asserts that there was no evidence that Dixon suffered bodily injury at the hands of Simmons and that Dixon's "only fear of 'imminent' harm related to [Simmons's] name-calling and [Simmons's] alleged threats to the dog he bought her while they were intimately involved." Simmons claims that the legislature did not intend the protective order scheme to apply to family pets, and that, based on her own testimony, Dixon was never afraid for her personal safety; rather, she only wanted Simmons to quit calling her names. Furthermore, Simmons claims that, because Dixon waited four months to file the petition, she was not in fear of "imminent" harm. For these reasons, he argues that Dixon's allegations "do not come squarely within what the statute prohibits or purports to guard against." We disagree.

Here, it is clear that the trial court did not grant relief based on Simmons's threats to the dog, but rather his threats to "beat" Dixon herself. Moreover, Dixon's allegations came within the broad parameters of the Act because, although she waited four months to file the petition in this case, she was clearly in fear of "imminent" harm at the time that Simmons threatened her.

In *Mississippi River Transmission Corp. v. Weiss*, 347 Ark. 543, 550, 65 S.W.3d 867, 872–73 (2002), our supreme court stated as follows:

> We review issues of statutory interpretation de novo, as it is for this court to decide what a statute means. In this respect, we are not bound by the trial court's decision; however, in the absence of a showing that the trial court erred, its interpretation will be accepted as correct on appeal. The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language.
>
> When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. When the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other

> appropriate means that shed light on the subject. The basic rule of statutory construction is to give effect to the intent of the General Assembly.

(Citations omitted.)

Arkansas Code Annotated section 9-15-103 includes "the infliction of fear of imminent physical harm" as a form of domestic abuse. In this case, the evidence shows that Dixon was in fear of "imminent" harm as contemplated by the broad purpose of the Act — to prevent domestic violence. According to Webster's Dictionary, "imminent" means "likely to occur at any moment" or "impending." *See Random House Webster's College Dictionary* 673 (1996). Here, Dixon claimed that she was "afraid" when Simmons sent the threatening text messages. This clearly fell within the broad parameters of the statute — "imminent" meaning "likely to occur at any moment" or "impending" at the time of the alleged abuse, not at the time of filing the petition for a protective order. Given the purpose of the statute, to prevent domestic abuse, we cannot see how the statute could be interpreted any other way. In addition, as Dixon points out, the Act itself prohibits the denial of an order of protection based solely on the amount of time between the alleged abuse and the filing of the petition. *See* Ark. Code Ann. § 9-15-214 (Repl. 2002) (stating that a circuit court shall not deny a petitioner relief "solely because the act of domestic or family violence and the filing of the petition did not occur within one hundred twenty (120) days"). The fact that Dixon waited four months to file the order is not a basis for reversal. Thus, the trial court did not err in its interpretation of the statute.

Sufficiency of the Evidence to Support the Trial Court's Decision to Issue the Order of Protection

Regarding Simmons's claim that the evidence is insufficient to support the trial court's decision in this case, his arguments are apparently the same as for the first point addressed above. Essentially, Simmons is arguing that his actions did not meet the statutory requirements for the issuance of a protective order and, thus, that there was insufficient evidence for the court to issue such an order. In bench trials, the standard of review on appeal is not whether there is substantial evidence to support the finding of the court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence; 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. *Chavers v. Epsco*, 352 Ark. 65, 98 S.W.3d 421 (2003). Disputed facts and determinations of credibility are within the province of the fact-finder. *Id.*

Here, we are not left with a firm conviction that a mistake was made. Simmons admitted to sending threatening text messages to Dixon, and Dixon claimed she was "afraid" after receiving the messages. As discussed herein, this was clearly sufficient to show the infliction of fear of "imminent" physical harm under the domestic abuse statutes. We therefore affirm.

Affirmed.

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

ROAF, J., dissents.

ANDREE LAYTON ROAF, Judge, dissenting. I would reverse and dismiss this case because I do not believe that appellee Angie Dixon presented sufficient evidence to justify the grant of a protective order. I conclude that the trial court erred in finding that there was the infliction of fear and imminent physical harm, bodily injury, or assault, an element of the statutory offense, under the circumstances of this case.

At the September 20, 2005, hearing, Dixon testified that she and Simmons had separated on April 1, 2005, and that she began receiving text messages on April 22. She claimed that Simmons called her a lying whore and stated that she needed to quit telling people that he whipped her "a**" or he would actually do it. She claimed that she never said such a thing, but merely told people that he had a habit of pushing when he got drunk. Dixon also testified that Simmons threatened to kill the dog he had given her as a Christmas gift because they were in a dispute as to whether she had returned all of his Harley-Davidson items. She stated that she received the last message on May 22, 2005, and that she decided to get an order of protection in June 2005, after Simmons came into Big Daddy's club, called her a whore, and pushed her.

She claimed that she filed a report with the Dell police although the club is in Blytheville, because she was asked to leave the club and she went home and called the police. According to

her, the report never got faxed to the sheriff's department until September 20, 2005, and she waited so long to file the complaint because she was told that she would have to wait for a letter to get a court date. Dixon further testified that she was going to dismiss the complaint as long as Simmons left her alone and stopped making catty remarks and flipping her off. She stated that she believed that Simmons would leave her alone because he was getting married. She also stated that she would be satisfied with a restraining order or a mutual restraining order if the court did not grant an order of protection.

On cross-examination, Dixon stated that after the sheriff's department received the police report, she told them that the only thing Simmons was doing now was making catty remarks and flipping her off, which she admitted did not present a clear and present danger of bodily harm. She testified that she worked at Fasco and Drift-In and that Simmons had never been to either place to her knowledge, although she believed that either Simmons or his fiancee had called her supervisor at Drift-In. Dixon also admitted that she asked that Simmons be restrained from the residence where neither of them still lived and admitted that when she went to work at Drift-In, she told her supervisor, Wayne Snow, that she had a restraining order against Simmons.

Dixon testified that "[A]t the time I went to the Dell Police Department it was because of the incident at Big Daddy's. I had all the text messages, therefore, they wanted those." However, she testified that she was afraid because Simmons said in the text messages that if he caught her out he would whip her and that she would find her dog dead in her backyard.

Simmons's testimony agreed with much of Dixon's, and he likewise confirmed the incident at Big Daddy's in June 2005, where there was a confrontation which resulted in Dixon and her male companion being ousted by the club's bouncers.

In Dixon's affidavit that she filed on September 20, 2005, seeking the order of protection, Dixon recited the text messages and an incident at a Sonic restaurant that occurred August 5, made no mention of the incident at Big Daddy's that precipitated her police report, yet asked that the court exclude Simmons from an apartment where they no longer lived, her place of employment, and also "Big Daddy's."

The purpose of the domestic abuse law is to "provide an adequate mechanism whereby the State of Arkansas can protect the general health, welfare, and safety of its citizens by intervening

when abuse of a family member of a household by another member of a household occurs or is threatened to occur, thus preventing further violence." Ark. Code Ann. § 9-15-101 (Repl. 2002).

In this instance, testimony reveals that Dixon filed her petition after the altercation in Big Daddy's club, after which she admitted that she was the one asked to leave. In addition, she did not dispute Simmons's testimony that she was the one who initially approached him in the club and had to be restrained by her boyfriend. The club incident occurred well after Dixon testified that she received her last text message, and her actions negate the prospect that she feared Simmons would cause her bodily harm. Further, Dixon admitted that Simmons no longer bothered her except to make "catty remarks," and that these remarks did not cause her any imminent fear, but that she just wanted them to stop.

It appears that both Dixon and Simmons said and did unkind things to each other, and Dixon was often the aggressor. The trial court recognized this when it stated that Simmons's threat to whip Dixon was clearly intended to scare Dixon to stop "badmouthing" Simmons; however, the trial court made no finding as to whether Simmons's text message actually inflicted Dixon with fear of *imminent* harm. Dixon asserts that the trial court did make a finding of imminence when it stated that this finding was required for the issuance of an order of protection. This assertion is incorrect. As stated previously, the court only found that Simmons *intended* to scare Dixon, not that he actually inflicted her with imminent fear. Even if the assertion were correct, such a finding of imminence would be clear error. Witness credibility did not seem to be an issue in this case, as the trial court decided to issue an order of protection based upon Simmons's own testimony.

The trial court clearly erred in issuing an order of protection against Simmons because it did not make a finding of infliction of fear of imminent bodily harm. In the absence of that finding, the court could have (but did not) made a finding that Simmons had actually caused Dixon bodily harm. While Simmons admitted to sending some ill-advised text messages, I have a definite and firm feeling that a mistake has been made in this case. Not only was there no fear of imminent infliction of physical injury, but the court issued an order of protection requiring Simmons to stay away from a night club and from a residence at which neither party resided. While protection-order hearings are not criminal in nature, there is some stigma attached to having been found to be the perpetrator in a domestic-abuse case. The trial court at most

should have issued mutual restraining orders because both parties agreed that they wanted the other to leave them alone; however, it was error to grant an order of protection against Simmons simply because Dixon wanted him to stop making catty remarks, especially in light of the fact that Dixon appeared to be also making derogatory statements about Simmons.

While Dixon did claim after the fact that she was afraid, it is abundantly clear from her testimony and the other evidence presented that she was angered by the incident at Big Daddy's, sought to make a police report only as a result of that incident, and that it was the police who then injected the text messages into this dispute. I do not think the important statutory protection afforded by Ark. Code Ann. § 9-15-101 for persons who experience real and threatened domestic abuse is advanced by permitting its utilization to allow a party, such as Ms. Dixon, in a back-and-forth boyfriend-girlfriend feud to score one-upmanship points.

Margaret Lillette SMITH *v.* Robert McCRACKEN
and Leslie McCracken

CA 06-139 240 S.W.3d 621

Court of Appeals of Arkansas
Opinion delivered October 4, 2006

Hamilton & Hamilton, PLLC, by: *James A. Hamilton*, for appellant.

The Ray Law Firm, P.A., by: *Michael D. Ray*, for appellee.

WENDELL L. GRIFFEN, Judge. This is an appeal from an order granting custody of K.E.E., d.o.b. 10/15/96, to appellees Leslie and Robert McCracken. The case began as a contested adoption proceeding. The McCrackens sought to adopt K.E.E, who is Leslie's great-niece. Appellant Margaret Smith, who is also K.E.E.'s great-aunt, had been named as the child's guardian by virtue of unlimited letters of guardianship from Indiana. Smith, who did not have full-time physical custody of the child, contested the adoption and counterclaimed to adopt K.E.E. Because the circuit court determined that the notice to the biological parents was procedurally infirm, it denied both adoption petitions, treated the matter as a custody issue, and awarded custody to the McCrackens. Smith now appeals, arguing that because the case began as an adoption proceeding, the circuit court, sitting in probate, had no jurisdiction to enter an award of custody. We disagree and affirm the order granting custody of K.E.E. to the McCrackens.

Smith was appointed as K.E.E.'s guardian on December 10, 1999. Subsequently, the child stayed alternatively with her biological mother, Smith, and the McCrackens. On August 14, 2000, Smith executed a document stating that she transferred "temporary custody" to Leslie because it was unsafe for the child to be in the mother's custody.

Leslie married appellee Robert McCracken in June 2002, and they filed a petition for adoption in Ashley County, Arkansas, on October 14, 2004. Attached to the petition was an affidavit in

which the McCrackens stated: "[W]e need to have an order of custody so we can legally be responsible for the child." They further indicated in the same paragraph their desire to adopt K.E.E.

In Smith's answer to the adoption petition, she asserted that she was K.E.E.'s guardian and that she consented to the adoption of K.E.E. by the child's maternal grandfather (who never filed a petition to adopt). She requested that the court deny the McCrackens' petition to adopt. A temporary hearing was conducted to determine in whose custody K.E.E. should remain until the hearing on the adoption petition was conducted. (At the time of the hearing, K.E.E. was staying with her mother.) During this hearing, the circuit court noted that a petition for adoption had been filed and that a request had also been made "for a hearing on custody." The court stated that it set the temporary hearing on custody pending the final hearing only. At this point, Smith objected, asserting that because the matter was a probate matter, the "probate court," being a court of limited jurisdiction, could not deal with custody issues. The court overruled the objection, citing to Amendment 80 of the Arkansas Constitution and to its belief that it could deal with temporary custody pending a final hearing in the case.[1]

The court recognized the parties' August 14, 2000 custody agreement and continued custody in appellees. In response, Smith filed a counterclaim for adoption, asserting that the biological mother had consented to Smith's adoption of K.E.E.

The final hearing was held on May 10, 2005. Smith did not at this point challenge the circuit court's jurisdiction to determine the issue of custody. The court heard testimony from various witnesses regarding who should be K.E.E's legal custodian and whether either of the petitions to adopt should be granted. The court first responded to the parties in a November 3, 2005 letter, stating that it considered treating the matter as a guardianship, but due to the procedural infirmities regarding notice to the biological

[1] The court also erroneously stated that "the legislature has specifically given the probate court the authority to grant visitation." The error is two-fold. First, there are no longer any "probate courts" in Arkansas after the passage of Amendment 80, and second, probate proceedings, as defined under Arkansas law, do not expressly encompass visitation or custody determinations. *See* Ark. Code Ann. § 28-1-104 (Repl. 2004). Nonetheless, we affirm because the circuit court otherwise had jurisdiction to make the custody determination in this case.

parents, it treated the matter as a custody issue. In its final order, the court dismissed both adoption petitions due to the procedural infirmities and expressly elected to treat the matter as a custody matter. It granted custody to the McCrackens and granted visitation to Smith.

The sole issue now before us is whether the circuit court had jurisdiction to enter a custody order once it dismissed the adoption petition.[2] We affirm the order awarding custody to the McCrackens based on the express terms of Amendment 80, Administrative Order Number 14, and our previous holding in *Moore v. Sipes*, 85 Ark. App. 15, 146 S.W.3d 903 (2004).

Smith's main argument is that Amendment 80 to the Arkansas Constitution did not confer upon a trial court, sitting in the probate division, the "expanded jurisdiction" to treat a matter that began as an adoption matter as a custody issue. For support of this proposition, she cites to *First National Bank of DeWitt v. Cruthis,* 360 Ark. 528, 203 S.W.3d 88 (2005) (reversing where the trial court improperly submitted an equitable issue to the jury because Amendment 80 did not alter the scope of a party's right to a jury, which is limited to cases at law), and *Arkansas Professional Bail Bondsman Licensing Board v. Frawley,* 350 Ark. 444, 88 S.W.3d 418 (2002) (reversing where the circuit court enjoined a State licensing board, where no court of equity prior to Amendment 80 would have had the power to enjoin the board).

Smith correctly notes that the statute that defines the jurisdiction of probate proceedings includes adoption determinations but not custody proceedings. *See* Ark. Code Ann. § 28-1-104 (Repl. 2004). She also correctly notes that nothing under the adoption code, at Arkansas Code Annotated section 9-9-101 *et seq.*, authorizes a circuit judge, sitting in the probate division in an adoption case, to make an award of custody if the adoption proceeding fails. Thus, Smith argues that because Amendment 80 did not expand the jurisdiction of probate courts, because probate courts are not expressly authorized to make custody determinations, and because adoptions are probate matters, the circuit court

[2] Smith cursorily asserts that if the circuit court had jurisdiction to treat the issue as a custody issue, then the court should have awarded custody to her. However, she offers no support for this argument, and it is not part of her argument in her single-point heading. Hence, we do not treat it as a properly-preserved challenge to the sufficiency of the evidence supporting the circuit court's order.

had no power to take any further action in this case once it dismissed the adoption petition. She asserts that "once the adoption proceedings were dismissed, the case was over."

We disagree with Smith's restrictive and erroneous characterization of the powers that may be exercised by a circuit court following Amendment 80. Amendment 80 merged in Arkansas what were once chancery and circuit courts into circuit courts, so that any circuit court would thereafter have jurisdiction "over *all matters* previously cognizable by Circuit, Chancery, Probate, and Juvenile Courts." *See* Amend. 80 § 19(B)(1) (emphasis added). Amendment 80 § 6(A) provides that circuit courts are established as the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to the Arkansas Constitution. Section 6(B) of this same amendment allows the division of the circuit court into subject-matter divisions and provides that *any judge* within the circuit may sit in *any division.*

In turn, Administrative Order Number 14 regulates the administration of circuit courts and established the following subject matter divisions: criminal, civil, juvenile, probate, and domestic relations. *See* Admin. Order No. 14(1)(a). This order defines "probate" to include adoptions and defines "domestic relations" to include custody. *See id.* However, Order 14(1)(a) also states:

> *the designation of divisions* is for the purpose of judicial administration and caseload management and *is not for the purpose of subject-matter jurisdiction.* The creation of *divisions shall in no way limit the powers and duties of the judges to hear all matters within the jurisdiction of the circuit court.*

(Emphasis added.)

We are convinced that the purpose of Amendment 80 was to eliminate the artificial distinctions regarding a circuit court's jurisdiction that Smith would have us reimpose. Pursuant to Amendment 80, circuit courts simply have added to their already existing jurisdiction as courts of law the equitable jurisdiction that chancery courts held prior to adoption of the amendment. *See Cruthis, supra.* As the Arkansas Supreme Court stated in regard to the passage of Amendment 80: "Jurisdictional lines that previously forced cases to be divided artificially and litigated separately in different courts have been eliminated." *Id.* at 533, 203 S.W.3d at 91.

In other words, a circuit court may now exercise any act of jurisdiction that *either* a court of law or equity could have exercised prior to Amendment 80, and further, the designation of an action as a specific type of action does not prevent a circuit court from hearing any matter within the court's jurisdiction that is properly raised to the court. In this case, the issue of custody was before the circuit court because the McCrackens requested custody of K.E.E., as well as the right to adopt her. Accordingly, the circuit court had the power to determine custody of K.E.E. after it dismissed the adoption petitions.

While Smith is correct that probate jurisdiction does not expressly include the power to make custody determinations, her argument ignores the fact that *the circuit judge was not limited to probate jurisdiction* in determining what the best interest of K.E.E. Rather, using its jurisdiction to determine adoption issues, it dismissed both adoption petitions. The dismissal of the adoption petitions did not somehow divest the circuit court of its jurisdiction to make the necessary custody determination regarding K.E.E., where the trial court recognized that the custody issue had been raised by the McCrackens in the affidavit attached to their petition for adoption, and where the trial court heard evidence that would allow it to make a custody determination. Clearly, the same evidence relating to whether either adoption petition should be granted based on the best interest of the child would also support a custody determination.

While our courts have not addressed the precise situation that we have in the instant case, this court has examined the relationship of Amendment 80 to probate and custody cases, in *Moore v. Sipes*, *supra*. We find that case to be dispositive of the issue in the instant case. In *Moore*, we explicitly rejected the argument that the "probate court" had no jurisdiction to enter a guardianship order because the case should have been determined as a juvenile dependency-neglect case or as a custody case. We noted:

> Since the implementation of Amendment 80, circuit court jurisdiction includes all matters previously cognizable by circuit, chancery, probate, and juvenile court. . . . Probate proceedings, as well as juvenile and chancery proceedings, often concern matters of child custody and parental rights. Custody suits and guardianship petitions involving minors are similar in that each may limit parental rights and may award custody based on the best interest of the child. . . . Thus, custody determinations may be made in both types of

> cases. In numerous instances, our courts have made what amount to custody determinations involving minors in the context of a guardianship proceeding.

Id. at 20, 146 S.W.3d at 906-07.

The same reasoning applies here — if custody determinations may be made in conjunction with guardianship proceedings, they may just as readily be made in conjunction with adoption proceedings. Like guardianship proceedings, adoption proceedings are probate proceedings that necessarily impact matters of custody and parental rights — if an adoption petition is granted, a parent's rights with regard to that child are forever foreclosed. However, if the adoption petition fails, as in this case, the circuit court must ultimately determine where the child is to live and which parties are responsible for the child's well-being.

Because a circuit court has jurisdiction to determine custody issues, it is not required to keep a child and the would-be custodians in legal limbo until they file yet another petition requesting a custody determination. The dismissal of the adoption petitions in this case did not resolve the issue of the best interest of the child because the prior custody order the circuit court had entered in this case was a *temporary* order. Just as a circuit court retains jurisdiction over custody or visitation issues in a divorce case, *see Stellpflug v. Stellpflug*, 70 Ark. App. 88, 14 S.W.3d 536 (2000), the circuit court here retained jurisdiction over the custody issue that had not been resolved. It then exercised its jurisdiction to enter a custody order which, on the merits, is not challenged in this appeal.[3]

Finally, the *Cruthis* case and *Frawley* case cited by Smith do not compel a different result. Those decisions merely stand for the proposition that after Amendment 80, a circuit court cannot exercise jurisdiction that no court of law or equity had prior to Amendment 80. Unlike those cases, the circuit court in this case was not attempting to exercise a power that no court of law or

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[3] If we dismissed the custody order, the temporary order granting custody to the McCrackens and visitation to Smith would be the standing order in this case. Notably, Smith does not now challenge the circuit court's jurisdiction to enter the temporary order. Further, she consistently requested "all other relief" to which she may be entitled and does not challenge the circuit court's power to grant her visitation under either the temporary order or the custody order.

equity did not possess prior to Amendment 80. In denying the adoption petition, the circuit court here clearly exercised a power that probate courts had prior to Amendment 80; in determining custody, the circuit court clearly exercised a power that chancery courts exercised prior to Amendment 80. Via Amendment 80, a circuit court is now authorized to exercise either power or both, as the circuit court properly did here.

Affirmed.

VAUGHT and ROAF, JJ., agree.

Linda Ann WILLIAMS *v.* STATE of Arkansas

CA CR 06-429 241 S.W.3d 290

Court of Appeals of Arkansas
Opinion delivered October 11, 2006

Erin Vinett, Deputy Public Defender, for appellant.

Mike Beebe, Att'y Gen., by: *Beth B. Carson*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Chief Judge. Appellant was charged with committing aggravated assault and domestic battery. After a bench trial, she was found guilty of one count of aggravated

assault and one count of aggravated assault on a family member. On appeal, she argues that the trial court erred in refusing to grant a directed verdict on the ground that the State failed to prove that appellant engaged in conduct that created a substantial danger of death or serious physical injury. We affirm.

A motion for directed verdict is viewed as a challenge to the sufficiency of the evidence. *Henson v. State*, 94 Ark. App. 163, 227 S.W.3d 450 (2006). The test for determining evidentiary sufficiency is whether there is substantial evidence to support the finding of guilt; on appeal, the court reviews the evidence in the light most favorable to the appellee and sustains the conviction if there is any substantial evidence to support it. 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. *Schwede v. State*, 49 Ark. App. 87, 896 S.W.2d 454 (1995).

A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he or she purposely engages in conduct that creates a substantial danger of death or serious physical injury to another person. Ark. Code Ann. § 5-13-204(a)(1) (Repl. 2006). A person commits aggravated assault on a family or household member if, under circumstances manifesting extreme indifference to the value of human life, he purposely engages in conduct that creates a substantial danger of death or serious physical injury to a family or household member. Ark. Code Ann. § 5-26-306(a) (Repl. 2006).

Viewing the evidence in the light most favorable to the appellee, the record shows that appellant was involved in a week-long affair with Virgil Ware that resulted in the birth of a child. There had recently been acrimonious legal proceedings between appellant and Mr. Ware concerning custody of the two-year-old child. As a result, appellant was under a restraining order to avoid contact with Mr. Ware.

On June 21, 2005, appellant drove to Mr. Ware's home, opened her car door, and shouted something about the child. Appellant then got out of her car and, using a razor, began scratching the side and back of a car belonging to Mr. Ware's girlfriend, Danielle Utsey. When Mr. Ware attempted to intervene, appellant said that she "got something for him" and attacked Mr. Ware with a baseball bat. As they struggled, appellant struck

Mr. Ware on the head with the bat, then swung at him and missed, the blow being delivered with sufficient force to break a car window.

By this time, Ms. Utsey and her sister Monica had come outside and were standing on the sidewalk by the street. Appellant then re-entered her car. Ms. Danielle Utsey described the subsequent events as follows:

> [S]he backed back and then tried to run us over. So we like ran in the ditch. And after that she pulled off. She drove her car toward me I would say about three times. When she was doing that Virgil was like beside me. Right beside me to my left, and Monica was to my right. I know she wasn't just trying to drive off down the street because there's a ditch. She drove off this way toward us — where the ditch is at, drove right — ran us in the ditch. She almost went in the ditch. If she went any further, she wouldn't have been able to back up and get out of the ditch.

Ms. Monica Utsey testified that:

> [Mr. Ware] wrestled her back to the car. And she just — she got in the car and I was like, Danielle, she's going to hit us. So we come back up in the yard. And just then she ran into the ditch trying to hit us with the car.

Mr. Ware recalled the event as follows:

> At that point, she jumped in her car to leave. She jumped in her car, but she didn't leave. She tried to hit me with the car once and then when Monica and them made it to the street — when Monica and Danielle made it to the street, she tried again. Then she tried — the last time she did, she ran in the ditch and then she backed up.

Appellant's sole argument for reversal is that, with regard to the assault convictions, the testimony that she tried to hit the victims with her car does not constitute substantial evidence that she engaged in conduct that created a substantial danger of death or serious injury to the victims. We do not agree. The fact-finder does not and need not view each fact in isolation, but rather considers the evidence as a whole. *Bridges v. State*, 46 Ark. App. 198, 878 S.W.2d 781 (1994). Here, the testimony regarding appellant's attempt to run over the victims can be considered in light of the evidence that appellant, in violation of a no-contact

order, drove to Mr. Ware's home and engaged in various acts of violence including property damage and physical injury to Mr. Ware by hitting him over the head with a baseball bat. Nor is the fact-finder required to set aside common sense. An automobile is a massive and powerful machine, and common sense tells us that such a machine is capable of inflicting death or serious physical injury to pedestrians even at relatively low speeds. The Arkansas Supreme Court has held that, under some circumstances of use, an automobile might constitute a deadly weapon. *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976). We hold that, in light of the evidence that appellant, after engaging in a rampage, intentionally attempted to strike the victims with her vehicle, there is substantial evidence that appellant engaged in conduct that created a substantial danger of death or serious injury to the victims.

Affirmed.

BIRD and NEAL, JJ., agree.

Jason Gregory HULL *v.* STATE of Arkansas

CA CR 05-442 241 S.W.3d 302

Court of Appeals of Arkansas
Opinion delivered October 11, 2006

Scott Adams, for appellant.

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

JOSEPHINE LINKER HART, Judge. A Van Buren County jury convicted Jason Gregory Hull of second-degree sexual assault and sentenced him to fourteen years in the Arkansas Department of Correction. On appeal he argues that the trial court erred in denying his motion for a directed verdict and in refusing to grant him access to Arkansas Department of Human Services' records. We affirm.

Hull first argues that the trial court erred in denying his motion for a directed verdict because "there are so many elements which serve to create doubt that . . . basic fairness would preclude conviction in light of the many inconsistencies in the State's case." He acknowledges that the scope of the directed verdict made at trial was limited to assertions that the absence of scientific or DNA evidence, conflicts in the witnesses' testimony, and the unreliable victim testimony caused the evidence to be so deficient that a "reasonable person could not conclude beyond a reasonable doubt" that he was guilty. Neither at trial, nor on appeal, does he specifically reference any particular element of the offense for which the State failed to present proof. His argument is without merit.

We treat the denial of motions for a directed verdict as a challenge to the sufficiency of the evidence. *Silverman v. State*, 63 Ark. App. 94, 974 S.W.2d 484 (1998). Evidence is sufficient to support a conviction if the trier of fact can reach a conclusion without having to resort to speculation or conjecture. When reviewing the sufficiency of the evidence, it is only necessary for us

to ascertain that evidence which is most favorable to the State, and it is permissible to consider only that evidence which supports the guilty verdict. *Id.*

First, it is well-established law that reconciling conflicts in the testimony and weighing the evidence are matters within the exclusive province of the jury and the jury's conclusion on credibility is binding on this court. *Id.* Second, we are unable to find any real inconsistency in the testimony supporting Hull's conviction. The ten-year-old victim testified that she was lying on the couch in the home of Jason Shelton when Hull pulled her pants and underwear down to her ankles and touched her "private spot" with his tongue. She confirmed that her knees were "apart" when Hull perpetrated the act. We note that Arkansas State Police child-abuse investigator Robert Leal testified that when he interviewed the victim, she described how her knees were spread apart and her pants were pulled down so that her ankles were held together, which is consistent with the victim's testimony at trial.

Jason Shelton testified that on the day in question, he walked into his residence and observed Hull kneeling in front of his couch with the victim's legs up in the air, her pants around her ankles, and Hull's hands "under her butt" and his face "three or four inches at the most" away from her crotch. Van Buren County Sheriff's Deputy Paul Rice testified that on the day in question, he met with the victim and she told him that Hull "pulled down her pants and he had been playing with her privates." Rice also stated that Hull admitted pulling down the victim's pants, but explained that he had done so to examine a "bug bite."

Hull next argues that the trial court erred in refusing to allow him to access the Arkansas Department of Human Services CHRIS (Children's Reporting and Information) records. He acknowledges that the United States Supreme Court passed on this issue in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), and held that an *in camera* review of the confidential records when a criminal defendant seeks access to the records satisfied the requirements of the Sixth Amendment. Hull, however, urges us to rely, not on the holding in *Ritchie*, but instead on the dissent, which urges a more expansive interpretation of the State's obligations in regard to the Confrontation Clause. We are unable to accede to this request. We cannot discern that Hull has asserted a separate Arkansas constitutional question in his argument, and we are bound by the decisions of the United States Supreme Court regarding the interpretation of

the United States Constitution. *Williams v. State*, 254 Ark. 799, 496 S.W.2d 395 (1973). In accordance with the Supreme Court's procedural blueprint as set forth in *Ritchie*, we have reviewed the sealed records that were reviewed *in camera* by the trial court, and we agree that they do not contain exculpatory evidence that would warrant their release.

Affirmed.

GLOVER and CRABTREE, JJ., agree.

Josephine C. BELL, Ph.D. *v.*
JEFFERSON HOSPITAL ASSOCIATION, INC.

CA 06-249 241 S.W.3d 276

Court of Appeals of Arkansas
Opinion delivered October 11, 2006

Porter Law Firm, by: *Austin Porter, Jr.*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *R.T. Beard III* and *Kynda Almefty-Hernandez*, for appellee.

JOHN B. ROBBINS, Judge. Appellant, Dr. Josephine C. Bell, appeals from an order dismissing her complaint against ap-

pellee Jefferson Hospital Association, Inc. (JHA). The trial court dismissed Dr. Bell's claim on the basis that it was barred by the three-year statute of limitations as set forth in Ark. Code Ann. § 16-56-105 (Repl. 2005). On appeal, Dr. Bell argues that the trial court erred by not allowing her amended complaint to relate back to the filing date of her original complaint, which was filed within the limitations period but mistakenly named the wrong party as the defendant. We agree, and we reverse and remand.

In Dr. Bell's original complaint filed on January 27, 2005, she brought suit against Jefferson Regional Medical Center Development, Inc. (JRMCD). The complaint alleged that, while visiting her husband at Jefferson Regional Medical Center on March 10, 2002, Dr. Bell slipped and fell on a recently waxed floor, causing a fracture to her shoulder. The complaint alleged that there were no warning signs to caution guests about the hazards of the floor, and sought damages for negligence.

On February 18, 2005, Robert P. Atkinson, agent for service of process for JRMCD, was served with the summons and complaint. On March 4, 2005, JRMCD filed its answer, and also submitted interrogatories and requests for production of documents. On March 30, 2005, JRMCD filed a motion to dismiss, asserting that it was not a proper party to the action because it does not and has not at any time owned or operated Jefferson Regional Medical Center as alleged in Dr. Bell's complaint. The motion to dismiss identified appellee JHA as the party that operates the hospital.

On April 4, 2005, Dr. Bell filed her amended complaint, which was virtually identical to the original complaint but named JHA as the proper party. On or about April 11, 2005, Mr. Atkinson, who is also the agent for service of process for JHA, was served with the summons and amended complaint. JHA filed its answer on April 20, 2005, relying on the statute of limitations as a complete bar to Dr. Bell's claim. On May 6, 2005, JHA filed a motion to dismiss on that basis, and after the submission of opposing trial briefs and a hearing, the trial court entered an order granting the motion on November 17, 2005.

Dr. Bell contends on appeal that the order of dismissal was erroneously entered because the amended complaint related back to the original filing date of January 27, 2005, which was within the applicable limitations period. In making this argument, Dr. Bell relies on Ark. R. Civ. P. 15(c), which provides:

> *Relation Back of Amendments.* An amendment of a pleading relates back to the date of the original pleading when:
>
> (1) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (2) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (1) is satisfied and within the period provided by Rule 4(i) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Dr. Bell asserts that, consistent with this rule, the amended complaint contains facts that arose out of the conduct, transaction, or occurrence as set forth in the original complaint. Dr. Bell further submits that, within the 120-day period set out in Rule 4(i), JHA received notice of the action and thus was not prejudiced in maintaining a defense on the merits. Finally, Dr. Bell argues that JHA knew that but for a mistake in identity, it would have been named in the original pleading as opposed to JRMCD.

■ We agree that the amended complaint related back to the filing date of the original complaint because each of the elements of Rule 15(c) were met. In order for a party to avail herself of Rule 15(c)'s relation-back provision, the facts must show four things: (1) that the claim must have arisen out of the conduct set forth in the original complaint; (2) the party to be brought in must have such notice of the institution of the action that it would not be prejudiced in maintaining a defense on the merits; (3) the party must have known, or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it; and (4) the second and third requirements must have been met within 120 days of the filing of the original complaint. *Stephens v. Petrino*, 350 Ark. 268, 86 S.W.3d 836 (2002); *George v. Jefferson Hosp. Ass'n, Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999). In the present case the first element was met because the allegations in the amended complaint were the same as in the original complaint. The remaining elements were satisfied

because JHA was served with the amended complaint on April 11, 2005, which was within 120 days of the filing of the original complaint on January 27, 2005.

JHA argues in its brief that it had no notice of Dr. Bell's claim before the statute of limitations lapsed. It contends that, although Mr. Atkinson was the agent for service of process for both JRMCD and JHA, his receipt of the original complaint against JRMCD was not sufficient notice to JHA.[1] However, the inquiry is not whether JHA received notice before the limitations period expired; the inquiry is whether JHA had notice of the action and knew or should have known that it should have been named as the defendant *within 120 days of the filing of the original complaint.* Although the amended complaint was filed after the statute of limitations expired, it served as timely notice to JHA because it was served on JHA within 120 days as required by Rule 15(c). Rule 15(c) was revised to this extent by a 1993 amendment. Prior to the amendment, an amended complaint could not relate back if the notice to the defendant came outside of the applicable statute of limitations, but that is no longer the rule.

JHA also argues that, with reasonable diligence, Dr. Bell would have named the proper defendant in the original complaint, and that at any rate she had ample opportunity to make a timely amendment because in the answer filed by JRMCD, JRMCD denied that it owned or operated Jefferson Regional Medical Center. We cannot agree. In *Harvill v. Community Methodist Hospital Association*, 302 Ark. 39, 786 S.W.2d 577 (1990), our supreme court focused on whether the party made a deliberate strategical decision at the outset not to sue the party later added or whether the failure was caused by a mistake in identifying the proper defendant. Here, there was no evidence of any deliberate strategic decision on the part of Dr. Bell, and her mistake in naming Jefferson Regional Medical Center Development, Inc., as the defendant in the original complaint was understandable given that the alleged negligence occurred at Jefferson Regional Medical Center.

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[1] Because Mr. Atkinson is the President and CEO of Jefferson Regional Medical Center, we think JHA was on notice of the lawsuit against it when he received the original complaint. Nevertheless, this fact was not before the trial court when it entered its order of dismissal, and thus we cannot consider it. JHA first brought this to the attention of the trial court in its motion for reconsideration, which was neither ruled on nor appealed from.

While JHA maintains that JRMCD denied being the operator of the hospital in its answer, we note that JRMCD generally and specifically denied in their entirety the following two paragraphs of the complaint:

> 2. The Defendant, Jefferson Regional Medical Center Development, Inc. (Hereinafter referred to as "JRMC") is a domestic corporation organized and existing under the laws of the State of Arkansas, authorized to do business in the State of Arkansas, engaged in the business of operating a medical hospital known as Jefferson Regional Medical Center, and operates and has offices and agents within the State of Arkansas.
>
> 3. The agent for service of process for JRMC is Robert P. Atkinson, 1515 West 42nd Street, Pine Bluff, Arkansas 71603.

Many of the allegations denied by JRMCD were in fact true, and it cannot be said that its answer put Dr. Bell on notice that she was suing the wrong party. This is particularly true in light of the fact that JRMCD raised the defense of comparative fault in its answer, and served interrogatories and requests for production of documents on Dr. Bell. It was not until March 30, 2005, when JRMCD filed its motion to dismiss, that Dr. Bell became aware that she sued the wrong party, and thereafter Dr. Bell promptly filed her amended complaint naming JHA as the defendant.

Finally, JHA asserts that it will be prejudiced if it is forced to defend Dr. Bell's untimely claim, citing the time that has elapsed and the possibility of faded memories and lost evidence. However, this argument fails because the amended complaint was served on JHA before the 120-day period to serve the original complaint expired. JHA is in no worse position than had it been properly named in the original complaint filed January 27, 2005, and then timely served on April 11, 2005.

In *St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County*, 348 Ark. 197, 73 S.W.3d 584 (2002), our supreme court made the following observations about the application of Rule 15:

> Rule 15 applies, for example, when an amendment permissibly changes the party against whom the claim is asserted or adds a party after the statute of limitations has run, and it may relate back to the time of filing of the original complaint. *Southwestern Bell Tel. Co. v. Blastech*, 313 Ark. 202, 852 S.W.2d 813 (1993). Rule 15 makes

> liberal provision for amendments to pleadings and even allows a plaintiff to amend to add new claims arising out of the conduct alleged in the initial valid complaint. *Jim Halsey Co. v. Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985).

Id. at 204-05, 73 S.W.3d at 588. We hold that, under the facts of the present case, Rule 15(c) applies and thus that the trial court erred in dismissing appellant's complaint on the grounds that it was barred by the statute of limitations.

Reversed and remanded.

GLADWIN and BAKER, JJ., agree.

Jason Wayne BURROUGHS *v.* STATE of Arkansas

CA CR 05-1169 241 S.W.3d 280

Court of Appeals of Arkansas
Opinion delivered October 11, 2006

Darrel Blount, for appellant.

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

DAVID M. GLOVER, Judge. Appellant, Jason Wayne Burroughs, was tried by a jury for the offense of manufacturing methamphetamine. He was tried as a habitual offender, found guilty, and sentenced to twenty years in the Arkansas Department of Correction. As his sole point of appeal, he contends that the trial court erred in denying his motion to suppress the evidence that was seized from his house because "the officers that furnished the information leading to the issuance of the search warrant were in his home illegally." We attempted to certify this case to our supreme court but certification was denied. We find merit in appellant's argument and reverse and remand this case to the trial court for proceedings consistent with this opinion.

The Suppression Hearing

At the suppression hearing, Lieutenant Allen Story, a Hot Springs police officer, testified that on September 9, 2004, he was assisting Arkadelphia police officers who held warrants for a burglary suspect. He said that they went to the residence located at 247 Glade Street in Hot Springs, which was appellant's residence, and knocked on the door. He related that a female answered the door, that he explained that they had a warrant for the arrest of some individuals, and that he asked for her identification. He said that she informed him her name was Alice Ashmore, and he again asked her for identification. He testified that she then said, "Come in, I'll get it out of my purse." He said that he went in, along with Detective Chapmond; that the female went to her purse, got her identification, and gave it to him; that he ran it through ACIC and NCIC; and that it showed there was an outstanding warrant for her

through another agency. He stated that he asked her if there was anyone else in the house, and she said there was not.

On cross-examination, he explained that there was a total of five or six officers who approached the house, that all were armed, and that only he was in uniform. He denied hearing a dog barking. He could not recall whether Ashmore was arrested or not. He explained that when he first entered the residence, he watched Ashmore go and get her identification. He said that he did not see any contraband in the room, but that he was not looking. He acknowledged that no one ever told Ashmore that she had the right to refuse entry to the officers. He said that he believed the other officers entered the rooms off the living room, that noises were heard, and that one of the officers said he observed what he thought were the makings of a meth lab. Story said that the officers reported hearing a noise and could not see into the rooms, so he assumed the doors off the living room were closed. On re-direct, Story stated that he did not enter the house to search and that he did not ask for consent to search. On re-cross, he stated that he entered the house because Ashmore invited him in as she was getting her identification and that the purpose of asking for her identification was to find out if she was who she said she was and whether she was related to the individuals for whom they were looking. He acknowledged that they were looking for evidence of her identity, but stated that he did not consider going into the house as looking for evidence.

Detective Chris Chapmond of the Hot Springs Police Department testified that he and Story and at least one other officer went onto the porch of the residence located at 247 Glade Street; that a couple of other officers went around to the side of the house; that Story made contact with a female, identified himself, and explained to her that they were looking for an individual wanted for questioning regarding a burglary or burglaries in Arkadelphia; and that she gave them a name and invited them inside to get her identification. He stated that Story stepped in and went to the right, where the woman's purse was on the couch. Chapmond said that he looked toward the kitchen and saw what he believed to be bottled acid, iodine salt crystals, and a gas generator (hydrogen peroxide). He also stated that there was a strong odor in the room. He stated that he recognized the odor from his experience working with narcotics. He testified that he and Detective Stringer heard some sounds in the back bedroom; that they asked if anyone

else was in the house; that the female, Ms. Ashmore, said no; and that for officer's safety, they checked both the bedroom and the bathroom. He stated that they found a Mrs. Cotten in the bathtub; that she also had outstanding warrants for her arrest; that there was an active meth lab in the back corner of the bedroom; that the house was secured; that the drug task force was notified; and that Rick Norris secured a search warrant for the premises. He stated that he then left with the Arkadelphia officers.

On cross-examination, Chapmond testified that he did not recall hearing a dog barking; that there could have been a dog, but that he did not recall one; and that if there were a dog, he would have had him secured for officer's safety. He acknowledged that he did not hear Story advise Ms. Ashmore that she had the right to refuse entry to the officers. He said that on the table in the kitchen, there was camp fuel, Liquid Fire, which is a drain cleaner, and some iodine salt crystals. He testified that he also saw a bottle of hydrogen peroxide, and that those items, plus the smell, led him to believe that they were being used to produce methamphetamine. He stated that there were six officers inside the house prior to the time that they searched the back of the residence. He said that he, Story, Stringer, and three Arkadelphia police officers went into the living room because Ms. Ashmore told Story to come in and that she would get her identification. He acknowledged that it did not take six people to see an identification.

Sergeant Rick Norris of the Hot Springs Police Department testified that he was assigned to the 18th District Drug Task Force as coordinator. He said that on September 9, 2004, he was called to the house at 247 Glade Street in Hot Springs by other officers. He stated that he went to the house, that he looked in through the front door and saw several items, that they secured the residence, and that he went back to get a search warrant. On cross, Norris stated that he based his affidavit on information that he received from the officers who had gone inside the house; if it had not been for their entry, his attention would not have been drawn to that house on that particular day.

For the defense, Allison Ashmore testified that she was at 247 Glade Street on September 9, 2004; that she was asleep on the couch and her dog started barking; and that she got up and heard the police knocking on the door. She said that she went to the door and that they told her they were the police. She stated that she opened the door about a hand length; that the officers told her they

were looking for a girl with purple hair; that they told her to put the dog up before she opened the door; that she put the dog in the bedroom; that she opened the door about eight inches wide and saw two officers; that one officer was in uniform and she talked with him; that she told him there was no girl with purple hair there; and that they did not mention anything about burglary suspects or tell her that they had a warrant for anyone. She stated that her hair was blonde with brown roots.

Ms. Ashmore testified that the officers asked if they could come in and look around to see if she was telling the truth. She said that she told them it was not her house, that she had only been staying there for a couple of days, and that she was eight months pregnant. She testified that she told them they could look right there in the living room and kitchen. She stated that they did not tell her she had the right to refuse to let them in the house and that they did not ask her to sign a consent-to-search form. She stated that when they came in, the officer in uniform stood there talking to her while at least three more officers came in behind him and proceeded to go into the kitchen. She said that she told them not to do that but they did anyway. She explained that there were two other rooms and a closet in the house and that all the doors to those rooms were closed; that she had put the dog in the bedroom; that they asked her if anyone else was there and she told them no because she did not know that her mother had come home; that they started yelling, "somebody's in here," and slung the bathroom door open with their guns drawn; that her mother was in the bathroom taking a bath; that they let her mother get dressed and had her mother put the dog out; that they then proceeded to go through the rest of the house; that they did not have a search warrant at that time; and that they were opening cabinets and drawers. She stated that they told her to pack a bag; that they "sent her down the road"; and that they took her mother to jail. Ms. Ashmore stated that she was not arrested or issued a citation.

The trial court took the matter under advisement, and in a letter opinion dated April 18, 2005, denied appellant's motion to suppress, specifically finding "that the officer's entry into the residence was by spontaneous invitation and not in response to request for consent, so that the provisions of *State vs. Brown* do not apply." Appellant was then subsequently tried by a jury and found guilty. In this appeal, he challenges the trial court's denial of his motion to suppress.

Standard of Review

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). We defer to the credibility determinations made by the trial judge when weighing and resolving facts and circumstances. *Id.*

Stated another way, our standard of review for a trial court's action granting or denying motions to suppress evidence obtained by a warrantless search requires that we make an independent determination based upon the totality of the circumstances, giving respectful consideration to the findings of the trial judge. *Breshears v. State*, 94 Ark. App. 192, 228 S.W.3d 508 (2006). We give considerable weight to the findings of the trial judge in the resolution of evidentiary conflicts and defer to the superior position of the trial judge to pass upon the credibility of witnesses. *Id.* Illegal entry by law enforcement officers into the homes of citizens is the "chief evil" the Fourth Amendment is intended to protect against and therefore is of the highest degree of seriousness. *Id.* It is settled law in this state that warrantless entry into a private residence is presumptively unreasonable under the Fourth Amendment. *Id.* Nonetheless, that presumption may be overcome if the police officer obtained consent to conduct a warrantless search. *Id.* As the United States Supreme Court has explained, a firm line has been drawn by the Fourth Amendment at the entrance to the house. *Id.* (Citing *Payton v. New York*, 445 U.S. 573 (1980)).

State v. Brown

In *State v. Brown*, 356 Ark. 460, 474, 156 S.W.3d 722, 732 (2004), which involved a "knock and talk" situation, our supreme court held:

> We hold that the failure of the Drug Task Force agents in this case to advise Jaye Brown that she had the right to refuse consent to the search violated her right and the right of Michael Williams against warrantless intrusions into the home, as guaranteed by Article 2, § 15, of the Arkansas Constitution. We affirm the suppression of all evidence seized in this case that flowed from this unconstitutional search. While we do not hold that the Arkansas

> Constitution requires execution of a written consent form which contains a statement that the home dweller has the right to refuse consent, this undoubtedly would be the better practice for law enforcement to follow.

Following the supreme court's decision in *Brown*, Rule 11.1(c) of the Arkansas Rules of Criminal Procedure was amended to provide:

> (c) A search of a dwelling based on consent shall *not* be valid under this rule *unless the person giving the consent was advised of the right to refuse consent.* For purposes of this subsection, a "dwelling" means a building or other structure where any person lives or which is customarily used for overnight accommodation of persons. Each unit of a structure divided into separately occupied units is itself a dwelling.

(Emphasis added.) In *Stone v. State*, 348 Ark. App. 661, 669, 74 S.W.3d 591, 595-96 (2002), our supreme court explained:

> A warrantless entry into a private home is presumptively unreasonable under the Fourth Amendment. However, the presumption of unreasonableness may be overcome if the law-enforcement officer obtained the consent of the homeowner to conduct a warrantless search.

(Citations omitted.) Arkansas Rule of Criminal Procedure 10.1 (2005), defines search as

> any intrusion other than an arrest, by an officer . . . upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or sufficient consent, would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or this state.

Further, a search occurs whenever something not previously in plain view becomes exposed to an investigating officer. *McDonald v. State*, 354 Ark. 216, 119 S.W.3d 41 (2003).

Here, the basis relied upon by the trial court in denying appellant's motion to suppress was its specific finding that the officer's entry into the home was by "spontaneous invitation" and not in response to a request for consent. Our difficulty has been in

understanding how Ms. Ashmore's "spontaneous invitation" takes this case out of the purview of *Brown, supra.* After *Brown*, a search of a dwelling — even one based upon consent — is not valid "unless the person giving the consent was advised of the right to refuse consent." The officers were very candid in acknowledging that they did *not* advise Ms. Ashmore of the right to refuse consent.

The State has the burden of proof in suppression cases because 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, and the burden of proof is on those who seek to justify it. *Mays v. State*, 76 Ark. App. 169, 61 S.W.3d 919 (2001). From the evidence presented, the officers were not at the residence to search for drugs, rather they were there either searching for persons, *i.e.*, the persons for whom they had arrest warrants, or, at least, they were there searching for evidence of Ms. Ashmore's identity. In fact, Story explained, "We were looking for evidence of her identity, but I wouldn't consider that going into the house looking for evidence." The candid testimony presented by the State in the instant suppression hearing established that the officers were at the residence to determine if the persons on whom they wanted to serve arrest warrants were actually at the residence. Accordingly, we have determined that the situation falls in the category of a "knock and talk" because the officers were "searching" for individuals for whom they had arrest warrants. They were not sure that those persons were actually located at 247 Glade Street. Therefore, they approached the address to "knock and talk" their way to finding the persons for whom they had arrest warrants.

As quoted previously from the *Bulloch* case, Rule 10.1 of the Arkansas Rules of Criminal Procedure explains that a "search" is

> any intrusion *other than an arrest*, by an officer . . . upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or *sufficient consent*, would be a civil wrong, criminal offense, or violation of the individuals' rights under the Constitution of the United States or this state.

(Emphasis added.) Because we have concluded that the facts of this case fit more in the category of a "search" than in the straight service

of arrest warrants, the only "sufficient consent" would have been consent *preceded* by advice of the *right to refuse* consent, as explained in *Brown, supra*, and as stated in Arkansas Rule of Criminal Procedure 11.1, which was *not* done here. A search by any other name is still a search, and this search of the dwelling should have been preceded by advising Ms. Ashmore that she did not have to give consent. Consequently, we hold that the trial court erred in denying appellant's motion to suppress. We reverse and remand this case for proceedings that are consistent with this opinion.

Reversed and remanded.

HART and ROAF, JJ., agree.

VAUGHT, J., concurs.

BIRD and CRABTREE, JJ., dissent.

LARRY D. VAUGHT, Judge, concurring. In this case, the majority advocates reversal based on our supreme court's holding in *Brown v. State*, which mandates that an officer inform a suspect of his right to refuse consent when executing a "knock and talk." 356 Ark. 460, 156 S.W.3d 722 (2004). The majority's analysis rests on a conclusion that "the situation falls into the category of a 'knock and talk' case because the officers were 'searching' for individuals for whom they had arrest warrants." However, I am not convinced that the facts support such a definitive conclusion. Indeed, based on my reading of *Carson v. State*, 363 Ark. 158, 211 S.W.3d 527 (2005), which was not mentioned in the majority opinion, it is apparent that the applicability of *Brown* in cases involving "spontaneous" invitation requires close factual analysis.

In *Carson*, our supreme court considered a scenario where a lone, plain-clothed officer approached the home of David Carson in order to execute a "knock and talk" after receiving a tip that Carson had just purchased "strong iodine tincture, an item used in the manufacture of methamphetamine." *Id.* at 162, 211 S.W.3d. at 529. Once at the suspect's home, the officer went to the door and knocked. When Carson came to the door, the officer displayed his badge and asked if he could "step inside to speak." Carson claimed to be too busy to let the officer in, but agreed to visit on the front porch. The officer testified that he found it strange that Carson had time to visit on the porch but not inside his residence. The officer also noticed that Carson was sweating, had trouble making eye contact, and was shaking. The officer then pointed out his suspi-

cions to Carson — commenting on Carson's erratic behavior, the recent iodine purchase, the strong chemical odor in the air, and the stains on Carson's hands. Eventually, Carson broke down, began to cry, and admitted that he did have a lab inside and would show the officer where everything was. The officer, accepting Carson's invitation, entered the home and observed several items in plain view, which were sufficiently suspicious to support a search warrant.

In a four-to-three decision, our supreme court reversed the trial court's denial of Carson's motion to suppress. The court reiterated the "bright-line rule" it declared in *Brown*, stating "when an officer does not inform a suspect of his or her right to refuse consent, any subsequent search — even one based on the suspect's apparent consent — is invalid." *Id.* at 164, 211 S.W.3d. at 530. Although *Carson* could broadly be categorized as a spontaneous-consent case, in my view, it does not completely resolve the question presented on appeal. My paramount concern is the fact that, unlike the situation presented in *Carson*, officers here did not first execute a "knock and talk" where entry was denied before finally gaining "voluntary consent" to enter the home. Indeed, Ms. Ashmore invited officer Story to enter her home in response to his innocuous inquiry for proof of Ashmore's identity. Further, unlike the situation presented in *Carson*, the record does not clearly establish that Ms. Ashmore was a "suspect" or that she was the target of the officer's interest whatsoever.

However, this is not to say that I disagree with the majority's conclusion. Here we have numerous armed officers surrounding a residence and one officer knocking on the door. Therefore, at the very least there was a "knock," and it does not take an enormous legal leap to conclude that the officer's request for identification was the "talk," thereby triggering the need for a disclaimer prior to the officers' entry into the home. However, based on the prevailing case law, it is a leap nonetheless, that has not been specifically addressed by our supreme court. If there is to be a bright-line rule that *before* an officer enters an individual's home, regardless of how or why he enters, I believe it is for the supreme court to so state. Therefore, I write separately.

As I see it, this case presents two distinct paths for our court to travel, both with particular problems. The problems with the majority's course I have already stated. However, I do not believe that a conclusion that this was not a "knock and talk" because Ms. Ashmore issued an invitation for officers to enter after they

"knocked" but *before* they requested permission is a satisfactory resolution. This is because such a course would also require us to thread a needle of legitimacy that seems innately counter to our state's decision to embrace "a heightened privacy protection for citizens in their homes against unreasonable searches and seizures, as evidenced by our constitution, state statutes, common law, and criminal rules." *Brown*, 356 Ark. at 470, 156 S.W.3d at 729.

Indeed, to affirm under this theory we must also conclude that Ms. Ashmore's invitation to enter — after Story (the sole, uniformed officer) requested to see her identification — extended to both officers Chapmond and Story. In order to do so, we would have to ignore the following testimony of officer Chapmond:

> A: Once she opened the door for Lieutenant Story, they identified each other.
>
> Q: First, how wide did she open the door when she first opened the door?
>
> A: I was to the side, but I do know that they were able to see each other.
>
> Q: Okay.
>
> A: Once they identified each other, she stated her name was Ms. Ashmore. Lieutenant Story asked if she had an I.D., she said, "Yes, I do. Come in. I'll go get the I.D." At the point, that's when we entered behind her. Like I said, she invited us in.
>
> . . .
>
> Q: Okay. So, you and Lieutenant Story, and Stringer, and the other three (3) Arkadelphia Police Officers all went into the living room because Ms. Ashmore told Lieutenant Story, "Come in. I'll get my I.D."?
>
> A: That is correct.
>
> Q: Did it take six (6) of you to see her I.D.?
>
> A: No. It did not.

We would also have to ignore Story's testimony that he knocked on the door and Ms. Ashmore opened the door "just enough" so that he "could see her physical appearance and see

her." And that after he made it clear that he was a police officer, he "asked her if she had some identification, and she said yes. She opened the door completely and said, 'Come in, I'll get it out of my purse.' " He described what happened next

> As I entered the living room, she — I was behind her — she moved to her right and I moved to my — behind her, watching her. She was going into her purse to get her identification, so my eyes were focused on what she was doing and I kept — that was my attention.
>
> . . .
>
> I was watching her as to what her actions were. I took her identification and ran it through A.C.I.C./N.C.I.C. and it showed that there was a warrant out. . . . I had her come out — she sat there on the couch for a minute and then we went outside. She made conversation.

Further, and most importantly, the trial court's letter opinion plainly states that "the *officer's* entry into the residence was by spontaneous invitation." (Emphasis added.) To me, the trial court's use of the singular "officer," and not the plural "officers" is important. *See Baird v. State*, 357 Ark. 508, 182 S.W.3d 136 (2004) (requiring deference to the trial court when weighing and resolving facts and circumstances). It seems logical that when officer Story asked Ms. Ashmore to produce her identification and she responded, "Come in, I'll get it out of my purse," she was inviting only officer Story into the home. Officer Chapmond's testimony, officer Story's testimony and, the trial court's letter opinion support this conclusion.

The resolution of this factual discrepancy is important to the ultimate outcome of this case because officer Story, by his own testimony, neither observed contraband in plain view nor participated in the actual search of the house. He retrieved Ms. Ashmore's identification and "did not do anything else in relation to the house." It was officer Chapmond who noticed a strong odor, observed suspicious items in the kitchen, and heard "a noise" in the back of the house that prompted him to enlist as many as six other officers to assist him in a full-blown "safety" search of the home whereby they discovered a naked woman bathing and a methamphetamine lab. To me, six armed officers entering the home — under the authority of Ms. Ashmore's narrow and limited invitation that she extended to officer Story — then fanning out

and searching the residence for their "safety" is quintessential "overbearing police conduct" and is certainly "offensive to the average person." *See Carson*, 363 Ark. at 166, 211 S.W.3d at 532 (Gunter, J., dissenting).

Therefore, I cannot vote to affirm this case. Instead, I return to the oft-repeated rule that a warrantless entry into a private home is per se unreasonable. *Welsh v. Wisconsin*, 466 U.S. 740 (1984). As such, I believe that the "spontaneous invitation" that Ms. Ashmore issued was very limited in scope and purpose and that the officers' warrantless search exceeded the boundaries of both. Rule 11.3 of the Arkansas Rules of Criminal Procedure provides that a "search based on consent shall not exceed, in duration or physical scope, the limits of the consent given." Therefore, I am satisfied by clear and positive evidence that the scope of the consent to search, if any, given by Ms. Ashmore was for officer Story to accompany her to her purse so that she could retrieve her identification. She did not invite the other officers to enter the home or to go beyond the retrieval of the purse. *See Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999) (relying on "scope of search" concept as a basis for reversal).

SAM BIRD, Judge, dissenting. I respectfully disagree with the majority's conclusion that the trial court's denial of appellant's suppression motion must be reversed, and I would affirm the appellant's conviction.

Appellant filed a pre-trial motion to suppress evidence that was discovered at his residence by officers of the Hot Springs and Arkadelphia Police Departments on September 9, 2004. Appellant alleged in his motion that the items seized by the police officers were discovered after the officers entered appellant's residence without consent. After hearing the testimony of three officers who testified on behalf of the State, and two witnesses who testified for the appellant, the trial court specifically found "that the officer's entry into the residence was by spontaneous invitation and not in response to request for consent, so that the provisions of *State v. Brown* do not apply." I agree with the trial court that *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004), does not apply.

In *Brown* drug-task-force agents knocked on the door of the residence, Brown answered the door, an agent told her that their purpose was to investigate information about illegal drug activity at the residence, she was asked to sign a consent-to-search form, and she signed it. The agents then entered Brown's residence

where they discovered evidence of methamphetamine use and evidence of precursors used to manufacture methamphetamine. The discovery of these items lead to the issuance of a search warrant and, eventually, to the discovery of evidence of the manufacture and use of methamphetamine and marijuana. The supreme court held that the drug-task-force agents' initial search of Brown's residence was illegal because Brown had not been informed by the officers that she had the right to refuse to give her consent to the search. The supreme court said, "It is the intimidation effect of multiple police officers appearing on a home dweller's doorstep, sometimes in uniform and armed, *and requesting consent to search without advising the home dweller of his or her right to refuse consent* that presents the constitutional problem." *Brown*, 356 Ark. at 466, 156 S.W.3d at 726 (emphasis added).

In the present case Lt. Allen Story testified at the suppression hearing that he was a Hot Springs police officer assisting Arkadelphia officers in serving an arrest warrant on a burglary suspect. Story testified that he went to Burroughs's residence with other officers, that he knocked on the door, and that a female opened it enough that he could see what she looked like. Story testified that he told the female that the officers had a warrant for the arrest of some individuals, that the female identified herself as Alice Ashmore, and that he asked her for identification. Story testified that Ashmore then stated, "Come in, I'll get it out of my purse," and that he and another Hot Springs police detective, Chris Chapmond, entered the residence, along with other officers. On cross-examination, Story said that the words Ashmore used were, "Come in, I'll get my I.D."

Detective Chapmond's testimony was substantially the same as Lt. Story's, reiterating that when Story asked Ashmore if she had any identification, she responded with an invitation for them to "come in and she would get the I.D." Chapmond also recounted that he, Story, a Detective Stringer, and three Arkadelphia officers entered the residence in response to Ashmore's invitation.

Alice Ashmore testified as a witness at the suppression hearing, stating in relevant part that when she opened the door, a uniformed officer told her that they were looking for a girl with purple hair and she responded that there was no girl there with purple hair. She said that the officer asked her if they could come in and look around to see if she was telling the truth, and that she responded that they could look around in the living room and kitchen. Ashmore testified that the officer did not inform her that

she had the right to refuse to let them enter and that they did not ask her to sign a consent-to-search form.

In my view, *Brown* stands for the proposition that when a police officer requests consent to enter a residence, that request must be accompanied by the officer's notice that the request for consent to enter may be refused; otherwise the entry is nonconsensual. Nothing in *Brown* precludes an officer from accepting an unsolicited invitation to enter a residence.

Whether the officers' entry into Burroughs's residence was a result of a spontaneous invitation, as testified to by Lt. Story and Det. Chapmond, or in response to a request for consent, as testified to by Ms. Ashmore, was a matter of credibility to be determined by the trial court, which we are not at liberty to disturb on appeal. *See Gonder v. State*, 95 Ark. App. 144, 234 S.W.3d 887 (2006) (rejecting appellant's argument that he and his wife were bullied and that he consented to a search because he was threatened with incarceration and the children's removal from their home). I would hold that the trial court's finding of a spontaneous invitation takes this case outside the purview of *Brown*. Unlike in *Brown*, where officers went to the residence with the purpose of investigating illegal drug activity, the search in the present case evolved after officers had accepted an invitation from Ashmore to enter appellant's residence.

The majority's difficulty in understanding how Ashmore's invitation to the officers distinguishes this case from *Brown* arises from a misreading of *Brown*. *Brown* does not require that notice of the right to refuse consent be given unless the officers request consent to search. It is illogical to require an officer to inform a person of the right to refuse consent to enter a residence when no such consent has been requested by the officer. I read nothing, either in *Brown* or in Rule 10.1 of the Arkansas Rules of Criminal Procedure, that prohibits an officer from accepting an invitation to enter a residence when the officer has made no request to enter.

I certainly agree with the concurring judge that the majority's position is a "leap" from our supreme court's decision in *Brown*. I do not agree with the concurring judge that the issue presented by this case can be resolved based on the trial judge's placement of an apostrophe in the word "officers" in his letter opinion. From my reading of the testimony, it is clear that while Lt. Story was apparently the only uniformed officer on the scene and that Lt. Story was the one who knocked on the door of

Burroughs's residence, it is equally as clear that Detective Chapmond accompanied Story at the door. It is obvious from Ms. Ashmore's testimony alone that she was aware of the presence of more than one officer outside the door:

> I went to the door and *they* said *they* were the police. I opened the door about a hand length and *they* told me *they* were looking for a girl with purple hair. *They* told me to put up the dog before I opened the door.
>
> . . . .
>
> I opened the door about eight inches wide, and could see *two officers*. There was one in uniform, and I talked with him. I told *them* there was no girl with purple hair there. *They* did not mention anything about burglary suspects or tell me *they* had a warrant for anyone.
>
> . . . .
>
> They asked if *they* could come in and look around. . . . I told *them they* could look right there in the living room and kitchen.

(Emphasis added.)

From these limited excerpts from Ms. Ashmore's testimony, it is obvious that she knew that Lt. Story was not the only law enforcement at the door and that she invited *them* into the house to look in the living room and kitchen. Considering that this testimony clearly establishes that two police officers were in Ashmore's view outside the door, and considering that Ms. Ashmore obviously considered that she was speaking to both of them, it is hard for me to imagine that the trial court, by its use of the singular possessive "officer's" in describing who was spontaneously invited by Ashmore to enter Burroughs's residence, intended to say that the invitation was extended only to Story but not to Chapmond. With all due respect to the trial judge, I cannot agree that this case should be decided on the strength of his understanding of the significance of the location of an apostrophe.

Deferring to the trial judge to resolve conflicts in testimony, I would conclude that Ashmore spontaneously invited the officers inside the house in response to a request that she produce identification. Because the officers did not request Ashmore's consent to

enter the residence, they were not required to inform her that she had a right to refuse to consent when she invited them in. Therefore, I would uphold the trial court's denial of Burroughs's motion to suppress the evidence that was discovered as a result of police entry into the home.

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

CONTINENTAL CARBONIC PRODUCTS, INC. *v.* Phillip COHEN

CA 05-1091 241 S.W.3d 296

Court of Appeals of Arkansas
Opinion delivered October 11, 2006

Friday, Eldredge & Clark, by: *David D. Wilson*, for appellee.

Taylor Law Firm, by: *Timothy L. Brooks*, for appellee.

TERRY CRABTREE, Judge. Appellee Phillip Cohen sued his former employer, appellant Continental Carbonic Products, for breach of contract for nonpayment of stock options after his employment terminated. The jury found in favor of Cohen. Continental appeals, contending that the trial court erred in failing to grant its motions for directed verdict and for judgment notwithstanding the verdict and that the trial court erred in admitting evidence to the effect that Continental could not demonstrate any financial harm as a result of Cohen's employment with a competitor. We affirm.

Background

Continental manufactures and sells dry ice for use in many different applications. Although the manufacture of dry ice is its primary product line, Continental also sells blasting equipment for use in the cleaning of industrial equipment. In 1991, Cohen became employed by Continental as a salesman. In accepting this position, Cohen signed non-competition agreements with Continental and its subsidiary Dixie Carbonic, Inc. (Dixie). The relevant terms of these agreements had the effect of prohibiting Cohen from going to work for a competitor who sold competitive products within a seventy-five-mile radius of any Continental facility for a two-year period following termination of employment with Continental. On May 17, 2002, Cohen submitted his two-week notice, effectively resigning from Continental as of May 31, 2002. Pursuant to the express terms of the non-competition agreements, Cohen would be prohibited from going to work for a competitor through May 31, 2004.

During his employment with Continental, Cohen received certain stock options. Upon terminating his employment with Continental, Cohen exercised those options. On May 24, 2002, Cohen and Continental entered into a Stock Option Settlement Agreement (the option settlement) whereby the total value of the options was agreed upon, as well as the terms and conditions of the payout for the options. The option settlement contained the following language: "All future payments will be forfeited for any violations of the employee's Confidentiality and Non-Compete Agreements."

A few months out after leaving employment with Continental, Cohen was offered employment with Cold Jet, Inc., a competitor of Continental within the dry-ice industry. Cold Jet's principal business was the manufacture and sale of dry-ice blasting

equipment for use in industrial cleaning applications. Cold Jet also sold pelletized dry ice to its customers for use with the blasting equipment. Continental and Cold Jet also did extensive business with each other.

Cohen accepted the position at Cold Jet, but prior to doing so, he negotiated a limited release of his obligations to Continental. The release contained the following language: "[Continental and Dixie] agree to release Cohen from the Non-Compete Agreements for the sole purpose of allowing Cohen to sell dry ice blasting equipment manufactured by Cold Jet. . . . Other than for the foregoing limited release, the Non-Compete Agreements shall remain in full force and effect. . . ." Cohen sold blasting equipment for Cold Jet until March 29, 2004, when he accepted a promotion to become Cold Jet's vice president of customer-service relations. This position did not involve selling blasting equipment. The position had responsibility to supervise Cold Jet's dry-ice sales staff, and Cohen received a commission on all sales of dry ice.

On May 17, 2004, Continental informed Cohen by letter that he had violated the terms of his non-competition agreement and the release and, therefore, had forfeited the remaining balance due under the terms of the option settlement. The reasons given were the very nature of Cohen's position as vice president of customer-service relations and the few ice referrals received during Cohen's tenure as a blasting equipment salesman. The letter also noted that the agreements between Cohen and Continental prohibited Cohen from arranging any dry-ice sales with any supplier except for Continental.

Cohen filed suit against Continental, alleging that it breached the option settlement agreement to pay Cohen the remaining $49,339.35 owed for his stock options. Continental denied the material allegations of the complaint and also pled that Cohen was in breach of the various agreements.[1]

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[1] The complaint also included counts that Continental had converted the money belonging to Cohen and had breached its fiduciary duty to him. Finally, the complaint also sought punitive damages. Continental was granted partial summary judgment on these claims. Continental had also filed a counterclaim, alleging that Cohen had breached the non-competition agreements and sought damages for that breach but later moved to voluntarily dismiss its counterclaim. The trial court granted the motion. No issue regarding these matters is raised in this appeal.

The Evidence

Phillip Cohen testified that he signed the non-competition agreements and understood them to mean that he could remain in the dry-ice business as long as he remained more than seventy-five miles from a Continental location. He was aware that the option settlement contained a provision that future payments would be forfeited if he violated the non-competition agreement. Cohen said that he understood that the release allowed him to sell equipment for Cold Jet and refer dry-ice sales to Continental. He also stated that, when he was selling blasting equipment for Cold Jet, he referred all customers who wanted dry ice to Continental, where Cold Jet obtained its dry ice, and denied that he sold or arranged the sale of dry ice for anyone other than Continental while employed at Cold Jet. He said that Continental wanted him to work for Cold Jet because he would be referring ice sales to Continental. According to Cohen, there was no Continental facility within seventy-five miles of his home. He said that he was paid like other salesmen, based on a formula including dry-ice sales.

In late March 2004, after Cold Jet acquired ownership of a competitor, Cohen was offered a promotion to vice president of customer-service relations and dealt with all aspects of customer service, including dry ice. He was no longer involved in selling blasting equipment and was not calling on customers trying to sell ice. He said that, after his promotion, he trained a salesman to take over his territory and traveled to California to learn the operations of the newly acquired company. He denied making any sales of ice prior to the expiration of the non-competition agreement. Cohen's compensation included percentages of certain company activities, including dry ice. He denied taking the promotion prior to March 2004.

Three Continental executives, Robert Wiesemann, Continental's chief executive, John Funk, president, and Randy Spitz, vice president and chief financial officer, each testified that they understood the non-competition agreements to prohibit Cohen from working for any company if that other company had employees or a facility within seventy-five miles of a Continental facility, even if Cohen himself were not within that radius of a Continental facility. Wiesemann said that he was responsible for the forfeiture provision in the option settlement. None of the executives had any specific knowledge of any person to whom Cohen solicited the sale of ice or actually sold dry ice after his

promotion. They also said that they did not have personal knowledge of any of Cohen's actions between March 29, 2004, and May 31, 2004, that caused any specific damages or loss of sales to Continental. All three opined that Cohen's taking the promotion itself was a violation of the non-competition agreement and release. They also said that Cohen could not be compensated based on dry-ice sales because that would be a breach of the non-competition agreement but admitted that there was no specific language in the release to that effect.

Gene Cooke, Cold Jet's chief executive, stated his belief that, in executing the release, Cold Jet was not setting Cohen up to compete with Continental; instead, he believed that it would further the close relationship between the companies. He believed that Cohen's sales efforts were going to support Continental's distribution efforts in his territory. He said the offer of employment did not contemplate Cohen's having responsibility for dry-ice sales. He stated that he was unsure whether there was an understanding that Cohen would refer all of Cold Jet's dry-ice sales within his territory directly to Continental, adding that it would have made sense to do so because of the relationship between the companies. Once Continental began directly contacting Cold Jet's clients, Cooke did not involve Cohen in formulating a response to preserve Cold Jet's clients.

Cooke promoted Cohen to vice president of customer-service relations in March 2004 and said that, after the promotion, Cohen had supervisory authority over Pat Frank, the director of Cold Jet's dry-ice sales. He added that, as a result of the promotion, Cohen was given a commission on dry-ice sales. Cooke said that he did not examine the release to determine whether Cohen would be in breach by accepting the promotion but that he called Robert Wiesemann at Continental to alert them to what Cold Jet was planning, though he did not discuss it as a possible violation of the release. He said that it never occurred to him that Cohen's promotion might violate the non-competition agreements or the release. Cooke said that Cohen never attempted to sell or solicit dry-ice business for Cold Jet because Cold Jet had its own department for that activity.

Patrick Frank, a former Cold Jet employee, testified that he was responsible for Cold Jet's dry-ice business. He said that he reported to Cohen after Cohen's promotion to vice president of customer-service relations, which, according to Frank, occurred in January 2004. On cross-examination, Frank admitted that he

never saw Cohen attempting to make dry-ice sales within seventy-five miles of a Continental facility.

At the close of Cohen's case and again at the close of all of the evidence, Continental moved for a directed verdict on the basis that Cohen could not present a *prima facie* case for breach of contract because he himself breached the non-competition agreement. The trial court denied the motions.

As noted above, the jury returned a verdict in Cohen's favor. The parties stipulated that Cohen's damages were $53,840.69, and judgment was entered on the jury's verdict. Thereafter, Continental filed a motion for judgment notwithstanding the verdict (JNOV) or new trial, alleging that the verdict was not supported by substantial evidence. That motion was denied, and Continental now appeals.

Arguments on Appeal

Continental's first point is that the trial court erred in denying its motions for directed verdict or JNOV. Our standard of review of the denial of a motion for directed verdict is whether the jury's verdict is supported by substantial evidence. *Stewart Title Guar. Co. v. American Abstract & Title Co.*, 363 Ark. 530, 215 S.W.3d 596 (2005). Similarly, in reviewing the denial of a motion for JNOV, we will reverse only if there is no substantial evidence to support the jury's verdict and the moving party is entitled to judgment as a matter of law. *Id.* Substantial evidence is that which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. *Id.* It is not this court's place to try issues of fact; rather, this court simply reviews the record for substantial evidence to support the jury's verdict. *Id.* In determining whether there is substantial evidence, we view the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *Id.*

Continental argues that Cohen failed to present a *prima facie* case for breach of contract because he himself breached the non-competition agreement by taking a promotion where he had oversight responsibility for Cold Jet's dry-ice sales. As a general rule, the failure of one party to perform his contractual obligations releases the other party from his obligations. *American Transp. Corp. v. Exchange Capital Corp.*, 84 Ark. App. 28, 129 S.W.3d 312 (2003). Whether a covenant not to compete has been materially breached

is a factual, not a legal, issue. *Abernathy v. Knych*, 76 Ark. App. 127, 61 S.W.3d 207 (2001); *see also DBA Enters. v. Findlay*, 923 P.2d 298 (Colo. App. 1996).

The jury in this case was instructed that a material breach by one party excuses the performance of the other party and that a breach that is not material does not excuse the performance of the other party. We believe that there was sufficient evidence from which the jury could find that Cohen did not materially breach his agreements. Cohen and Gene Cooke both testified that Cohen did not make or solicit any sales of dry ice while at Cold Jet, other than through Continental. The Continental executives testified that they did not conduct an in-depth investigation into the matter and offered no specific proof of any sales made by Cohen during the two-month period after his promotion. Further, they could not identify the number of sales they missed or the amount of money Continental may have lost as a result of any breach by Cohen. This testimony, if believed, would tend to show that Continental received the benefit of its bargain, an influential circumstance in the determination of the materiality of a breach. *TXO Prod. Corp. v. Page Farms, Inc.*, 287 Ark. 304, 698 S.W.2d 791 (1985); *Vereen v. Hargrove*, 80 Ark. App. 385, 96 S.W.3d 762 (2003).

Continental also argues that Cohen's promotion itself violated the release because, after the promotion, Cohen was not solely selling blasting equipment. However, this was not the reason given Cohen in the letter declaring the forfeiture absolute. Further, it is contrary to the language of the agreements. The non-competition agreement prevents Cohen from working for a competitor selling dry ice within seventy-five miles of a Continental facility. The option settlement contains a forfeiture clause restating the prohibition on Cohen's selling dry ice and providing that "any violation of such prohibition by Cohen shall result in Cohen's forfeiture of his stock option balance. . . ." The release provides that Cohen could work for a competitor, just not selling dry ice. Therefore, the fact that Cohen received a promotion was not, by the plain language used, a material breach of the non-competition agreement.

In its second point, Continental argues that the trial court erred in admitting evidence to the effect that Continental could not show any financial harm as a result of Cohen's employment with Cold Jet. Continental acknowledges that this point concerns

whether Cohen materially breach the agreements and is interwoven with its first point. Therefore, we need not address this point separately.

Affirmed.

HART and GLOVER, JJ., agree.

Barbara BINGLE *v.* QUALITY INN;
Union Standard Insurance Co.

CA 04-1142 241 S.W.3d 271

Court of Appeals of Arkansas
Opinion delivered October 11, 2006

Claudell Woods, for appellant.

Kenneth A. Olsen, for appellees.

KAREN R. BAKER, Judge. Appellant Barbara Bingle challenges the decision of the Workers' Compensation Commission finding that appellant was able to return to work on August 14, 2001, and that appellees Quality Inn and Union Standard Insurance Co.'s refusal to pay appellant's medical bills and attorney's fees previously ordered was not willful. We originally ordered rebriefing in this case in No. CA04-1142 (Apr. 5, 2006). On resubmission, we reverse in part and affirm in part.

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. *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 Mgmt.*, 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 denial of the 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).

Appellant Barbara Joyce Bingle, age forty-four, was employed by appellee Quality Inn as a housekeeper when she sustained an accidental injury to her right knee on May 30, 1999. On August 12, 1999, Dr. Bud Dickson identified the injury as traumatic pre-patellar bursitis and performed an excision on the right knee. Appellant returned to light-duty work on or about August 25, 1999.

In an opinion filed February 2, 2000, an administrative law judge found that appellant proved she sustained an injury to her right knee on May 30, 1999; that appellant was entitled to temporary total disability compensation from August 12, 1999, through September 13, 1999; and that appellant proved she was entitled to medical treatment and referrals from Dr. Bud Dickson. No appeal was taken from the administrative law judge's opinion.

Appellant continued to follow up with Dr. Dickson. Dr. James Mulhollan performed arthroscopic surgery on appellant's right knee on April 11, 2001. Dr. Mulhollan indicated that appellant would return to restricted work on April 16, 2001, and then to full work duties on April 23, 2001. However, on April 28, 2001, appellant sought emergency treatment, and the emergency physician took her off work that date until seen by Dr. Mulhollan.

April 28, 2001, was the last day of work for appellant. A pre-hearing order was filed with the Commission on June 26, 2001. Appellant claimed that she continued to require medical treatment, that her authorized treating physician had declined to provide further treatment, and that she was entitled to a change of treating physician in close proximity to her residence. She also stated that she had been rendered totally disabled since the April 28, 2001 emergency-room visit and that appellees were liable for

the emergency-room treatment as well as temporary total disability benefits and change of treating physician all of which had been controverted. Appellees contended that they were providing reasonably necessary medical treatment through Dr. Mulhollan.

Subsequently, appellant presented on her own to Dr. D'Orsay Bryant, III, at Tri-State Orthopaedic and Sports Medicine Center, on July 10, 2001. Dr. Bryant performed arthroscopic surgery on appellant's knee on July 13, 2001. On August 14, 2001, Dr. Bryant wrote that appellant was doing well with no complaints and that follow-up for the patient would be "as needed."

On October 30, 2001, the administrative law judge filed an opinion stating that appellant was temporarily totally disabled for the period beginning April 29, 2001, and continuing through the end of her healing period or until she returned to work, whichever occurred first. He also found that medical treatment for Dr. Bryant was reasonably necessary, and determined that appellees were to pay all reasonable hospital and medical expenses arising out of the injury of May 30, 1999. In an opinion dated August 6, 2002, the Commission affirmed the award of additional benefits and designation of Dr. Bryant as appellant's authorized treating physician.

Another pre-hearing order was filed with the Commission on February 11, 2003. Appellant claimed that she remained within her healing period and was entitled to continued temporary total disability compensation. She further asserted that appellees failed and refused to pay for her reasonably necessary medical treatment as previously ordered and that appellees' failure to comply with those orders had resulted in her being denied access to reasonably necessary medical treatment by her authorized physician. These claims were based on appellant's assertion that Dr. Bryant refused to see her for treatment until her accumulated charges had been paid.

Appellees acknowledged that two bills had not been paid, but that those bills had been placed in line for payment along with a 20% penalty and attorney's fee. They explained that their failure to pay these bills was a result of a serious illness by the adjuster handling the claim. Although the adjuster continued to work during the treatment of her illness prior to her passing, she became increasingly disoriented. These two bills had been overlooked during that time, but all other bills had been paid. When appellee Union Standard Insurance Company realized that the illness of the adjuster required another individual to work the files originally

assigned to her, it hired Ms. Hill, at least in part, to begin working these numerous files. Ms. Hill testified that she received these files in December 2002, and that appellant's file was included in that distribution. She described the difficult process required to determine which bills had been paid. This process included sorting through the duplicate bills, contacting the individual physicians' offices, determining correct balances, and maintaining contact with appellant's attorney. Ms. Hill was unable to identify the exact date that she began working appellant's file because of the number of files she was processing; however, it was undisputed that the two overlooked bills were paid on February 12, 2003. One bill was submitted by the physician on July 24, 2001, and the other was submitted on September 4, 2001, from the facility where the surgery was performed.

Despite the delay in the payment of these two submitted charges, the Commission found that appellees' failure to timely pay the two bills was neither willful nor intentional to require the imposition of the 36% penalty pursuant to Arkansas Code Annotated section 11-9-802(e) (Repl. 2002). Although the delay in payment was significant, the Commission found that the Commission's opinion affirming the administrative law judge's original award was not final until September 6, 2002, after the thirty days allowed for an appeal had expired. *See* Ark. Code Ann. § 11-9-711(b) (Repl. 2002). Pursuant to Arkansas Code Annotated section 11-9-802(c), appellees had fifteen (15) days to pay the award of temporary total disability. They did not do so, but paid a 20% penalty pursuant to the statute. The Commission stated that although reasonable minds could find that appellees' actions in this case were negligent, that the 36% statutory penalty was not warranted because the record did not show that appellees acted willfully and intentionally in failing to pay the medical bills submitted to them.

The issue before us 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., supra.* Nothing in the record indicates that appellees intentionally structured the processing of appellant's claims to delay the payment of the two medical bills. To the contrary, the testimony specifically set forth appellees' acknowledgment that the illness of the adjuster was affecting the

processing of claims including appellant's file and that steps were taken to address the delays. Appellees also ensured on their own initiative that the 20% penalty was paid. Accordingly, we hold that substantial evidence supports the Commission's disposition of the contempt issue and affirm that portion of the decision.

However, we must reverse the Commission's finding that appellant was entitled to temporary total disability only through August 14, 2001. In reaching its decision, the Commission noted that Dr. Bryant assigned a permanent anatomical rating and opined that appellant had reached maximum medical improvement on April 15, 2003, not August 14, 2001. The Commission reasoned that appellees implicitly contended that appellant reached the end of her healing period on August 14, 2001, noting that Dr. Bryant testified that the healing time for surgery would be four to six weeks and that the time period of July 13, 2001 through August 14, 2001 closely corresponded with the projected healing time for surgery. It further dismissed appellant's assertion that she was unable to timely return to Dr. Bryant because of appellees' failure to timely pay the outstanding balance at his office stating that the record supported the conclusion that she did not try to see her treating physician until her knee was painful and swollen in February 2002.

On appeal to this court, appellees argue that the Commission properly inferred from Dr. Bryant's constructive release of appellant that she had reached the end of her healing period, or that it was imminent, when he saw her on August 14, 2001. Appellees cite no law supporting the premise that our statutory or case law regarding the provision of workers' compensation benefits recognizes the constructive release of a patient or the inference from such a release that the patient has reached the end of her healing period. Perhaps one practical effect of a failure to timely pay outstanding medical bills could be a delay in obtaining the statutorily required medical opinion identifying the date of maximum medical improvement and assigning an impairment rating.

■ Nevertheless, our review of the workers' compensation statutes and their interpretation by case law leads us to reject any suggestion that a party may prove or disprove the end of a healing period through a constructive release of a patient. Section 11-9-102(16)(B) of Arkansas Code Annotated (Repl. 2002) provides that medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of

medical certainty. The legislative declaration found in section 11-9-1001 admonishes that any liberalization or broadening or narrowing of the extent to which any physical condition or injury should be excluded from or added to coverage by the law is the sole province of the Arkansas legislature.

While 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, *see Poulan Weed Eater, supra,* the Commission cannot arbitrarily disregard any witness's testimony. *See Freeman v. Con-Agra Frozen Foods, supra.* In this case, the Commission rejected Dr. Bryant's medical opinion assigning an impairment rating and finding maximum medical improvement on the date of April 15, 2003, and substituted that medical opinion with its own finding of a constructive release of the patient. Neither the Commission nor this court has the authority to extend or limit coverage by finding a constructive release when the statute specifically requires a medical opinion regarding impairment and compensability to be within a reasonable degree of medical certainty. Without this authority, the Commission's substitution of the medical opinion with its own finding of a constructive release was arbitrary. Accordingly, we must reverse and remand on that issue.

Reversed and remanded in part; affirmed in part.

GLADWIN and ROBBINS, JJ., agree.

ARKANSAS DEPARTMENT of HUMAN SERVICES *v.* J.N.

CA 06-286 241 S.W.3d 293

Court of Appeals of Arkansas
Opinion delivered October 11, 2006

[Rehearing denied November 15, 2006.]

Arkansas Department of Human Services, Office of Chief Counsel, by: *Gray Allen Turner*, for appellant.

Buckley McLemore & Hudson, P.A., by: *Kent McLemore*, for appellee.

ANDREE LAYTON ROAF, Judge. This is an appeal from a circuit court's order to remove appellee J.N.'s name from the Arkansas Child Maltreatment Central Registry (central registry). Appellant Arkansas Department of Human Services (DHS) argues on appeal that the trial court erred when it ordered DHS to remove J.N.'s name from the central registry, and that the trial court erred when it remanded this case for an in-person administrative hearing. We affirm.

There were allegations of child maltreatment against J.N., a minor, and, after an investigation into the matter by DHS, it found the allegations to be true. After a hearing, an administrative law judge (ALJ) ordered J.N.'s name to be placed on the central registry. J.N. initially contested the placement of his name on the central registry, and he requested an administrative hearing pursuant to Ark. Code Ann. § 25-15-213(1) (Repl. 2002), which states that every party shall have the right to appear in person or by counsel. J.N.'s hearing was conducted by telephone conference in which the parties, counsel, and witnesses appeared at the DHS offices in Fayetteville while the ALJ listened over the telephone from Little Rock. At the hearing, J.N. objected to the format of the hearing, arguing that it was not an "in-person" hearing pursuant to Ark. Code Ann. § 25-12-213(1). The ALJ found that the telephone hearing was adequate. J.N. appealed this ruling to the Washington County Circuit Court.

A hearing was held at the circuit court on May 12, 2005. Among those present at the hearing were two attorneys for DHS, Nancy Shray and supervising attorney Michael Chase. The circuit court ruled that a hearing by telephone conference was not an "in-person" hearing within the meaning of Ark. Code Ann. § 25-15-213(1), and it remanded the case for a "hearing to be conducted *de novo*, in person. . . ." The trial court stated that the hearing "shall be scheduled at [DHS's] earliest possible convenience." The trial court's order was entered on June 15, 2005, after it was approved as to form and signed by Nancy Shray. On July 25, 2005, a copy of the order was faxed to Shray by the Washington County Circuit Clerk.

One hundred eighty-one days after the trial court's order was entered, J.N. filed a motion to remove his name from the central registry pursuant to Ark. Code Ann. § 12-12-512(c)(2) (Repl. 2003), which provides that "the Administrative Hearing process must be completed within one hundred-eighty (180) days from the receipt of the request for hearing, or the Petitioner's name shall be removed from the Central Registry." DHS filed a response, arguing that it was not the responsibility of the DHS Office of Chief Counsel to communicate the order to the DHS Office of Appeals and Hearings.

The trial court entered an order on February 1, 2006, directing DHS to remove J.N.'s name from the central registry because DHS failed to provide a timely hearing. The trial court found that DHS attorney Nancy Shray had notice of the order of remand and that DHS did not comply with the order in a timely manner. DHS now appeals the trial court's order to remove J.N.'s name from the central registry.

For its first point on appeal, DHS argues that the trial court erred when it ordered DHS to remove J.N.'s name from the central registry. DHS asserts that DHS complied with Ark. Code Ann. § 12-12-512(c)(2) (Repl. 2003) because the first or original hearing in this case was completed within the 180 days. DHS further asserts that J.N. failed to inform the ALJ of the trial court's earlier remand order and that it was J.N.'s responsibility to request a new hearing after the remand order was issued. DHS did not include in its abstract the hearing held on May 12, 2005, which resulted in the remand order being issued in this case. An abstract of this hearing is "necessary to an understanding of all questions

presented to [this court] for a decision." *See* Ark. Sup. Ct. R. 4-2(a)(5). Nevertheless, we will reach the merits of this appeal because J.N. cured the deficiency by including the hearing in the supplemental abstact.

Arkansas Code Annotated section 12-12-512(c)(2) states that the administrative hearing process must be completed within 180 days from the date of the receipt of the request for a hearing or the petitioner's name shall be removed from the Central Registry, provided that the delays in completing the hearing that are attributable to the petitioner shall not count against the 180-day limit. Here, there was a hearing that was held within 180 days of J.N.'s original request for a hearing. On appeal, however, the case was remanded back to the ALJ to conduct an in-person hearing, and this in-person hearing was not held within 180 days of the remand order. DHS argues that it was J.N.'s responsibility to request a new hearing in a timely manner, which he did not do, and therefore the delay in completing the hearing was attributable to J.N. and should not count against the 180-day limit.

The situation in the present case is unique and there is no analogous case law. When the circuit court remanded the case back to the ALJ for an in-person hearing, the posture of this case was as if there had been no first hearing before the ALJ. DHS, therefore, should have scheduled another hearing and notified J.N. of this hearing. DHS should have treated this situation as if there had been no first hearing before the ALJ. DHS did not do this, however, and now places the blame on J.N. for DHS's failure to have a hearing within the 180-day period.

DHS provides no authority for its assertion that it was J.N.'s responsibility to provide the Office of Appeals and Hearings with the circuit court's remand order. Arkansas Code Annotated section 12-12-512 does not place the burden on the petitioner to schedule hearings. The only time that petitioner has a duty to report a disposition of a case is when the petitioner is involved in an ongoing criminal or delinquency investigation that relates to the child maltreatment report. Ark. Code Ann. § 12-12-512(c)(2)(B). In this situation, the petitioner must report the final disposition of the criminal or delinquency proceeding to DHS. *Id.* Thus, J.N. had no duty to report the remand order to DHS.

DHS argues that J.N. should have requested another hearing after the case was remanded. This argument makes no sense,

because J.N. initially requested a hearing and one of the arguments before the circuit court was whether J.N. was entitled to an in-person hearing. The circuit court remanded the case so that J.N. could have an in-person hearing. Thus, J.N. should not have to again request a hearing that has already been ordered.

The circuit court remanded the case for an in-person hearing to be scheduled "at the respondent's [DHS] earliest possible convenience." DHS had the responsibility of scheduling the hearing. It did not schedule the hearing within 180 days of the receipt of the request for a hearing, which in the present case was the remand order, and so the circuit court did not err when it ordered that J.N.'s name should be removed from the central registry.

For its second point on appeal, DHS argues that the trial court erred when it remanded this case for an in-person administrative hearing. J.N. argues that this argument is not preserved because DHS failed to appeal from the remand order entered on June 15, 2005. Under Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure – Civil, this court is limited to a review of a final judgment, decree or order. An order is final if it dismisses the parties from the court, discharges them from the action, or concludes their rights to the subject matter in controversy. *Daniel v. State,* 64 Ark. App. 98, 983 S.W.2d 146 (1998). The order must put the judge's directive into execution, ending the litigation, or a separable branch of it. *Id.* When an order provides for a subsequent hearing, that provision prevents the order from being a final order. *Id.* Thus, J.N.'s assertion that DHS should have appealed from the remand order is incorrect, because the remand order was not a final order for purposes of an appeal. Moreover, Arkansas Rule of Appellate Procedure – Civil 2(b) states that an "appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment." Thus, DHS's argument regarding the trial court's remand for an in-person administrative hearing is preserved for this court's review.

DHS asserts that J.N.'s request for an in-person hearing was untimely because he did not make his request until the administrative hearing had begun. DHS cites no authority for this asser-

tion. Moreover, J.N.'s counsel stated at that hearing that he had made the same request for an in-person hearing in previous hearings.

Arkansas Code Annotated section 12-12-512(c)(1)(C)(ii) states that a person named as the offender of the true report may request an administrative hearing.[1] Arkansas Code Annotated section 25-15-213 states that every party compelled to appear before an agency or representative of an agency shall have the right to appear in person or by counsel. Neither statute specifically prohibits telephone hearings, but Ark. Code Ann. § 25-15-213 suggests that one is entitled to a hearing in person, with "in person" meaning that the petitioner, respondent, witnesses, and the hearing officer are in one location. Thus, J.N. was entitled to an in-person hearing before the hearing officer, and the trial court did not err by so holding.

Affirmed.

GRIFFEN and VAUGHT, JJ., agree.

[1] Arkansas Code Annotated section 12-12-512(c)(1)(C) was amended in 2005 to specifically allow for a hearing by video teleconference in lieu of an in-person hearing and to allow for telephone hearings when neither party requests an in-person hearing. Ark. Code Ann. § 12-12-512(c)(1)(C)(v) (Supp. 2005).

Dawn SOWELL and Terry Sowell *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 05-1137 241 S.W.3d 767

Court of Appeals of Arkansas
Opinion delivered October 25, 2006

Glen Hoggard, for appellants.

Martha O. Carder, Attorney Ad Litem.

Gray Allen Turner, Dep't of Human Services, Office of Chief Counsel, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. This is an appeal from an order terminating appellants' parental rights to their two children. Appellants argue that the trial court erred in finding grounds for termination of parental rights at the adjudication hearing conducted January 4 and 5, 2005, prior to the termination hearing being held and without notice to the appellants that a termination hearing would be conducted. They also argue that the evidence was insufficient to support the findings that appellants failed to remedy the conditions causing removal and that the Arkansas Department of Human Services made a meaningful effort to provide them with appropriate services. We affirm.

Appellants' argument that the trial court erred in finding grounds for termination of parental rights at the adjudication hearing without notice to the appellants that a termination hearing would be conducted is not preserved for appeal because appellant filed no notice of appeal from the adjudication order. Arkansas Rules of Appellate Procedure – Civil 2(c)(3)(A) expressly provides that adjudication hearings in juvenile cases are final, appealable orders. Appellants failure to file a timely notice of appeal deprives this court of jurisdiction to consider the issues raised in that order. *See Arkansas Department of Human Services v. Dix*, 94 Ark. App. 139, 227 S.W.3d 456 (2006); *see also Jefferson v. Arkansas Department of Human Services*, 356 Ark. 647, 158 S.W.3d 129 (2004); *Hawkins v. State Farm Fire and Casualty Co.*, 302 Ark. 582, 792 S.W.2d 307 (1990); *Moore v. Arkansas Department of Human Services*, 69 Ark. App. 1, 9 S.W.3d 531 (2000).

Appellants' remaining arguments challenge the sufficiency of the evidence to support the termination of their parental rights.

Although termination of parental rights is an extreme remedy and in derogation of the natural rights of parents, parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Jefferson v. Arkansas Department of Human Services, supra.* Grounds for termination of parental rights must be proven by clear and convincing evidence. *Carroll v. Arkansas Department of Human Services*, 85 Ark. App. 255, 148 S.W.3d 780 (2004). When the burden of proving a disputed fact is by "clear and convincing evidence," the question on appeal is whether the trial court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Dinkins v. Arkansas Department of Human Services*, 344 Ark. 207, 40 S.W.3d 286 (2001).

Pursuant to Ark. Code Ann. § 9-27-341(a) (Repl. 2002), an order terminating parental rights must be based on a finding that termination would be in the best interest of the juvenile pursuant to enumerated grounds, including a finding that the child has been adjudicated dependent-neglected and, despite meaningful effort by ADHS to rehabilitate the home and rectify the conditions causing removal, the parent has failed to remedy the conditions. Noting that the child had been removed four times in the course of two years, the trial court found that there was little likelihood of successful reunification because the condition in the home had not improved in two years despite meaningful efforts by ADHS to rehabilitate the home, including provision of appropriate services.

The oldest child, T.S., was six months old when this case was opened in January 2003 because of environmental neglect. Danielle Sims, a family services worker with ADHS, testified that appellants' home was in utter disarray with trash in the living room and dirty clothes, bottles, and dishes everywhere. The parents smoked in the home and there were three or four ashtrays full of cigarette butts located in various places in the house. Ms. Sims, noticing that T.S. breathed with a gurgling, rasping sound, directed appellants not to smoke in the house. Although T.S. had been medically diagnosed with Respiratory Syncytial Virus and had been prescribed Proventil and Albuterol, and the parents had

been repeatedly directed by Conway Children's Clinic to discontinue smoking in the home, they continued to do so for the duration of the case.

T.S. had also been diagnosed with failure to thrive and, given his diagnosis and the failure of appellants to comply with directions to keep the home clean, safe, and smoke-free, he was taken into ADHS custody. Services, including numerous in-home lessons in housekeeping and parenting, were provided to appellants by ADHS. T.S. was returned to his parents in September 2003 but was again removed pursuant to a motion for emergency change of custody filed by ADHS only one month later. The reason for the emergency removal was that T.S.'s primary care physician reported that she had given appellants specific feeding instructions but, during the month in appellants' custody, his weight had fallen below the fifth percentile. T.S. was hospitalized for failure to thrive and gained almost one pound during the first night of hospitalization. Because T.S. had gained weight in foster care and lost weight in appellants' care, the trial judge ordered T.S. to be returned to foster care. A new baby born in December, V.S., was added to the case but remained in the home. During this time, appellants were provided with more intensive services, including a check-list to keep track of necessary child care and household chores.

T.S. was returned to the home in April 2004 under intensive supervision by ADHS. It became clear that appellants would only comply when they were under strict and frequent supervision, and that the smoking in the home remained a concern. At a review hearing in June 2004, it was reported that the condition of the home was somewhat improved but that there were still piles of things scattered everywhere, and the odor of smoke in the home continued to be strong enough to cause an ADHS worker to have an allergic reaction.

A petition for emergency change of custody filed by ADHS resulted in an adjudication hearing for V.S. There was testimony from a licensed practical nurse at the day school attended by T.S. that T.S. regularly reeked of cigarette smoke, that he frequently had head lice, and that he came to school in so unhygienic a state that the administrator took the unusual step of bathing him at school after contacting the parents produced no improvement. An occupational therapist at the school testified that T.S. arrived at school in October 2004 smelling of cigarette smoke, coughing horribly, and unable to catch his breath. Even after the school

nurse gave T.S. his inhaler, he could not stop crying and coughing. She testified that T.S. was much improved when he was placed in foster care. He no longer needed his inhaler at all and no longer had a runny nose or head lice.

The record contains many more similar examples; suffice it to say that removal of the children in this case was occasioned by environmental neglect, and there was abundant proof to show that this situation had not appreciably changed despite two years of intensive effort by ADHS, including room-to-room cleaning instructions for Mrs. Sowell and one-on-one lessons to show her how to bathe a child. On this record, we cannot say that the evidence is insufficient to support the finding that appellants failed to remedy the conditions causing removal.

Appellants also argue that the services offered by ADHS were not meaningful because Mrs. Sowell was disabled by virtue of her borderline mental retardation and therefore entitled to special services under the Americans with Disabilities Act. This argument is without merit because Mrs. Sowell has not demonstrated that she is disabled. To come within the purview of the Americans with Disabilities Act, Mrs. Sowell must demonstrate that she has a mental impairment that substantially limits one or more of her major life activities 42 U.S.C. § 12102(2); *see Ruble v. Arkansas Department of Human Services*, 75 Ark. App. 321, 57 S.W.3d 233 (2001). However, Lewis Campbell, a psychological examiner, testified that he conducted a psychological evaluation of Mrs. Sowell and found nothing to indicate that she was incapable of performing the basic tasks of dressing, cleaning, and bathing that were required of her, and that her only mental diagnosis was mild mental retardation. Given this evidence and the evidence that Mrs. Sowell, by intermittent compliance, did in fact demonstrate that she had learned and was capable of satisfactorily performing the tasks at issue, we do not think it can be said that she was disabled as defined by the Act or that the services offered were not adequate.

Affirmed.

BIRD and NEAL, JJ., agree.

Harold LEPEL *v.* ST. VINCENT HEALTH SERVICES
and Preferred Professional Insurance Company

CA 05-1340 241 S.W.3d 784

Court of Appeals of Arkansas
Opinion delivered October 25, 2006

[redacted]

Kaplan, Brewer, Maxey & Haralson, P.A., by: *Silas H. Brewer*, for appellant.

Walter A. Murray, for appellees.

JOHN B. ROBBINS, Judge. Appellant Harold Lepel sustained a neck injury while working for appellee St. Vincent Health Services on March 11, 2002. The appellee accepted the injury as compensable and covered certain medical and temporary total disability benefits. However, a dispute arose over Mr. Lepel's claim for additional benefits that included medical services provided by Dr. Anthony Russell, TTD benefits from May 22, 2003, through a date yet to be determined, and benefits under Ark. Code Ann. § 11-9-505(a)(1) (Repl. 2002) on account of St. Vincent's alleged refusal to return Mr. Lepel to work within his physical limitations after May 22, 2003. After a hearing, the Workers' Compensation Commission ruled that Mr. Lepel failed to establish entitlement to any of the above additional benefits. Mr. Lepel now appeals, asserting that none of the Commission's findings are supported by substantial evidence. We affirm.

When reviewing a decision from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm the decision if it is supported by substantial evidence. *Swaim v. Wal-Mart Assoc., Inc.*, 91 Ark. App. 120, 208 S.W.3d 837 (2005). Substantial evidence is that which a reasonable mind might accept as adequate to support

a conclusion. *Id.* 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. *Davis v. Old Dominion Freight Line, Inc.*, 341 Ark. 751, 20 S.W.3d 326 (2000).

Mr. Lepel testified that he worked for the appellee in the nuclear medicine department. He stated that he was moving a patient in a stretcher on March 11, 2002, when he felt a sharp pain between his neck and right shoulder, as well as pain down to his left elbow. Mr. Lepel first sought treatment at St. Vincent's emergency room on March 18, 2002, where he was prescribed medication and advised to visit his family physician, Dr. Charles Barg.

On May 2, 2002, Dr. Barg ordered an MRI and bone scan, and after reviewing the results he took Mr. Lepel off work for two weeks beginning on May 16, 2002, due to a cervical herniation. Dr. Barg then referred Mr. Lepel to a neurosurgeon, Dr. Wilbur Giles. After an evaluation, Dr. Giles returned Mr. Lepel to work beginning on May 31, 2002, with the restrictions that he not lift more then twenty pounds or engage in pushing or pulling activities. Mr. Lepel continued to work with these restrictions and on October 1, 2002, Dr. Giles returned him to regular duty.

Mr. Lepel continued to experience problems related to his cervical injury and was referred to Dr. Reze Shahim, who first saw him on November 5, 2002. Dr. Shahim recommended a program of physical therapy and pain management, which was administered under the direction of Dr. Gary Frankowski. Dr. Frankowski recommended another MRI, which was conducted on December 20, 2002, and indicated what was described as a questionable tiny ruptured disc on the right at C3-4.

Mr. Lepel testified that he aggravated his injury while working under limitations on April 16, 2003, when a patient was getting out of a chair and grabbed his left arm, causing pain to shoot down the arm. On the following day Dr. Barg advised that Mr. Lepel should remain off work until he visited a neurosurgeon. Mr. Lepel presented to a neurosurgeon, Dr. Anthony Russell, on May 14, 2003, on what Dr. Russell characterized as essentially a self referral. Dr. Russell ordered another MRI that was performed on May 16, 2003, which revealed a cervical fusion predating the compensable injury as well as multilevel degenerative changes. On

May 19, 2003, Dr. Russell noted that Mr. Lepel could return to work with the restrictions that he avoid pushing, pulling, or lifting more than thirty pounds without assistance. Mr. Lepel was on authorized leave from work under the Family Medical Leave Act from April 17, 2003, until returning to work on May 21, 2003.

Mr. Lepel worked on May 21, 2003, and a portion of the following day before being advised that his employment in the nuclear medicine department was being terminated. Mr. Lepel testified that the manager, Kenneth Goad, and radiology director, Dent Smith, met with him on the morning of May 22, 2003. Mr. Smith was the primary spokesman and told Mr. Lepel that due to budget considerations they could not afford to keep his job open. Mr. Smith then advised Mr. Lepel to report to the office of LeRoy Walker, the vice president of human resources.

When Mr. Lepel met with Mr. Walker, he was presented with a "confidential release" form which, among other things, provided that Mr. Lepel would receive a month's salary and health coverage if he would agree to release any potential claims against the hospital. However, Mr. Lepel elected not to sign the agreement. Mr. Lepel acknowledged that, during the meeting, Mr. Walker asked him if he would be interested in other positions with the hospital and advised that there were jobs available. Mr. Walker printed off a list of potential jobs and gave it to Mr. Lepel. However, Mr. Lepel declined to apply for any of the jobs, explaining that "I did not think they intended to hire me in any position since I had already been fired." Mr. Lepel instead accepted his termination and collected his pension fund.

Mr. Smith testified that, at the time Mr. Lepel's position was terminated, he told Mr. Lepel that he was an employee in good standing with the hospital and that he was eligible to apply for anything that he was interested in within the hospital. Mr. Walker testified that the termination agreement presented to Mr. Lepel was a standard form routinely given to terminated employees. Mr. Walker stated that he specifically asked Mr. Lepel to review the job postings and return to discuss what positions he might be interested in, but that Mr. Lepel never came back to discuss any jobs. In this regard, Mr. Walker testified, "I specifically spoke to Mr. Lepel, shared with him a job listing and recall talking to him about not knowing his exact skill sets or interests in other positions, so specifically asked him to look at our posting and come back to me and indicate what positions he might be interested in sliding into."

Mr. Lepel's first argument on appeal is that the Commission erred in refusing to award benefits for the treatment rendered by Dr. Russell on the basis that such treatment was not authorized. Mr. Lepel concedes that he was not referred to Dr. Russell by one of his authorized physicians and that he did not apply for a change of physician pursuant to the applicable rules in Ark. Code Ann. § 11-9-514(a) (Repl. 2002). Subsection (b) of the statute provides, "Treatment of services furnished or prescribed by any physician other than the ones selected according to the foregoing, except emergency treatment, shall be at the claimant's expense." However, Mr. Lepel relies on Ark. Code Ann. § 11-9-514(f) which provides:

> (f) When compensability is controverted, subsection (b) of this section shall not apply if:
>
> (1) The employee requests medical assistance in writing prior to seeking the same as a result of an alleged compensable injury;
>
> (2) The employer refuses to refer the employee to a medical provider within forty-eight (48) hours after a written request as provided above;
>
> (3) The alleged injury is later found to be a compensable injury; and
>
> (4) The employer has not made a previous offer of medical treatment.

Mr. Lepel maintains that subsection (f) applies because the appellee controverted further medical benefits, and that a written request for medical assistance was executed and denied. While Mr. Lepel did not himself make any written request, he relies on the April 9, 2003, independent medical evaluation of Dr. Ronald Williams, where Dr. Williams reported that the previous MRI findings were equivocal and that "I would like to repeat that."

■ We hold that the Commission properly denied compensation for the treatment by Dr. Russell. Contrary to Mr. Lepel's argument, the provisions of Ark. Code Ann. § 11-9-514(f) were not met in this case. The report by Dr. Williams did not constitute a written request by the employee for an MRI or treatment under the meaning of the statute. Moreover, compens-

ability of Mr. Lepel's neck injury was not controverted by the appellee, and a previous offer of medical treatment was made by the appellee and accepted by Mr. Lepel. Mr. Lepel's authorized physician was Dr. Barg, who had made previous referrals to neurosurgeons Giles and Shahim. While Dr. Barg noted on April 17, 2003, that Mr. Lepel should remain off work until he sees a neurosurgeon, this did not constitute a referral to any specific physician, including Dr. Russell. Mr. Lepel did not apply for a change in physician and elected to visit Dr. Russell on a self referral, and we agree that the resulting treatment was unauthorized.

We next address Mr. Lepel's argument that the Commission erroneously denied his claim for benefits under Ark. Code Ann. § 11-9-505(a) (Repl. 2002), which provides:

> (a)(1) 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.
>
> (2) In determining the availability of employment, the continuance in business of the employer shall be considered, and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall control.

Mr. Lepel contends that because the appellee terminated him and unreasonably failed to return him to suitable work within his limitations, the above provision applies.

In making his argument, Mr. Lepel relies on *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.3d 237 (1996), where we held:

> Before Ark. Code Ann. § 11-9-505(a) applies several requirements must be met. The employee must prove by a preponderance of the evidence that he sustained a compensable injury; that suitable employment which is within his physical and mental limitations is available with the employer; that the employer has refused to return

> him to work; and, that the employer's refusal to return him to work is without reasonable cause.

Id. at 230, 934 S.W.2d at 239. In that case, we further held that the statute requires that, when an employee who has suffered a compensable injury attempts to re-enter the work force, the employer must attempt to facilitate the re-entry by offering additional training to the employee, if needed, and reclassification of positions, if necessary. Mr. Lepel asserts that Mr. Walker nor any of the appellee's employees attempted to assess his job skills or assist in any training. While Mr. Lepel was given a list of potential jobs, he maintains that he was understandably skeptical about applying for any of the positions given that he had just been terminated by his employer.

We hold that substantial evidence supports the Commission's decision that Mr. Lepel failed to establish entitlement to benefits under Ark. Code Ann. § 11-9-505(a)(1). We think it significant that appellee returned Mr. Lepel to work following his March 11, 2002 compensable injury and that Mr. Lepel worked all but two weeks over the next thirteen months until he absented himself under the Family Medical Leave Act on April 16, 2003.[1] Furthermore, in *Torrey v. City of Fort Smith, supra,* we held that the claimant was entitled to such benefits where, after being advised by his employer that there were no jobs within his physical restrictions, the claimant was encouraged to apply for other positions within the city and he applied for two dispatcher positions but was not hired. To the contrary, as found by the Commission in the instant case, Mr. Lepel was offered but failed to take advantage of the opportunity to apply for other positions. Because Mr. Lepel was provided assistance by Mr. Walker in obtaining alternate employment that may have been within his restrictions, but declined to apply for any other jobs, we cannot say that the appellee refused to return him to work. And while Mr. Lepel testified that he elected not to apply for any jobs because he thought it would be useless, this is belied by his stipulation below that his termination had nothing to do with his workers' compensation claim, as well as the evidence that the elimination of his

[1] The five weeks that Mr. Lepel was on medical leave between April 16, 2003, and May 21, 2003 are not in issue on this appeal. Mr. Lepel does not claim entitlement to temporary total disability during this period and the Commission has made no ruling on whether this time off was precipitated by a compensable injury.

position was purely a financial decision as opposed to one based on any misconduct or personal animosity.

Mr. Lepel's remaining argument is that the Commission erred in failing to award temporary total disability benefits beginning from the date of his termination. We disagree. Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). The evidence in this case demonstrated that when his position was terminated Mr. Lepel was capable of working in some capacity, and in fact had been working for the appellee for an extended period of time following the compensable injury. While Mr. Lepel contends that the appellee thereafter failed to provide any other job within his restrictions, we reiterate that Mr. Lepel failed to apply for any jobs as encouraged by Mr. Walker. Moreover, there was testimony by Mr. Lepel that he frequently climbed Pinnacle Mountain, and climbed it two to three times per week even during the period he was off work for medical reasons immediately before his position was eliminated. He also testified that he intends to go back to work. Given these circumstances, there was substantial evidence to support a finding that Mr. Lepel was not totally incapacitated from earning wages.

Affirmed.

PITTMAN, C.J., GLADWIN, BIRD, CRABTREE, and BAKER, JJ., agree.

GRIFFEN, GLOVER, and ROAF, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I agree that appellant was not entitled to benefits for medical services provided by Dr. Russell. I, however, dissent from the majority's view that the Commission properly denied appellant's claim for benefits under Ark. Code Ann. § 11-9-505(a)(1) (Repl. 2002).

Arkansas Code Annotated section 11-9-505(a)(1) 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.

The purpose of § 11-9-505 "is to place an emphasis on returning the injured worker to work, while still allowing and providing for vocational rehabilitation programs when determined appropriate by the commission." Ark. Code Ann. § 11-9-505(d). Before this section applies, a claimant must prove by a preponderance of the evidence that he sustained a compensable injury; that suitable employment within his physical limitations is available with the employer; that the employer has refused to return him to work; and that the employer's refusal to return him to work is without reasonable cause. *Torrey v. City of Ft. Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

In *Torrey*, the injured employee was terminated after learning that the City of Fort Smith had no positions available that would accommodate the restrictions placed on his work activities. He was encouraged to apply for other positions with the City and was afforded the opportunity to interview for other positions, but he was not rehired by the City. While the Commission denied benefits in light of the City's position that it did not hire the injured employee because there were others more qualified for the position, this court reversed and remanded for an award of benefits. We stated:

> At a minimum Ark. Code Ann. § 11-9-505(a) requires that when an employee who has suffered a compensable injury attempts to re-enter the work force the employer must attempt to facilitate the re-entry into the work force by offering additional training to the employee, if needed, and reclassification of positions, if necessary.

Id. at 231, 934 S.W.2d at 239-40.

The record in this case demonstrates a glaring failure by the employer to comply with either the terms or the spirit of the statute based on what we said in *Torrey*. Rather, St. Vincent terminated the appellant one day after he returned to work from having been on Family and Medical Leave because, according to its witnesses, the employer could not afford to maintain the nuclear medicine department where he worked. Appellant was not transferred to a different department. He was not offered employment elsewhere within St. Vincent. There is no evidence that St.

Vincent made any effort to determine what job openings, if any, matched appellant's twenty-pound lifting restriction. Rather, the evidence shows that St. Vincent terminated appellant, tried to get him to sign an agreement that called his severance a voluntary resignation, and did so intending to extinguish appellant's right to any further benefits (presumably including workers' compensation benefits).

After discharging appellant, St. Vincent attempted to induce him to sign a document titled "Confidential Release" which, by its terms, was intended to forever release St. Vincent "from any and all possible liability" in exchange for one month's base salary. The document that St. Vincent presented appellant misstated the fact of his termination and the circumstances surrounding its tender, as is readily discerned from the following numbered provisions of that document:

> 1. By executing this Confidential Release, Employee confirms that they [sic] voluntarily and irrevocably resign their [sic] employment with St. Vincent effective May 22, 2003, and they [sic] agree that their [sic] employment with St. Vincent will be forever terminated under the terms and conditions of this Confidential Release.
>
> . . . .
>
> 11. Employee expressly warrants, acknowledges and represents that: (a) They [sic] have been advised by St. Vincent that they [sic] may wish to consult with an attorney prior to executing this Confidential Release; (b) They [sic] have been afforded an opportunity to consider this Confidential Release for a period of twenty-one (21) days; . . .
>
> 12. Employee shall have a period of seven (7) days following their execution of the Confidential Release to revoke it, if they [sic] so choose, and this Confidential Release shall not be effective or enforceable prior to the expiration of that period. In the event the Employee exercises their [sic] right to revoke this Confidential Release, St. Vincent shall immediately and automatically be relieved of any responsibility to provide the considerations set forth in paragraph 2 of this Confidential Release [calling for payment of salary for one month].

Contrary to the language of the document that St. Vincent presented to appellant, he was discharged from its employ. He did not resign and had not sought to resign. Dent Smith informed

appellant that his employment was terminated. LeRoy Walker tried to entice appellant to sign the release and term his separation a "voluntary resignation." There is no evidence in the record that Smith, Walker, or anyone else informed appellant that he could resign his employment or that appellant sought to resign it. Furthermore, there is no proof that St. Vincent presented the release to appellant twenty-one days earlier or that anyone at St. Vincent had even discussed his possible separation from the employment before Smith informed appellant that his employment was terminated.

Although the majority may disregard or minimize the significance of these uncontroverted facts, these facts directly bear on the employer's responsibility under § 11-9-505(a). Before the Commission determined whether the employer fulfilled its statutory responsibility, it should have analyzed the record in light of what the employer did and what it did not do. After all, § 11-9-505 obligates employers to engage in affirmative efforts aimed at returning injured workers to the workplace. Our decision in *Torrey* made that obligation unmistakably clear.

Implicit in § 11-9-505(a) and our interpretation of that section in *Torrey* is an expectation of a good-faith effort to facilitate an injured employee's re-entry into the workforce where suitable employment is available. That good faith is conspicuously absent in this case. First, Smith and manager Ken Goad terminated appellant before they sent him to the human resources office. Second, they did not refer him to the human resources office for reassignment; rather, they sent him there to secure a release of claims against St. Vincent. Third, Walker did not offer the list of 300 "available" openings until *after* he attempted to secure a release and *after* he and appellant had further discussion about jobs within the St. Vincent system. Fourth, when Walker presented appellant with the list of openings, Walker did not discuss whether appellant would be hired for any of those jobs; nor did he indicate whether any of the positions met the twenty-pound lifting restriction appellant had been given.

The post-termination actions taken by St. Vincent were inconsistent with the conclusion that it acted in compliance with § 11-9-505(a). Although the Commission concluded that appellant made no effort to pursue any of these opportunities, the workers' compensation act, and particularly § 11-9-505, places the onus of facilitating an injured worker's re-entry into the workplace on the employer, not the employee. St. Vincent, which terminated

appellant's employment, should not be allowed to skirt its statutory obligation to facilitate appellant's return to the workforce by relying on appellant's reasonable belief that he would not be re-employed after its managers told appellant that he had been discharged. Further, an employer cannot meet its obligation by terminating an employee and by merely providing a list of jobs. That action merely places an injured employee back into a hiring pool of unemployed job applicants.

The majority also appears to be impressed by the stipulation that appellant's position was eliminated purely for financial reasons and had nothing to do with any animosity toward appellant. However, in *Torrey*, we rejected the employer's contention that it did not rehire the claimant there because others were more qualified to fill the positions for which the claimant applied. Again, the employer still has a statutory obligation to facilitate the re-entry into the workforce.

Section 11-9-505 is designed to ensure that injured workers are returned to the workforce. Regardless of St. Vincent's motives, it failed to facilitate appellant's re-entry into the work force. Because the majority has decided that appellant is not entitled to benefits despite St. Vincent's failure to facilitate appellant's return to the workforce, I must respectfully dissent.

I am authorized to state that Judges GLOVER and ROAF join in this opinion.

OFFICE of CHILD SUPPORT ENFORCEMENT &
Anita Gauvey *v.* Robert W. GAUVEY

CA 06-103 241 S.W.3d 771

Court of Appeals of Arkansas
Opinion delivered October 25, 2006

Mark L. Ross, Attorney for OCSE State of Arkansas, Ark. Dep't of Finance & Admin., for appellant.

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *Traci LaCerra* and *Quentin E. May*, for appellee.

DAVID M. GLOVER, Judge. The issue in this case is whether the Office of Child Support Enforcement (OCSE) can

enforce a spousal support order contained in a foreign divorce decree from Germany. We hold that OCSE can enforce the spousal order in question, and we reverse and remand this case.

Anita and Robert Gauvey were married on December 22, 1988, in Cleburne County, Arkansas, and were divorced on March 28, 1995, in Starnberg, Germany. Two children were born of the marriage — Elizabeth, on November 8, 1989, and Sean, on March 31, 1992. The German divorce decree provided that Anita Gauvey was the proper person to have custody of the children. Appellee, Robert Gauvey, was given no visitation rights in the divorce decree because there was an outstanding warrant for his arrest concerning, among other things, false certification, loan fraud, bodily injury, and narcotic drug offenses; because Anita Gauvey testified that he had been violent toward her and the children; and because he had had no contact with the children for almost two years, having fled Germany. The pertinent support order from Germany provided that appellee was to pay monthly child support of $212.25 per child and monthly spousal support of $915.35. The total arrearage as of March 24, 2005, was calculated to be $164,801.55.

Anita Gauvey, through OCSE, filed a petition to register the German order for child support and spousal support in the Faulkner County Circuit Court pursuant to the provisions of the Uniform Interstate Family Support Act (UIFSA), found at Arkansas Code Annotated section 9-17-101 et seq., and the Act for the Recovery of Maintenance in Relations with Foreign States German Foreign Maintenance Act of December 19, 1986. OCSE also filed a motion for citation, asking the Faulkner County Circuit Court to find Robert Gauvey in contempt for failure to pay child and spousal support and to order him to obtain health insurance for the children. Robert Gauvey responded to the registration of the foreign judgment, arguing, in pertinent part, that OCSE was without authority to enforce and collect an award of spousal support. He also responded to the motion for citation, contending that he should not be held in contempt because he was never served with a summons and complaint; that the order was entered in violation of his due-process rights; that he had been denied contact with his children; that his attempts to send money to his ex-wife were rejected; and that because he was never served with the order, he did not know what obligations, if any, he owed pursuant to the order.

In an order filed of record on October 27, 2005, the trial court found that it could not register the judgment for spousal support because OCSE was not authorized to enforce the payment of spousal support, but it did register and confirm the order for child support. The trial court granted judgment to Anita Gauvey and OCSE for past due child support as of October 5, 2005, in the amount of $54,336 and ordered Robert Gauvey to pay $84.90 monthly on the judgment in addition to his monthly support of $424.50. The trial court did not find Robert Gauvey in contempt of court.

OCSE filed a motion and brief to reconsider on November 9, 2005, arguing that 45 C.F.R. § 301.1 gave it authority to collect overdue spousal support as well as overdue child support. The trial judge denied this motion.

On appeal, OCSE argues that it does have the authority to collect spousal support in conjunction with child support and that the trial court in effect modified the divorce decree when it refused to register the portion of the decree ordering spousal support. OCSE cities 45 C.F.R. § 301.1, which provides that "overdue support" is

> a delinquency pursuant to an obligation determined under a court order, or an order of an administrative process established under State law, for support and maintenance of a minor child, which is owed to or on behalf of the child, *or for the noncustodial parent's spouse (or former spouse) with whom the child is living, but only if a support obligation has been established with respect to the spouse and the support obligation established with respect to the child is being enforced under State's IV-D plan.* . . . Past-due support means the amount of support determined under a court order or an order of an administrative process established under State law for support and maintenance of a child *or of a child and the parent with whom the child is living*, which had not been paid. . . . *Spousal support means a legally enforceable obligation assessed against an individual for the support of a spouse or former spouse who is living with a child or children for whom the individual also owes support.*

(Emphasis added.)

Arkansas Code Provisions

Arkansas Code Annotated section 9-17-101(19)(ii) (Repl. 2002) defines "State" to include "a foreign jurisdiction that has enacted a law or established procedures for issuance and enforce-

ment of support orders which are substantially similar to the procedures under this chapter, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Enforcement of Support Act." Under the Uniform Interstate Family Support Act (UIFSA), "child support order" or "support order" is defined as "a judgment, decree, or order, . . . issued by a court or an administrative agency of competent jurisdiction for the support and maintenance of a child . . . *or of the parent with whom the child is living, which provides for monetary support, health care, arrearages, or reimbursement* . . . ." Ark. Code Ann. § 9-14-201(2) (Repl. 2002). (Emphasis added.) "Past due support" is defined as "the total amount of support determined under a court order established under state law, which remains unpaid." Ark. Code Ann. § 9-14-201(8). Arkansas Code Annotated section 9-14-210(b) provides in pertinent part that "an attorney employed by . . . the Office of Child Support Enforcement, . . . shall undertake representation of the action . . . in actions brought pursuant to Title IV-D of the Social Security Act, § 42 U.S.C. § 651 et seq., under the Uniform Interstate Family Support Act, § 9-17-101 et seq."

Arkansas Code Annotated sections 9-17-301(b)(2) & (3) state that this chapter provides for the "*enforcement of a support order* and income-withholding order of another state without registration pursuant to article 5 of this chapter" and "registration of *an order for spousal support or child support* of another state for enforcement pursuant to article 6 of this chapter." (Emphasis added.) Subsection (c) of this statute provides that "an individual petitioner *or a support enforcement agency* may commence a proceeding authorized under this chapter by filing a petition in an initiating tribunal for forwarding to a responding tribunal or by filing a petition or a comparable pleading directly in a tribunal of another state which has or can obtain personal jurisdiction over the respondent." (Emphasis added.) Arkansas Code Annotated section 9-17-307(a) (Repl. 2002) provides, "A support enforcement agency of this state, upon request, shall provide services to a petitioner in a proceeding under this chapter," and subsection (c) of that statute provides, that "a tribunal of this state *shall* recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction." (Emphasis added.) Our statutes thus explicitly provide for OCSE to enforce spousal support orders; therefore, the trial court erred in refusing to issue an order confirming the entire order, including spousal support.

Appellee cites *Chaisson v. Ragsdale*, 323 Ark. 373, 914 S.W.2d 739 (1996), for the proposition that UIFSA is limited only to the enforcement of child support. The statutes cited above refute that assertion. Furthermore, *Chaisson* is distinguishable from the present case; in *Chaisson*, the trial judge granted the mother a setoff against child support for debts she had paid that were the responsibility of the father, and the trial judge also granted visitation rights to the mother. Our supreme court reversed and remanded the case, finding that the UIFSA petition was limited to establishment of child support and its enforcement and that the trial judge exceeded his authority under UIFSA in resolving issues of setoff and visitation. Spousal support was not an issue in *Chaisson* as it is in the present case, and the holding in *Chaisson* is simply not applicable to the present case.

Reversed and remanded for entry of an order registering the entire support order.

HART and CRABTREE, JJ., agree.

MOUNTAIN PURE, LLC *v.*
AFFILIATED FOODS SOUTHWEST, INC.,
Turner Holdings, LLC, Portola Packing, Inc., Stone Container Corporation, and Consolidated Container Company, LLC

CA 05-837 241 S.W.3d 774

Court of Appeals of Arkansas
Opinion delivered October 25, 2006

[Rehearing denied November 29, 2006.]

Dudley & Compton, by: *Timothy O. Dudley; Barrett & Deacon, A Professional Association*, by: *D.P. Marshall Jr.*, and *Brandon J. Harrison*, for appellant.

Dover Dixon Horne, PLLC, by: *Steve L. Riggs* and *Nona M. Morris*; *Friday Eldredge, & Clark, LLP*, by: *William A. Waddell, Jr.*, for appellee Affiliated Foods.

LARRY D. VAUGHT, Judge. This is a contract case. Appellant Mountain Pure L.L.C. sued Affiliated Foods Southwest Inc. for breach of a supply agreement. Mountain Pure also sued

vendors Turner Holdings L.L.C., Portola Packaging Inc., Stone Container Corp., and Consolidated Container Co. L.L.C. for selling defective jugs, caps, and cartons that Mountain Pure used in its commercial water and juice bottling business.[1] The vendors counter-claimed against Mountain Pure for open-account debt. The trial court granted summary judgment to Affiliated and to the vendors. We reverse and remand for trial.

In January 2000, Mountain Pure's predecessor in interest, Dairy Farms of America Inc., purchased Mountain Pure from Affiliated. The sale was tied to a tandem, long-term supply agreement. For eight years, Affiliated was obligated to buy water and juice products from Mountain Pure in the same amounts — subject to agreed adjustments — that it had been buying prior to the sale. As an essential condition of the sale, Mountain Pure would serve as Affiliated's "primary supplier of water and juice products," until January 2008.

In the spring of 2001, the parties' relationship became strained due to problems with leaky jugs, leaking caps, and collapsing cartons. For several months Affiliated and Mountain Pure worked together in an attempt to resolve the problems. However, on July 2, 2001, Affiliated notified Mountain Pure by letter that it would begin buying water and juice from other suppliers because the leakage problems had not been corrected to Affiliated's satisfaction.

In a letter dated July 9, 2001, Mountain Pure outlined the corrective measures it had undertaken in an attempt to satisfy Affiliated. It also stated that it was committed to resolving any future problems encountered by Affiliated. Mountain Pure also reminded Affiliated that the supply agreement was a critical portion of the plant-purchase agreement.

Affiliated never resumed major purchases from Mountain Pure. In response, Mountain Pure sued Affiliated, alleging breach of the supply agreement. Mountain Pure claimed that it had cured the leakage problems but that Affiliated refused to honor the supply agreement. Mountain Pure also sued the vendors — Turner, Portola, Stone, and Consolidated — from which it bought

[1] Portola Packaging and Mountain Pure, by joint motion, asked us to dismiss the appeal as it relates to Portola following a settlement agreement by the parties. We granted the motion on September 20, 2006. A similar motion was filed on October 9, 2006, asking that the appeal against Turner be dismissed. We now also grant this motion.

jugs, caps, and containers for breach of contract and breach of warranties. Each vendor filed a counterclaim for debt against Mountain Pure for unpaid bills.

The parties' labyrinth of claims and counterclaims have produced a Gordian knot[2] of epic proportion. Because we have once before outlined "the long and convoluted procedural history" of the case, we will now discuss only the procedural elements essential to this second appeal. *See Mountain Pure, L.L.C. v. Affiliated Foods Southwest, Inc.*, 366 Ark. 62, 63, 233 S.W.3d 609, 610 (2006) (quoting full outline of case's procedural history contained in an unpublished opinion of the Arkansas Court of Appeals).

After the parties conducted discovery, Affiliated and the vendors made a series of summary-judgment motions. The circuit court granted Affiliated summary judgment on Mountain Pure's claim for breach of the supply agreement. The court concluded that no genuine issues of material fact existed and held that Mountain Pure had repudiated the supply agreement. Initially, the court allowed Mountain Pure to nonsuit its defect-based claims for breach of contract and breach of warranties. However, the court ultimately vacated those nonsuits and granted the vendors summary judgment on those claims. Mountain Pure had conceded that, while it could prove the total damages it suffered from the allegedly defective jugs, caps, and cartons, it could not apportion those damages exactly among the vendors. The court held that Mountain Pure could not "meet its burden of proof on the causes of action for breach of contract" and could not apportion damages to each vendor.

The circuit court later granted summary judgment to all the vendors on their debt counterclaims. In doing so, the court relied

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[2] The legend of the Gordian knot was aptly explained by the Eighth Circuit in *Prudential Insurance Co. of America v. National Park Medical Center, Inc.*, 154 F.3d 812, 819 n.4 (8th Cir. 1998), as follows:

> Gordius, King of Phrygia, tied his chariot to a hitching post before the temple of an oracle with an intricate knot, which, it was prophesied, none but the future ruler of all Asia could untie. In the course of his conquests, Alexander the Great came to Phrygia, and, frustrated with his inability to untangle the "Gordian knot," simply sliced through it with his sword. His subsequent success in his Asian campaign has been taken to mean that his solution to the "Gordian knot" fulfilled the prophesy. (Internal citations omitted.)

on its earlier summary judgments on Mountain Pure's contract and warranty claims against the vendors. The court rejected Mountain Pure's argument that the record established genuine issues of material fact on Mountain Pure's affirmative defense of defect to the vendors' claims for non-payment. Mountain Pure now appeals, limiting its claims of error to the summary judgments for Affiliated on the supply agreement and for the vendors on their debt counterclaims. Mountain Pure challenges the circuit court's grant of summary judgment on Mountain Pure's contract and warranty claims against the vendors only insofar as the court's decision is incorporated into the defect and debt issues on appeal.

We begin our plenary review of the record with the written supply contract between Mountain Pure and Affiliated, viewing all evidence and resolving all inferences in Mountain Pure's favor. *See Cole v. Laws*, 349 Ark. 177, 185, 76 S.W.3d 878, 882 (2002) (outlining summary-judgment review standard). According to Jerry Davis, the President and CEO of Affiliated, the sale of the plant was conditioned on the execution of this agreement. John Stacks, the President and CEO of Mountain Pure, concurred by stating that his company "relied upon that agreement when [it] acquired the Mountain Pure business from Affiliated." The agreement, dated January 21, 2000, required that Mountain Pure supply Affiliated with quality water and juice products; it obligated Affiliated to use Mountain Pure as its "primary supplier of water and juice products" for eight years after the plant sale.

The supply agreement also outlined a procedure whereby, under certain conditions, Affiliated could make major purchases of water and juice from other suppliers. The breach-of-contract dispute now before us turns on this provision, which states:

> Affiliated will only make major purchases of water and juice products from another supplier only (i) after a "Failure to Cure," when and this only so long as the Failure to Cure continues experiencing or (ii) where Supplier cannot meet Affiliated's needs due to a condition beyond Supplier's control (force majeure). "Failure to Cure" shall mean Supplier's failure to cure any quality problems within three (3) business days after Affiliated shall have delivered to Supplier written notice specifying the nature of the quality problem. The term "a condition beyond Supplier's control" will mean a delay if and to the extent caused by occurrences beyond the reasonable control of Supplier, including, but not limited to, acts of God, embargoes, governmental restrictions, governmental rationing, fire, flood, drought, earthquake, torna-

> does, hurricanes, explosions, riots, wars, civil disorder, failure of public utilities or common carriers, labor disturbances, rebellion or sabotage.

As anticipated by this provision, beginning in April 2001, there were "quality" problems with Mountain Pure's products. The record contains several letters between Affiliated and Mountain Pure documenting the parties' efforts to address these problems. The majority of the deposition testimony in this case outlines the various steps that the parties undertook to resolve the leaky-product dilemma. Mountain Pure offered proof that it had cured most of the problems no later than October 2001. Affiliated offered proof that the problems were never resolved. It is undisputed that Affiliated failed to resume using Mountain Pure as its "primary supplier" of water and juice products.

Giving Mountain Pure's evidence the highest probative value, as we must, it is clear that a question of material fact remains as to when — or if — Mountain Pure cured the "quality" problems with its products. Affiliated responds that this question of fact notwithstanding, summary judgment is still the proper remedy because the undisputed proof establishes that the product inadequacies continued well beyond three days. However, such a conclusion is based on a contorted reading of the supply agreement's time-to-cure provision.

Affiliated is mistaken as to what the contract's cure provision does and — more importantly — does not provide. The plain and unambiguous language of the contract establishes an outward limit of three days for Mountain Pure to cure before Affiliated's *right to buy from other suppliers* is triggered. It does not establish an outward limit of three days for Mountain Pure to cure before Affiliated *can be released from a long-term supply agreement* that was inextricably linked to a multi-million dollar plant purchase. When contracting parties express their intention in a written instrument in clear and unambiguous language, it is the court's duty to construe the writing according to the plain meaning of the language employed. *Holytrent Props., Inc. v. Valley Park Ltd. P'ship*, 71 Ark. App. 336, 32 S.W.3d 27 (2000).

Affiliated alternatively argues that "under no circumstances" can it be said that there is "no time limit" for Mountain Pure to cure, because the Uniform Commercial Code inserts a "reasonable time" provision when a contract is silent as to cure time. *See* Ark. Code Ann. § 4-2-609 (Repl. 2001). Affiliated insists that once

Mountain Pure failed to provide adequate assurances of due performance within a reasonable time (not to exceed thirty days) the contract was repudiated by Mountain Pure, and Affiliated had no further obligation to perform under the supply agreement.

■ However, Affiliated underestimates the completeness of the contract into which it freely entered. The sale-linked agreement bound the parties for a limited, eight-year period and anticipates performance problems over the course of the parties' relationship. If the problems were not resolved within three days, Affiliated was permitted to buy product from other suppliers "only so long as" Mountain Pure was in the process of curing, but no longer. Because a question of material fact remains as to whether Mountain Pure had cured the defect in its product, summary judgment was prematurely granted by the circuit court and we reverse and remand the case for trial.[3]

Next, we turn our attention to Mountain Pure's claim that the trial court erred by granting Stone and Consolidated summary judgment on their debt counterclaims. According to Mountain Pure, the vendors breached their contracts by providing defective goods and, therefore, Mountain Pure should be allowed to deduct its damages from any amounts it might owe them. It relies on Ark. Code Ann. § 4-2-717 (Repl. 2001), which permits a buyer, after acceptance of nonconforming goods and notification to the seller, to deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under that contract. Mountain Pure correctly maintains that, according to Ark. Code Ann. § 4-1-106(1) (Repl. 2001), this defense should be liberally applied.[4]

■ We agree that in a debt-defense context, Mountain Pure was not required to prove vendor-specific damages with mathematical accuracy to defeat the vendors' motions for summary judgment; it simply had to offer evidence that it was damaged by

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[3] Assuming arguendo that the contract's cure provision did not supply a remedy for chronic-performance failure (which would surely exceed a year and a half of an eight-year contract), a fact-intensive, UCC-based "reasonable assurance" repudiation inquiry could be triggered. This inquiry usually presents a question of fact — what is reasonable — which generally cannot be disposed of by summary judgment. *See generally Ford Motor Credit Co. v. Ellison*, 334 Ark. 357, 974 S.W.2d 464 (1998).

[4] This liberal administration of remedies was repealed by Act 856 of 2005. *See* Ark. Code Ann. § 4-1-106 (Supp. 2005).

defects in each of the vendor's products. Arkansas law has never required exactness of proof in determining the amount of damages. Recovery will not be denied merely because the damages are difficult to ascertain; if it is reasonably certain that some loss has occurred, it is enough that damages can be stated only approximately. *Morton v. Park View Apartments*, 315 Ark. 400, 868 S.W.2d 448 (1993). Accordingly, the circuit court erred in requiring Mountain Pure to allocate an exact amount of damages to each vendor in a debt-offset context.

Also, Mountain Pure's damage evidence created issues of fact for the jury. Evidence was presented that the boxes supplied by Stone were not scored properly; that they were not square and had inconsistent thicknesses; that they failed crush tests; that dry boxes fell apart; that the inner and outer skins of the cardboard pulled apart; that the boxes sometimes arrived damp; and that the flaps did not fold properly and were not uniform.[5] Mountain Pure also presented testimony that some of the bottles supplied by Consolidated contained carbon specks resulting from the manufacturing process that could cause leaks; that some bottles were not trimmed properly; and that one bottle demonstrated that its mold had been out of alignment. Many of these alleged product defects were denied by the responsible vendor. Others were admitted, but the impact of the defect on Mountain Pure's debt was disputed. Either way, a classic dispute of material fact is presented. Such disputes are to be resolved by the trier-of-fact, which in this case is a jury.

It is certainly tempting to sever the stranglehold of this Gordian knot in true Alexander the Great form with a swift slash of the summary-judgment sword. However, because this case presents many disputed issues of material fact, we must rely on the jury to untangle the knot, one strand at a time.

Reversed and remanded.

GRIFFEN and ROAF, JJ., agree.

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[5] It is of no import that the boxes that Mountain Pure identified in discovery as evidence proving its allegations were examined by Stone's representative, Charles Shelton, who found them to be within specifications. Once a question of fact is properly established, a subsequent denial does not trigger an obligation to re-establish a material dispute of fact. To condone such an approach in the summary-judgment context — the last in time wins — would invite a childish denial dialogue: "did not," "did too," "did not — infinity."

Dana WHITENER *v.* STATE of Arkansas

CA CR 06-106 241 S.W.3d 779

Court of Appeals of Arkansas
Opinion delivered October 25, 2006

Killough Law Firm, by: *Larry Killough, Jr.*, for appellant.

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

TERRY CRABTREE, Judge. The White County Circuit Court revoked the probation of Dana Whitener and sentenced her to five years in the Arkansas Department of Correction. The court ordered that three years of the sentence be suspended, and that she be transferred to the Regional Correction Facility for twenty-four months to participate in the drug program there. On appeal appellant argues that there was insufficient evidence to sustain a finding that she inexcusably violated the terms of her probation, because the terms and conditions of her probation were not introduced into evidence. The State responds that because the argument was not raised below, it is not preserved for appeal. We agree and affirm.

In August 2002, appellant entered into a plea bargain with the prosecution in the White County Circuit Court. As part of the negotiated plea, she pled guilty to a violation of the Arkansas Hot Check Law. She was placed on supervised probation for three years and ordered to pay a fine of $1000, restitution of $1056.29, and court costs of $150. Pursuant to Ark. Code Ann. § 5-4-303 (Repl. 2006), if a court suspends imposition of sentence on a defendant or places him or her on probation, the court shall attach such conditions as are reasonably necessary to assist the defendant in leading a law-abiding life. The statute further provides that every suspension or probation will contain the express condition that the defendant not commit an offense punishable by imprisonment during the period of suspension or probation. As required by statute, appellant was given a written copy of the terms and conditions of her probation which contained, among other requirements, the provision that she not commit a criminal offense punishable by imprisonment. She signed the acknowledgment of the terms and conditions on August 28, 2002, and a copy of the terms and conditions was made part of the court's file. A petition to revoke was filed on March 15, 2005, alleging that appellant violated the terms of her probation by her failure to report, delinquency on court ordered payments, failure to refrain from the use of illegal controlled substances, being out of state without permission, and being found guilty of driving under the influence and negligent minor care in the state of Nebraska and not reporting the offense to her probation officer. A hearing on the petition was held April 28, 2005.

At the hearing Mary Rudisill, a probation officer for White County, testified that she received a call from an officer in Nebraska informing her that appellant's transfer to that state was being denied due to new charges appellant received in Nebraska. Appellant was charged in Nebraska with driving under the influence and negligent minor care, and she was sentenced to ten days in jail, six months driver's license suspension and a $400 fine. Ms. Rudisill testified that appellant had completed her sentence in the state of Nebraska. Appellant testified that she did receive a DUI in Nebraska, and that her daughter was riding in the car with her when she was arrested. The court documents from Nebraska were admitted into evidence without objection.

Ms. Rudisill also testified that she performed a home visit at appellant's home, and appellant gave her permission to come inside. Appellant indicated to Ms. Rudisill the bedroom in which

she was staying, and on the nightstand in plain view was drug paraphernalia. A field test of a light bulb and plate revealed a positive result for methamphetamine. There was also a glass pipe, marijuana seeds in a plastic bag, three yellow tablets in a plastic bag, scrub pads, and a torch lighter. Ms. Rudisill testified that appellant tested positive for drugs on many occasions. During appellant's testimony she denied that the drug paraphernalia belonged to her, and she denied being on drugs; however, when escorted from the courtroom to take a drug test, she admitted that she would test positive for methamphetamine. Appellant's confession was admitted without objection. The trial court revoked appellant's probation, finding that there had been a violation of the terms of probation.

Appellant does not dispute the fact that she was on probation, rather she asserts that because the terms and conditions of her probation were not entered into evidence at the revocation hearing, the trial court had no legal basis for finding a violation. Although appellant raises this argument for the first time on appeal, she contends her argument is a challenge to the sufficiency of the evidence. The sufficiency of the evidence of the State's proof regarding violation of a condition of probation may be challenged on appeal of a revocation in the absence of a motion for directed-verdict. *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001).

This court dealt with a similar issue in *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004). In *Nelson*, the appellant argued for the first time on appeal that the State failed to produce proof at the hearing that a written list of probationary conditions was given to him, so no revocation could be had. He asserted that his argument was one about the sufficiency of the proof, so the issue was open for review despite being raised for the first time on appeal. We reasoned that "the rule requiring one to make procedural and evidentiary objections known to the trial court is still a viable rule of law. At no time did appellant raise this issue by pointing out to the trial court that he had not been furnished a written statement of his conditions or by objecting to the revocation hearing on that ground." *Id.* at 379, 141 S.W.3d at 904. We held that this was a procedural matter and appellant did not timely object; therefore, he waived the issue on appeal.

In the case at bar, appellant does not argue that the State failed to prove that *she* had knowledge of the terms and conditions of her probation; instead, she asserts that the State failed to prove that the court had knowledge of the terms and conditions

of her probation. Appellant's argument ignores the long-recognized presumption that every person is presumed to know the law, whether civil or criminal. *Owens v. State*, 354 Ark. 644, 128 S.W.3d 445 (2003). Indeed, a higher duty of compliance rests on those whose responsibility it is to enforce the law than on the general populace. *Harris v. State*, 264 Ark. 391, 572 S.W.2d 389 (1978). Because our statutory law requires that every probationary sentence contain the condition that the probationer not violate the law, and because everyone is presumed to know the law, it was not necessary for the State to introduce into evidence the probationary condition that appellant not violate the law. There was testimony from appellant's probation officer and from appellant herself that she was convicted and served jail time in Nebraska for driving under the influence. There was also testimony that appellant was in possession of drug paraphernalia during the probation officer's home visit, and appellant admitted at the hearing that she would test positive for methamphetamine. Appellant's argument that the terms and conditions of probation were not introduced into evidence amounts to a procedural objection, and appellant did not raise this issue at the revocation hearing. This court will not consider issues raised for the first time on appeal. *Brown v. State*, 5 Ark. App. 181, 636 S.W.2d 286 (1982).

Appellant also argues that the court's findings supporting the revocation of her probation are against the preponderance of the evidence because there was no proof that the violation was "inexcusable" as required by Ark. Code Ann. § 5-4-309(d) (Repl. 2006). Appellant testified that she was convicted in Nebraska of DUI, and she also confessed to using methamphetamine. She offered no excuse for her behavior. The preponderance of the evidence supports the court's finding that appellant violated the terms and conditions of her probation. Accordingly, we affirm.

Affirmed.

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

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. The majority has misapplied precedent regarding probation-revocation proceedings in affirming this case. Appellant did not fail to preserve her sufficiency challenge for appellate review. However, the State

failed to prove an essential element of its case. The decision announced today now compounds that error. Accordingly, I must respectfully dissent.

The majority acknowledges that it is unnecessary for a probationer to move for directed verdict or otherwise challenge the sufficiency of the evidence at trial to preserve the sufficiency argument for appellate review in a probation-revocation proceeding. *See Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001); *Brown v. State*, 85 Ark. App. 382, 155 S.W.3d 22 (2004). Nevertheless, my colleagues fail to recognize that this is, indeed, a sufficiency challenge. Instead, they erroneously rely on *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004). There, the appellant argued that his revocation should have been reversed due to the State's failure to present proof that he received the written list of probation conditions. The appellant in *Nelson* acknowledged that he was bringing this argument for the first time on appeal, but argued that he was challenging the sufficiency of the evidence to revoke the probation, which was open for review. This court noted that the requirement that probationary conditions be given to the probationer was in place to avoid any misunderstandings by the probationer. It continued by holding that the requirement was a procedural issue, *not a sufficiency issue*, and was waived by the appellant's failure to raise it to the trial court.

The issue presented in *Nelson*, however, is easily distinguished from the issue in the present case. Here, appellant is arguing that the State did not prove what the probation conditions were; thus, the trial court did not have proof sufficient to support a decision that her actions violated those conditions. This is plainly different from a claim that appellant did not know the terms and conditions of her probation. *Nelson* is inapplicable here. Appellant's challenge is still a challenge to the sufficiency of the evidence, and no motion was necessary below to preserve the issue before this court.

The majority states, "Because our statutory law requires that every probationary sentence contain the condition that the probationer not violate the law, and because everyone is presumed to know the law, it was not necessary for the State to introduce into evidence the probationary condition that appellant not violate the law." This statement is contrary to the result in *Ross v. State*, 268 Ark. 189, 594 S.W.2d 852 (1980). There, the trial court revoked the appellant's suspended sentence after the appellant committed battery and aggravated assault. The supreme court reversed the

revocation because the trial court failed to expressly condition the suspended sentence on good behavior. The State argued that "good behavior is an implied condition of every suspension and need not be expressed in writing or otherwise since a person should be presumed to know that his suspended sentence is contingent upon his refraining from criminal conduct." *Id.* at 190-91, 594 S.W.2d 852. In rejecting the argument, the supreme court stated:

> [C]ourts have no power to imply and subsequently revoke conditions which were not expressly communicated in writing to a defendant as a condition of his suspended sentence. This result not only comports with any due process requirements owed to a defendant upon the imposition of a suspended sentence but may serve to deter criminal conduct which a defendant might otherwise commit but for a full appreciation of the extent of his jeopardy.

Id. at 191, 594 S.W.2d at 853.

Not only does *Ross* run counter to the majority's reasoning, it explicitly holds that a probationer must violate an actual term of his or her probation before that probation can be revoked. Here, the State presented no evidence of the terms and conditions of appellant's probation; therefore, the trial court had no evidence upon which it could find that appellant violated one of those terms.

We may institutionally "know" that the terms and conditions of probation typically include the obligation not to do certain acts. However, just as the State must prove each element of a crime before an accused can be convicted, the State must prove every element of a probation violation before a court can revoke a probation. A trial court cannot revoke a probation absent specific evidence of the terms and conditions of that probation, even if appellate judges "know" that certain behavior violates usual probationary terms. If the State fails to prove an essential element of its case, our proper duty is to say so and reverse, not manufacture devices whereby an unproved case can be affirmed.

Persons who face the loss of their liberty based on accusations of violating the terms and conditions of their probationary sentences are entitled to the same standard of justice that the law provides other litigants. The prosecution has the burden of proving each and every element of the offense, even when the standard of proof is by a preponderance of the evidence. Failure to prove

the terms and conditions of probation is fatal to the prosecution's case. The decision announced by the majority excuses the defect in this case. Furthermore, by doing so the majority unwisely and unfairly signals to prosecutors, defense counsel, and trial judges that institutional "knowledge" can substitute for proof in probation-revocation proceedings. Because the State failed to meet its burden in this case, I respectfully dissent.

Amy REYNOLDS *v.* STATE of Arkansas

CA CR 06-403 241 S.W.3d 765

Court of Appeals of Arkansas
Opinion delivered October 25, 2006

The Blagg Law Firm, by: *Ralph J. Blagg*, for appellant.

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

KAREN R. BAKER, Judge. Appellant Amy Reynolds appeals her conviction for driving while intoxicated asserting that the circuit court erred in denying her motion in limine to exclude the results of her breath test under the provision of Ark. Code Ann. section 5-65-204(e)(1) (Repl. 2005). She argues that the results of the breathalyzer should have been excluded because the statement of rights read to her by the law-enforcement officers did not specifically state that she had the right to have a person of her choice administer an additional test. We find no error and affirm.

Arkansas Code Annotated section 5-65-204(e)(1) provides that:

> (e)(1) The person tested may have a physician or a qualified technician, registered nurse, or other qualified person of his or her own choice administer a complete chemical test in addition to any test administered at the direction of a law enforcement officer.
>
> (2) The law enforcement officer shall advise the person of this right.
>
> (3) The refusal or failure of a law enforcement officer to advise such person of this right and to permit and assist the person to obtain such test shall preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer.

The initial test result may be admitted into evidence if there was substantial compliance with the statute. *Hegler v. State,* 286 Ark. 215, 691 S.W.2d 129 (1985); *see also Daniels v. State,* 84 Ark. App. 263, 139 S.W.3d 140 (2003). When a defendant moves to exclude a test pursuant to § 5-65-204(e)(3), the State bears the burden of proving by a preponderance of the evidence that the defendant was advised of his right to have an additional test performed and that he was assisted in obtaining a test. *McEntire v. State,* 305 Ark. 470, 808 S.W.2d 762 (1991). Substantial compliance with the statutory provision (e)(3) is all that is required. *Kay v. State,* 46 Ark. App. 82, 877 S.W.2d 957 (1994). Whether the assistance provided was reasonable under the circumstances is ordinarily a fact question for the trial court to decide. *Id.*

The challenged provision of the statement of rights read to, and signed by, appellant states:

> If you disagree with the results of this test, you may request another chemical test of your choice and I will assist you in obtaining it.

> The additional test may be of either your breath, blood or urine administered by a qualified person such as a doctor, registered nurse, or technician other than a law enforcement officer.

Although the notice to appellant by the officers that she had the right to have a subsequent or different test was not as complete as it could have been,[1] we do not find error in allowing the test result to be introduced. *See Spicer v. State*, 284 Ark. 315, 681 S.W.2d 369 (1984) (allowing introduction of breath alcohol test where accused was notified of right to different type of test but notice did not mention person of choice for administration of test). Appellant was notified she could request a test of a different type, but she made no such request. Nothing in our case law requires the officer to structure proposals or options for the arrestee to pursue. We are not here addressing a situation in which an accused requests an opportunity to call her own doctor or other qualified person and have her doctor or other qualified person come to the jail or other place of incarceration and take a sample of blood. While there may have been other courses of action that would have been reasonable for the officer to assist appellant in pursuing had she requested, appellant made no other requests for assistance or proposed other options. Under these circumstances, we do not believe the notice precluded appellant from requesting another breathalyzer test. Nor do we find that the officers could have reasonably assisted her but did not.

Accordingly, we affirm.

GLADWIN and ROBBINS, JJ., agree.

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[1] The repetition of the prepositional phrase "of your choice" to modify "a qualified person" would have alleviated any possible confusion as to whether appellant had the right to have a person of her choice administer an additional test.

Ervin Ray SPARKMAN and Aline Sparkman *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 05-1011 242 S.W.3d 282

Court of Appeals of Arkansas
Opinion delivered November 1, 2006

Lee Wisdom Harrod, for appellants.

Gray Allen Turner, Dep't of Health and Human Services, Office of Chief Counsel, for appellee.

Sharron Glaze, Attorney Ad Litem.

JOSEPHINE LINKER HART, Judge. Ervin Ray Sparkman and Aline Sparkman appeal from an order of the Fulton County Circuit Court terminating their parental rights to their daughter, E.S. On appeal, they argue that the trial court clearly erred in: 1) finding that ADHS met its burden to establish the grounds for termination of their parental rights by clear and convincing evidence; and 2) taking judicial notice of all of the testimony of Lisa Hancock, which took place prior to the termination hearing, because they were denied

access to Hancock's records prior to the previous testimony and therefore did not have the opportunity to properly cross-examine this witness. We affirm.

On May 12, 2003, an emergency order was entered, placing E.S. in ADHS custody. The Sparkmans waived probable cause. The subsequent adjudication hearing was begun on June 17, 2003, but continued five times, finally concluding on May 14, 2004. After extensive testimony from no less than twenty-six witnesses, E.S. was adjudicated dependent/neglected. In the adjudication order, the trial court found that Ervin had sexually abused E.S. Further, it found that Aline was "afraid of her husband" and that she had failed to protect E.S. from Ervin. All of the testimony was incorporated into the termination-of-parental-rights proceedings.

On May 23, 2005, the trial court filed its order terminating the Sparkmans' parental rights. It stated that at the adjudication hearing, it found that Ervin had sexually abused E.S., that Aline was afraid of her husband and that she failed to protect E.S., and that Aline would be "unwilling and incapable" of protecting her daughter in the future. It further found that Ervin had subjected E.S. to aggravated circumstances based on his sexual abuse of E.S., and that Aline had made it "very clear" to the court that she had "no intention of protecting the juvenile from Ervin."

On appeal, the Sparkmans first argue that the trial court clearly erred in finding that ADHS met its burden to establish the ground for termination of the parental rights by clear and convincing evidence. They divide this argument into four sub-points, which we will take up in turn. We note that the grounds for termination of parental rights must be proven by clear and convincing evidence. *M.T. v. Arkansas Dep't of Human Servs.*, 58 Ark. App. 302, 952 S.W.2d 177 (1997). When the burden of proving a disputed fact is by clear and convincing evidence, the question on appeal is whether the trial court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). This court reviews termination of parental rights cases de novo. *Id.*

First, the Sparkmans argue that ADHS failed to present clear and convincing evidence that there is "a potential harm to the

safety of the child" caused by returning E.S. to Aline's custody. They assert that the record is "devoid of any shred of evidence which show affirmative acts" that Aline took to "place the child in harm's way," and it is uncontested that Aline is a "non-offending spouse." Accordingly, they contend that the finding that Aline would not protect E.S. is based on nothing more than speculation and conjecture. We disagree.

At the termination hearing, Aline was asked directly if she would keep Ervin away in order to take care of E.S. She answered: "It's just hard. I don't know. Put it this way, right now that decision would probably be no." Throughout the proceedings, Aline steadfastly refused to believe that Ervin was responsible for committing the sexual abuse of E.S. that was proven at the adjudication hearings. We believe the current case is analogous to *Wright v. Arkansas Department of Human Services*, 83 Ark. App. 1, 115 S.W.3d 332 (2003), where we affirmed the termination of a mother's parental rights even though she apparently did not abuse her child. While she may not have actually abused her child, she nonetheless chose to stand by the perpetrator, her boyfriend, "until the State proves something." We held that "the rights of parents are not proprietary and are subject to their related duty to care for and protect the child and the law secures their preferential rights only so long as they discharge their obligations." *Id.* (quoting *Jones v. Jones*, 13 Ark. App. 102, 680 S.W.2d 118 (1984)). Furthermore, in *Camarillo-Cox v. Arkansas Department of Human Services*, 360 Ark. 340, 201 S.W.3d 391 (2005), the supreme court held that marriage to a sex offender manifested "incapacity or indifference" to remedy a situation that warranted a child not being returned to the home, despite testimony in that case that the mother would supervise the child or force her husband to move out. Here, Aline testified that she did not intend to be nearly so willing to protect E.S. Accordingly, we hold that there is no merit in the Sparkmans' argument.

The Sparkmans next argue that ADHS failed to present clear and convincing evidence that it made meaningful efforts to rehabilitate Aline "to enable her to remove the perpetrator or keep him out of the home." We note, however, that the Sparkmans failed to appeal from the permanency-planning order in which the trial court found that ADHS had made reasonable efforts to deliver reunification services. Failure to appeal this finding waives this issue for appeal. *Lewis v. Arkansas Dep't of Human Servs.*, 364 Ark.

243, 217 S.W.3d 788 (2005). We note further that Aline was employed and that Ervin left the marital home for a period of time, only to be welcomed back. We are aware of no services that ADHS could have offered that would have prevented Aline from making that choice.

For their third sub-point, the Sparkmans argue that ADHS failed to present clear and convincing evidence that it made reasonable efforts to rehabilitate Ervin. They contend that because Ervin was found to be the perpetrator of the abuse, "the ADHS seemingly washed their hands of any effort to comply with statutes." We hold that there is no merit to this argument. Ervin was found by the trial court to have subjected E.S. to sexual abuse, which our juvenile code designates as "aggravated circumstances." Ark. Code Ann. § 9-27-303(6) (Repl. 2002). When a parent subjects a child to aggravated circumstances, it relieves ADHS of the burden of providing reunification services. Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(b) (Repl. 2002).

Finally, the Sparkmans argue that ADHS failed to present clear and convincing evidence that it made reasonable efforts to reunite the family as required by our juvenile code. Citing Arkansas Code Annotated section 9-27-303(46)(A)(i) (Repl. 2002), they contend that statute defines reasonable efforts as "efforts to preserve the family prior to the placement of a child in foster care to prevent the need for removing the child from his or her home and efforts to reunify a family made after a child is placed out of home to make it possible for him or her to safely return home," and they assert that ADHS had the responsibility to "make real meaningful and reasonable efforts to maintain family ties to whatever extent is possible in each case."

We believe that this final subpoint is merely reiteration of the Sparkmans' previous subpoints, and insofar as it tries to address the reasonable-efforts finding, it is similarly barred. However, we note further that the statutory section on which the Sparkmans attempt to rely is simply not dispositive of this situation. As we stated previously, "the rights of parents are not proprietary and are subject to their related duty to care for and protect the child and the law secures their preferential rights only so long as they discharge their obligations." *Wright v. Arkansas Dep't of Human Servs., supra.* By the time ADHS became involved in this case, it was too late to prevent Ervin from sexually abusing E.S. At that point, the only option available to ADHS was the

removal of the child from the home. Furthermore, we are very mindful of the fact that Aline refused to make a firm commitment to undertake the duty of assuring E.S.'s safety in the future. We hold that the trial court did not err in finding sufficient grounds for the termination of the Sparkmans' parental rights.

The Sparkmans next argue that the trial court erred in taking judicial notice of all of the testimony of Lisa Hancock, which took place prior to the termination hearing, because they were denied access to Hancock's records prior to the previous testimony, and therefore, they did not have the opportunity to properly confront this witness. The Sparkmans concede that they were given access to Hancock's records two weeks prior to the termination hearing. However, they were not able to use those records to cross-examine Hancock because ADHS failed to call her as a witness even though she was listed on its witness list. Without citation of authority, they assert that "the burden ought not to shift to Appellants that they should have to foresee that the State would not call Hancock, and that Hancock would have to be called by the Appellants in their case in chief at the Termination Hearing, only to properly cross-examine her on testimony from months, and possibly years earlier because the State failed to meet previous discovery requests." They assert that they were prejudiced because "Hancock's testimony carried great weight in the Adjudication and Termination stages of these proceedings." We disagree.

We review assertions of evidentiary error under an abuse-of-discretion standard. *See Arkansas Dep't of Human Servs. v. Huff*, 347 Ark. 553, 65 S.W.3d 880 (2002). The circuit court has broad discretion in its evidentiary rulings; hence, the circuit court's findings will not be disturbed on appeal unless there has been a manifest abuse of discretion. *See id.* Our juvenile code allows the trial court to take judicial notice of prior testimony and pleadings if the parents are represented by counsel for those proceedings. Ark. Code Ann. § 9-27-341(d)(2).

Lisa Hancock is a licensed professional counselor at the Woods and Associates Counseling Clinic. Pursuant to a referral from ADHS, she became E.S.'s counselor. Hancock began treating E.S. on a weekly basis, beginning shortly after E.S. was taken into ADHS custody. She testified on August 11, 2003, and April 9, 2004, during the adjudication phase of the proceedings. In her August 11, 2003, testimony, Hancock opined that E.S. had been severely sexually abused and was suffering from post-traumatic stress disorder. She based these opinions on specific statements that

were made by E.S. during her therapy sessions. Hancock was cross-examined extensively on the contents of her progress notes, and after she concluded her testimony, the Sparkmans orally moved to be provided a copy of her case file. The trial judge agreed to order production of the file. When Hancock took the stand during the April 9, 2004, setting, the substance of her testimony related to E.S.'s progress and how she related to Aline during a supervised visit. Again, Hancock was cross-examined extensively. The Sprakmans did not object to any portion of Hancock's testimony or argue that they were in any way inhibited by the lack of her case file in conducting their cross-examination.

Consequently, the essence of the Sparkmans' argument is that this case should be reversed because Hancock did not testify at the termination hearing. We note however, that the Sparkmans were afforded the opportunity to subpoena Hancock, and they simply did not do so. Moreover, they did not ask for a continuance. We will not reverse absent a showing of greater diligence on the part of the appellants to secure Ms. Hancock's attendance at the hearing. *See Wesley v. State*, 318 Ark. 83, 883 S.W.2d 478 (1994).

Affirmed.

VAUGHT and BAKER, JJ., agree.

AON RISK SERVICES *v.* MICKLES

CA 05-1397 242 S.W.3d 286

Court of Appeals of Arkansas
Opinion delivered November 1, 2006

[Rehearing denied December 6, 2006.]

Tony L. Wilcox, P.A., by: *Tony L. Wilcox*; *Orr, Scholtens, Willhite & Averitt, PLC*, by: *Chris A. Averitt*, for appellant.

Gary Eubanks and Associates, by: *William Gary Holt* and *Russell D. Marlin*, for appellee.

JOHN B. ROBBINS, Judge. In 1996, appellant Aon Risk Services, as agent for Cincinnati Life Insurance Company (CLIC), sold a policy to appellee Linda Mickles insuring the life of her son, Antonio Robinson. When Antonio died later that year, appellee submitted a claim to CLIC for the policy proceeds, which CLIC rejected due to an alleged misrepresentation in the application. Appellee denied making the misrepresentation, and indeed later events showed that the words constituting the misrepresentation had been placed on the application by someone other than appellee. Appellee sued CLIC and Aon and obtained a jury verdict for bad faith and outrage against CLIC and deceit and outrage against Aon; she was awarded $120,000 in compensatory damages, apportioned fifty percent to each defendant, and $1 million in punitive damages against CLIC and Aon individually. Aon and CLIC appealed, and in *Cincinnati Life Insurance Co. v. Mickles*, 85 Ark. App. 188, 148 S.W.3d 768 (2004) (*Mickles I*), we affirmed the verdict against CLIC, while reversing and remanding the verdict against Aon for a new trial. Thereafter, appellee accepted a satisfaction of judgment from CLIC for $1,060,000, plus costs and interest.

In May 2005, a new trial was conducted on appellee's outrage and deceit claims against Aon. On this occasion, the jury found against appellee on her outrage claim but awarded her

$58,884 on her deceit claim, plus $2 million in punitive damages. Aon filed post-trial motions, after which the deceit award was reduced to $29,942, but the punitive verdict stood. Aon now appeals and raises the following arguments: 1) appellee's claim for deceit was not supported by substantial evidence; 2) appellee's compensatory verdict should be reduced by $60,000 previously paid by CLIC, which would result in a zero verdict against Aon; 3) because the compensatory verdict should be reduced to zero, the punitive-damages award cannot stand; 4) alternatively, the punitive-damages award is excessive under Arkansas common law and the Due Process Clause of the United States Constitution. We affirm the verdict of $29,942 in compensatory damages and as modified to $750,000 in punitive damages on condition of a remittitur.[1]

Although we set out the facts of this case in *Mickles I*, we reiterate some of the more pertinent evidence here to provide a context for our discussion. In 1996, Aon was employed by CLIC as its agent for the purpose of selling life insurance policies and taking applications at the applicants' places of employment. According to the CLIC manual, its policies were available to employees and their spouses or "children, under age 23, unmarried, not in military service and dependent upon you for their support." Appellee was a minimum-wage worker in the laundry department of Chenal Rehabilitation Clinic in Little Rock when Aon representatives visited her workplace in July 1996. In response to the visit, appellee took out nine policies on her children and grandchildren, including her son, Antonio. In completing the applications, appellee verbally answered the questions and the enroller wrote down her answers. During this process, she asked the enroller whether Antonio would qualify for a policy since he was married and did not live with her; she further explained that Antonio had a learning disability, could not read or write, and qualified for SSI benefits, which she distributed to him as needed. The enroller assured her that Antonio would qualify and further, according to appellee, told her that the policy would pay double indemnity should Antonio's death be accidental.

The application for Antonio's policy, which CLIC would later claim contained a misrepresentation, reflected that he was a dependent, was just under twenty-one years old, that he was

[1] Our supreme court denied Aon's motion to certify and transfer this case.

married, and that he was a full-time student; it was signed by appellee and by James Foster of Aon as the "Agent Witness." The face amount of the policy was originally stated on the application as $38,942, but that figure was crossed out and $28,942 written in its place. The application was accepted by CLIC, and the policy was delivered in November 1996.

On December 17, 1996, Antonio was murdered in Little Rock. Appellee notified CLIC of Antonio's death, and CLIC reviewed the claim. In doing so, it discovered that Antonio's death certificate listed his occupation as a laborer, which did not correspond to the representation on the application that Antonio was a dependent and a full-time student. CLIC sent an investigator to obtain a statement from appellee, and she told him, among other things, that she had not told the enroller that Antonio was a full-time student.

At about the same time that the investigation was taking place, CLIC sent a questionnaire to James Foster of Aon, whose name had appeared on the application as the witnessing agent. In his answers, Foster represented that he had taken the application from appellee, that appellee had answered the questions on the application, and that the answers were accurately recorded. At one point, the questionnaire asked: "Did [appellee] tell you Antonio Robinson was a full time student?" Foster did not respond to that question. It would later be revealed that Foster had never been to Little Rock, had not taken appellee's application, and did not know who did. He denied ever having seen the questionnaire sent by CLIC. It would also later be revealed, through the testimony of a forensic expert, that the handwriting on the words "full time student" could not be matched to appellee and was inconsistent with the writing on the remainder of Antonio's application and the other applications, giving rise to the implication that the words "full time student" were placed on the application by someone other than appellee or the enroller.

Following its investigation, CLIC decided to rescind the policy, despite several factors pointing to a lack of any misrepresentation by appellee, including her insistence that she had not identified Antonio as a full-time student; Foster's failure to answer the crucial question of whether appellee told him that Antonio was a full-time student; the lack of any requirement in the CLIC manual that the insured be a full-time student; and a CLIC representative's realization that the words "full time student" were in different handwriting from the rest of the application. There-

after, appellee sued CLIC and Aon and obtained the aforementioned jury verdict against CLIC for bad faith and outrage and Aon for deceit and outrage. The jury awarded $1 million in punitive damages against CLIC; $1 million in punitive damages against Aon; and $120,000 in compensatory damages, which, although it was apportioned fifty percent to CLIC and fifty percent to Aon, was not broken down by cause of action.

On appeal in *Mickles I*, we affirmed the verdict against CLIC. We also determined that there was substantial evidence to support the deceit and outrage verdicts against Aon. However, we concluded that the trial court gave an erroneous jury instruction on the deceit count (which count was solely against Aon), and, because erroneous instructions are presumed to be prejudicial, we were required to reverse and remand the verdict against Aon. Further, because the jury's verdict did not state what portion of the monetary award against Aon was attributable to outrage and what was attributable to deceit, we reversed the verdict against Aon in its entirety. Several months after our decision, CLIC entered a satisfaction of judgment in favor of appellee for $1,060,000 plus interest and costs.

On re-trial against Aon in May 2005, appellee based her cause of action for deceit on the theory that she had relied to her detriment on Aon's false representation that the policy would provide double indemnity in the event of Antonio's accidental death. The jury found in favor of appellee on her deceit cause of action and awarded her $58,884, which was approximately twice the policy's face amount of $28,942. The trial judge deducted from that amount $28,942 that CLIC had previously tendered to appellee, leaving appellee with a final compensatory judgment of $29,942. The trial court declined Aon's request to further reduce the compensatory verdict by $60,000, paid by CLIC as part of its satisfaction of judgment. Finally, the court refused Aon's motion for a remittitur of the $2 million punitive-damages award or, alternatively, a new trial. This appeal followed.

Was The Deceit Verdict Supported By Substantial Evidence?

At the trial level, Aon moved for a directed verdict and a judgment notwithstanding the verdict (JNOV) on the ground that appellee had not produced sufficient evidence to support her cause of action for deceit. The standard of review for denial of a motion for directed verdict is whether the jury's verdict is supported by substantial evidence, which is evidence that goes beyond suspicion

or conjecture and is sufficient to compel a conclusion one way or the other. *Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481 (2000). A motion for a JNOV is technically only a renewal of the motion for a directed verdict made at the close of the evidence; a trial court may enter a JNOV only if there is no substantial evidence to support the jury verdict, and the moving party is entitled to judgment as a matter of law. *Conagra, Inc. v. Strother*, 340 Ark. 672, 13 S.W.3d 150 (2000).

The essential elements of an action for deceit are: (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; (5) damage suffered as a result of the reliance. *Mickles I, supra.* Aon contends that appellee's proof was lacking on each of these elements. Appellee responds that she proved the elements of deceit and, in any event, our statement in *Mickles I* that there was substantial evidence to support the deceit count is now law of the case.

We do not decide the question of whether our statement in *Mickles I* constitutes the law of the case because we have determined that the proof presented by appellee in the present trial (which, we note, differed in no significant respects from the proof she presented at the first trial) constitutes substantial evidence of deceit. We view the evidence in the light most favorable to appellee, giving it its highest probative value and taking into account all reasonable inferences deducible from it. *See Mangrum v. Pigue*, 359 Ark. 373, 198 S.W.3d 496 (2004). Applying that standard, we observe that appellee presented evidence from which it could reasonably be inferred that the Aon enroller, in representing that the policy would provide double indemnity, made a false statement of a material fact concerning the amount of coverage that appellee was purchasing; that the enroller had insufficient evidence upon which to represent the existence of double indemnity and, given the enroller's other misstatements as to his identity and Antonio's qualifications for coverage, may have deliberately misrepresented the existence of double indemnity; that, in light of the enroller's objective to sell appellee a policy, it would follow that he intended for appellee to rely on his representations concerning the amount of coverage; that appellee, a minimum-wage worker with no specialized education or skills, justifiably relied on

statements by insurance representatives concerning a matter as important as the amount of insurance coverage, *see generally Manhattan Credit Co. v. Burns*, 230 Ark. 418, 323 S.W.2d 206 (1959) (stating that reliance is to be presumed when the misrepresentation goes to a material matter); and that appellee was damaged because she received only the face amount of the policy from CLIC rather than the double-indemnity amount. In light of these factors, we believe that the jury's verdict is supported by substantial evidence and that the trial court did not err in denying Aon's motion for a directed verdict or a JNOV.

Should The Trial Court Have Deducted $60,000 From The Verdict?

The satisfaction of judgment entered by CLIC following the first trial consisted of a base amount of $1,060,000, which encompassed the $1 million in punitive damages awarded against CLIC, plus fifty percent, or $60,000, of the compensatory damages awarded in the first trial. Aon contends that, because it and CLIC were joint tortfeasors, any satisfaction of judgment paid by CLIC should be credited to any subsequent award obtained against Aon. Thus, following the jury's verdict against Aon in the second trial, it asked that such verdict be reduced by $60,000. The trial court refused to do so.

Arkansas's Uniform Contribution Among Tortfeasors Act provides that recovery of judgment from one joint tortfeasor does not discharge the other joint tortfeasor. Ark. Code Ann. § 16-61-203 (Repl. 2005). However, where a plaintiff obtains a judgment or release from one joint tortfeasor and later obtains a judgment against another joint tortfeasor, the plaintiff's first satisfaction must be credited against any subsequent recovery. *See Woodward v. Blythe*, 249 Ark. 793, 462 S.W.2d 205 (1971); *Smith v. Tipps Eng'g*, 231 Ark. 952, 333 S.W.2d 483 (1960). Procedurally, where, as in the present case, the jury has no knowledge of the prior recovery, the trial court must credit the prior recovery after the verdict is returned. *See Woodard v. Holliday*, 235 Ark. 744, 361 S.W.2d 744 (1962); *Walton v. Tull*, 234 Ark. 882, 356 S.W.2d 20 (1962).

Aon's argument would persuade but for the fact that, under the peculiar facts of this case, we cannot conclude that Aon and CLIC were joint tortfeasors. The Contribution Among Tortfeasors Act defines a joint tortfeasor as follows:

> For the purpose of this subchapter the term "joint tortfeasors" means two (2) or more persons jointly or severally liable in tort for

> the same injury to person or property, whether or not judgment has been recovered against all or some of them.

Ark. Code Ann. § 16-61-201 (Repl. 2005). In the present case we are unable to determine with any level of certainty that CLIC and Aon have been held liable for the same injury.

In the first trial, the jury rendered a verdict against CLIC for bad faith and outrage, and a verdict against Aon for deceit and outrage. However, only one recovery was awarded, for $120,000; the amount attributable to each cause of action is not known. Additionally, the jury in the first trial, as did the jury in the second trial, found Aon liable for deceit, a cause of action peculiar to Aon and not shared by CLIC. We thus have a situation in which appellee obtained a judgment against Aon on a distinct tort for which no recovery was had against CLIC. More importantly, we have a situation in which we cannot tell whether the damages awarded against CLIC and the damages awarded against Aon compensate appellee for the "same injury to person or property." The injury for which appellee has now recovered — the amount of double indemnity on the insurance policy — is economic in nature, while it is entirely possible that the injury for which she recovered from CLIC is for mental anguish, emotional distress, or the like. *See Mickles I* (recognizing, in discussing appellee's outrage claim, that there was evidence that she suffered extreme distress and further recognizing that the jury's bad-faith verdict against CLIC was supported by much of the same evidence that supported the outrage claim); *see also Growth Props. I v. Cannon*, 282 Ark. 472, 669 S.W.2d 447 (1984) (holding that the essence of the tort of outrage is injury to the plaintiff's emotional well-being); *Employers Equitable Life Ins. Co. v. Williams*, 282 Ark. 29, 665 S.W.2d 873 (1974) (recognizing, in a bad-faith action, that the plaintiff had suffered from anxiety as the result of the insurer's conduct); Howard Brill *Law of Damages*, § 4-7 (5th ed. 2004) (stating that mental-anguish damages have been awarded in outrage and bad-faith cases).

Based on the foregoing, we simply cannot conclude, as a matter of law, that the $60,000 that appellee recovered from CLIC corresponds to the same injury for which she recovered from Aon. Thus, for the purposes of this issue, CLIC and Aon were not joint tortfeasors, and the trial judge was correct in

refusing to credit the $60,000 paid by CLIC.[2] We therefore affirm the compensatory verdict of $29,942.

May Punitive Damages Be Awarded in the Absence of a Compensatory Judgment?

Aon argues that, if CLIC's payment of $60,000 is deducted from the jury's compensatory award, a zero verdict results, and, therefore, no judgment exists to support an award of punitive damages. *See generally Hudson v. Cook*, 82 Ark. App. 246, 105 S.W.3d 821 (2003) (recognizing that in the absence of an award for compensatory damages, punitive damages are barred). This issue is rendered moot by our previous discussion upholding the compensatory award of $29,942.

Should The Punitive-Damage Award Be Reduced?

We follow a two-step analysis in determining whether a punitive-damages award is excessive. *See Hudson v. Cook, supra*; Howard Brill *Law of Damages*, § 9-6 (5th ed. 2004). First, we determine whether the award was excessive under state law. This entails an analysis of whether the jury's verdict is so great as to shock the conscience of the court or demonstrate passion or prejudice on the part of the jury. *See Hudson v. Cook, supra.* It also involves consideration of the extent and enormity of the wrong, the intent of the party committing the wrong, all the circumstances, and the financial and social condition and standing of the erring party. *See id.*

The second step is to evaluate the award under the federal due-process analysis set forth in *BMW of North America v. Gore*, 517 U.S. 559 (1996). Here, we determine the degree of reprehensibility of the defendant's conduct; the disparity between the harm or potential harm suffered by the plaintiff and the punitive-damages award (which ordinarily involves consideration of the ratio be-

[2] We also reject Aon's argument that appellee's recovery against CLIC, as principal, bars her recovery from Aon, its agent. Aon cites *Barnett v. Isabell*, 282 Ark. 88, 666 S.W.2d 393 (1984), for its holding that, where the liability of an employer for acts of an employee is wholly derivative, a judgment against the employer and satisfaction thereof bars further proceedings on the same tortious act. Again, in light of the unusual circumstances of this case, we are unable to say that CLIC's liability to appellee was "wholly derivative," given that it was directly liable for bad faith and that there is no way to determine, with any level of certainty, whether the jury considered CLIC vicariously liable for Aon's deceit.

tween the compensatory and punitive awards); and the difference between this remedy and the civil penalties authorized by statute or imposed in comparable cases. *See Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003). In assessing the degree of reprehensibility, we may consider whether the harm caused was physical as opposed to economic; whether the conduct evinced an indifference to or reckless disregard of the health and safety of others; whether the target of the conduct had financial vulnerability; whether the conduct involved repeated actions or was an isolated incident; and whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). *Campbell* also held that, while the United States Supreme Court would not impose a bright-line ratio of punitive to compensatory damages, in practice, few awards exceeding a single-digit ratio will satisfy due process. In addition, our supreme court has stated that, in reviewing a punitive-to-compensatory ratio, we should determine whether the ratio is "breathtaking." *Union Pac. R.R. v. Barber*, 356 Ark. 268, 149 S.W.3d 325 (2004). Our standard of review is de novo. *Id.*

Employing our de novo review, we have given careful consideration to all of the applicable factors mentioned. Overall, we have little difficulty sustaining a substantial punitive award against Aon. Its conduct in this case, which we may consider in total, *see Superior Federal Bank v. Jones & Mackey Constr. Co*, 93 Ark. App. 317, 219 S.W.3d 643 (2005), was highly reprehensible in its dishonesty and outright fraud, particularly in light of appellee's financial vulnerability. However, we are troubled by the ratio of the punitive award to the compensatory award, which, when measured against the jury's initial verdict of $58,884, is approximately 34-to-1 and, when measured against the final judgment of $29,942, is approximately 66-to-1. Further, in reviewing several of our most recent cases decided since the *Campbell* opinion involving punitive damages imposed in connection with economic injury, we observe that the punitive-to-compensatory ratios have generally run between 1-to-1 and 17-to-1. *See, e.g.*, *Stewart Title v. Am. Abstract*, 363 Ark. 530, 215 S.W.3d 596 (2005); *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (2003); *Hudson v. Cook, supra*; *Superior Federal Bank v. Jones & Mackey Constr., supra*. We therefore believe that due process would best be served in this case by a reduction of the punitive award to $750,000. This figure yields a ratio of approximately 12-to-1 when compared with the jury's original verdict and approximately

25-to-1 when compared to the final judgment,[3] and is more in line with the ratios in our recent, comparable cases.

As we stated in *Superior Federal Bank v. Jones & Mackey Constr.*, *supra*, our review of a punitive-damage award is not an exact science but a fluid analysis based on the particular facts of each case. While we believe that Aon's conduct in this case justifies the imposition of an award that exceeds the single-digit rule expressed in *State Farm v. Campbell*, *supra*, we likewise believe that the circumstances of the case as a whole require a reduction of the award to a less breath-taking ratio of approximately 25-to-1 or less.

Therefore, if, within eighteen days, appellee remits $1.25 million of the punitive-damage award, leaving a punitive award of $750,000, the judgment will be affirmed. Otherwise, the case will be reversed, and the cause will be remanded for a new trial. *See Advocat v. Sauer*, *supra*.

Affirmed as modified on condition of remittitur.

NEAL and CRABTREE, JJ., agree.

David ESTES, et al. *v.* Randall MERRITT
and Vera Merritt

CA 06-288 242 S.W.3d 295

Court of Appeals of Arkansas
Opinion delivered November 1, 2006

[3] We make no decision in this opinion as to which compensatory figure is the proper one for this purpose.

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

Terry J. Lynn, for appellees.

SAM BIRD, Judge. This is an appeal from a judgment entered in favor of appellees Randall and Vera Merritt and against appellants David Estes, Nancy Estes, James Holder, Miki Holder, and the Vernon M. Rowe Family Limited Partnership in an action for declaratory and injunctive relief against the enforcement of restrictive covenants allegedly encumbering appellees' property. The trial court found that a reference in the plat of appellees' property to the restrictions covering appellants' property constituted an impermissible amendment to the bill of assurance for appellants' property. The trial court also found that the restrictions did not apply to appellees' property. Appellants raise two points on appeal. We affirm.

Appellants own some of the lots located in the Lake Pointe Above the Narrows, Phase 1 subdivision (hereinafter, "Phase 1"). The Phase 1 property is governed by a "Bill of Assurance and Protective Covenants" recorded on March 31, 1997, that defines acceptable home sizes, styles, and usages. It also prohibits the subdividing of any lots in the subdivision. Finally, the bill of assurance contains the following provision:

> 19. TERM: These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of thirty (30) years from the date these covenants are

> recorded, after which said covenants shall be automatically extended for successive periods of 10 years, unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change said covenants in whole or in part.

Appellees own the single, ten-acre lot contained in Phase 2 of Lake Pointe Above the Narrows subdivision, which is located across the road from Phase 1. The same developer created both Phases 1 and 2. The Phase 2 plat, recorded on April 26, 1999, references the bill of assurance that had previously been recorded for Phase 1, stating, "For Bill of Assurance see Deed Record Book 429 Page 617-622." The Phase 2 property was conveyed to appellees' predecessor in title in March 2000 and to appellees in December 2002. Neither deed contains any restrictions.

After a dispute arose, appellees filed a declaratory judgment action against appellants and some, but not all, of the other lot owners of Phase 1 on November 17, 2004. Appellees sought a declaration that Phase 2 was not subject to the bill of assurance for Phase 1. After other owners filed pro se answers, appellants filed an answer denying the material allegations of the complaint.

At trial, appellees argued that the Phase 1 bill of assurance was not subject to amendment for thirty years. Appellees also argued that appellants did not have any standing to enforce the Phase 1 covenants because Phase 1 and Phase 2 are adjoining but separate subdivisions and owners in one subdivision do not have standing to enforce the restrictions in another subdivision. In response, appellants argued that the bill of assurance was not being amended but, rather, was being adopted as a separate bill of assurance for Phase 2.

Randall Merritt testified at trial that he is a builder/developer. He said that he was familiar with legal descriptions and that the plat of Phase 2 did not include all of the property within the legal description of Phase 2. He also said that he did not believe his property in Phase 2 was covered by the Phase 1 bill of assurance referenced in the Phase 2 plat. He stated that he began polling his neighbors to ask their permission to subdivide his lot. Merritt admitted receiving a title search to Phase 2 that referenced the Phase 1 bill of assurance and put him on notice that the restrictions might apply. However, he did not seek legal advice on the issue before purchasing the Phase 2 property.

Merritt acknowledged that he sent a letter to some of the Phase 1 owners, which asked them to sign a document giving him permission to subdivide Phase 2 and stated that "more than 75% of

the current owners have been polled and all have responded positively, thus making this request for your signatures more of a formality." He said that his letter did not mean that more than seventy-five percent of the owners had agreed to his request but meant only that they responded positively. Merritt also stated that, until he sought legal counsel, he, as a builder, believed that the Phase 1 restrictions might apply to Phase 2.

Relying on the supreme court's decision in *White v. Lewis*, 253 Ark. 476, 487 S.W.2d 615 (1972), the trial court found that the reference in the Phase 2 plat to the Phase 1 bill of assurance constituted an invalid amendment of the restrictions in violation of the provision prohibiting amendments for thirty years from the date of the bill of assurance. The court also found that appellees' property was not subject to the Phase 1 bill of assurance because its legal description did not include the property located in Phase 2. The court enjoined appellees from proceeding to develop the property so that appellants could appeal.[1] An order containing the court's findings was entered on December 7, 2005, and appellants filed a notice of appeal on December 21, 2005.

Appellants raise two points for reversal. They first assert that the trial court erred in finding that the plat of Phase 2 amended the bill of assurance to Phase 1 because the plat only adopted the restrictive covenants of the Phase 1 bill of assurance and did not amend it. We affirm, but on different reasoning than that used by the trial court.

The ordinary method of establishing restricted districts when new subdivisions are surveyed and platted is to file a plat and bill of assurance, whereby the owner obligates himself not to convey except in conformity with the restrictions imposed in the bill of assurance. *McGuire v. Bell*, 297 Ark. 282, 761 S.W.2d 904 (1988). Another method is for the grantor to include the restrictions in the conveyances of the land. *Id.* Here, the deeds from the developer to appellees' predecessor in title and to appellees do not contain any restrictions. Therefore, the question is whether the reference to the Phase 1 bill of assurance on the Phase 2 plat is sufficient to create the restrictions.

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[1] The trial court also denied appellants' motion to dismiss for failure to join all of the Phase 1 owners and specifically declined to rule on whether the Phase 1 owners had standing to enforce any restrictions that might apply to Phase 2 or to rule on whether Phase 1 and Phase 2 are separate subdivisions. No issues concerning these rulings are raised in this appeal.

The general rule governing the interpretation, application, and enforcement of restrictive covenants is that the intention of the parties as shown by the covenant governs. *McGuire, supra.* Restrictive covenants are not favored, and if there is any restriction on land, it must be clearly apparent. *Hutchens v. Bella Vista Village Prop. Owners' Ass'n*, 82 Ark. App. 28, 110 S.W.3d 325 (2003). Where there is uncertainty in the language by which a grantor in a deed attempts to restrict the use of realty, freedom from that restraint should be decreed; but when the language of the restrictive covenant is clear and unambiguous, the parties will be confined to the meaning of the language employed, and it is improper to inquire into the surrounding circumstances of the objects and purposes of the restriction to aid in its construction. *Holmesley v. Walk*, 72 Ark. App. 433, 39 S.W.3d 463 (2001).

We hold that the Phase 2 plat's reference to the Phase 1 restrictions is ambiguous and was properly resolved as an issue of fact. The Phase 2 plat references only the book and page location of the Phase 1 bill of assurance and does not specifically state that it is adopting the Phase 1 restrictions for Phase 2. Further, the Phase 1 restrictions themselves state that they are intended to apply only to the land described in the attached legal description and shown by the Phase 1 plat, neither of which includes appellees' property. Because there are no restrictions clearly applicable to Phase 2, our rule of strict construction of restrictive covenants resolves the ambiguity in favor of the appellees and defeats the contention that the plat alone adopts the Phase 1 restrictions for Phase 2. We, therefore, affirm on this point.

For their second point, appellants assert that the trial court erred in finding that appellees were not bound by the restrictive covenants because they had notice of the covenants. It is undisputed that appellees had notice of the restrictions. However, this argument begs the threshold question of whether the restrictive covenants were valid. That issue is addressed in the first point and need not be addressed again here.

Affirmed.

GLADWIN and ROAF, JJ., agree.

Scott Randall ROSS *v.* STATE of Arkansas

CA CR 05-1378 242 S.W.3d 298

Court of Appeals of Arkansas
Opinion delivered November 1, 2006

[redacted]

The Law Offices of Ables, Howe & Standridge, PLLC, by: *J. Brent Standridge*, for appellant.

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

SAM BIRD, Judge. Appellant Scott Randall Ross was convicted by a jury of first-degree murder and using a firearm during the commission of a felony. He was sentenced to consecutive terms of forty and fifteen years in the Arkansas Department of Correction. Ross raises four points on appeal: (1) that the trial court

erred in declining to instruct the jury regarding his proffered jury instruction concerning mental state; (2) that the trial court erred in permitting his prior bad acts to be admitted into evidence; (3) that the trial court erred in ruling that communications between Ross and his pastor were not privileged under Ark. R. Evid. 505; and (4) that the trial court erred in permitting marital communications to be admitted into evidence in violation of Ark. R. Evid. 504. We affirm.

On February 23, 2004, Ross was charged with the first-degree murder of Inocencio Cruz. According to the felony information, Ross was subject to an additional term of imprisonment for employing a firearm in the commission of a felony offense.

Prior to trial, Ross filed a motion to invoke religious privilege under Ark. R. Evid. 505 based on statements made to his friend Steve Long, who, like Ross, was an ordained minister. The trial court denied this motion after a hearing on the matter. Ross also filed a motion to invoke the husband-wife privilege pursuant to Ark. R. Evid. 504. Although the trial court concluded that certain communications between Ross and his wife were confidential,[1] it ruled that the confidentiality did not include Ross's act of handing a gun and a knife over to his wife on the night that Cruz was killed.

Ross made other motions prior to trial, including a motion in limine to prevent the State from asking witness Craig Adams about a cut on Ross's finger. The court granted this motion. Ross also moved to exclude evidence that he had previously carried a gun into a local bar. The court granted this motion as well, excluding any reference to guns aside from "those that have a causal relationship with this incident."

The evidence at trial revealed that, on the evening of January 17, 2004, a red sport- utility vehicle (SUV) rear-ended a vehicle being driven by Ross at the corner of Summer and Hobson in Hot Springs. According to witnesses, Ross became agitated after the accident and shot the driver of the red SUV.

Over objection from Ross, Ross's friend and fellow minister Steve Long testified that he was a disc jockey at Lucky's Bar in Hot Springs, and he saw Ross at Lucky's around 6:00 p.m. on January

[1] The court's specific ruling was that Ross was entitled to the Rule 504 privilege for "whatever communication was made" by Ross to his wife "during [a] van ride" on the night of the incident in question.

17, 2004. According to Long, Ross appeared to have a cut on his finger. Long said that Ross left Lucky's around 9:30 p.m. and returned around thirty to forty minutes later. At that time, Ross told Long that "there was an accident and a gentleman had smashed the back of [Ross's] car and . . . he had shot him." Long said Ross mentioned that he had shot the man five times and that the man might have been the "Antichrist."

Ross testified extensively about what happened on the night in question, explaining that he was drinking with friends at Lucky's and later obtained a gun at his mother's pawn shop with the intention of committing suicide. After he left the pawn shop, his vehicle was rear-ended by another vehicle. He said he remembered getting out of his car and talking to the other driver, but he did not remember exactly what happened. He claimed that he returned to Lucky's to talk to Long in "confidence," and he admitted that he told Long that he had killed a "Hispanic man or a Mexican."

Ross said that he then called his wife[2] and she came to pick him up. He said that he admitted to her that he had killed a "Mexican fella" and had shot him five times. Ross said that his wife dropped him off at a gas station and that he ended up at her house later in the evening. At that point, she asked him for the gun in his possession and for his pocket knife, because she knew that he always carried a pocket knife. Ross said that he gave these items to her. Ross was later arrested.

Following Ross's testimony at trial, the State cross-examined him about whether he had ever carried a gun into Lucky's before the night of the shooting. Ross objected, but his objection was overruled after the State argued that it was proper cross-examination based on Ross's testimony concerning his possession of a gun. The State also cross-examined Ross about what he had said to his wife after the shooting. Ross objected based on the court's earlier determination that these communications were confidential, but the State argued that the privilege had been waived by Ross's testimony. The court overruled Ross's objection.

Two of Ross's witnesses, Kim Ocker and Jay Schapiro, testified that Ross was not a violent individual. The State then

[2] According to Ross's brief on appeal, Ms. Ross had filed for divorce, but the matter was still pending.

provided a rebuttal witness, Craig Adams, who testified that, shortly before the murder, Ross cut his finger in a confrontation with some people and had slashed their tires.

The jury was instructed that the State had the burden of proof beyond a reasonable doubt on every element of every charge that it considered; the jury was also instructed on first-degree murder, second-degree murder, and manslaughter. The jury returned a verdict of guilty on the first-degree murder charge and also found that Ross employed a firearm as a means of committing the murder. On September 23, 2005, the trial court entered a judgment and commitment order convicting Ross of first-degree murder with a felony-firearm-sentence enhancement. He was sentenced to consecutive terms of forty and fifteen years in the Arkansas Department of Correction.

Jury Instruction on Mental State

On appeal, Ross first contends that the trial court erred in refusing to instruct the jury concerning his proffered jury instruction on mental state. At the close of the State's case, Ross submitted the following instruction, which is a modified version of AMI Crim. 610:

> EVIDENCE THAT SCOTT ROSS SUFFERED FROM A MENTAL DISEASE OR DEFECT MAY STILL BE CONSIDERED BY YOU IN DETERMINING WHETHER SCOTT ROSS HAD THE REQUIRED MENTAL STATE TO COMMIT THE OFFENSE CHARGED OR MURDER IN THE SECOND DEGREE AND MANSLAUGHTER.

Our supreme court has held that a trial court should not use a non-model instruction unless there is a finding that the model instruction does not accurately reflect the law. *Calloway v. State*, 330 Ark. 143, 953 S.W.2d 571 (1997). Here, Ross claims that the proffered instruction essentially tracks Ark. Code Ann. § 5-2-303, which generally provides that evidence that a defendant suffered from a mental disease or defect is admissible to prove whether he had the kind of culpable mental state required for commission of the offense charged.

Ross argues that the court should have allowed the modified instruction because "in the context of this case, it was important for the jury to know, even though [Ross] was not asserting mental disease or defect as an affirmative defense to any crime, that [they]

could consider evidence of mental disease or defect in determining whether [Ross] had the requisite mental state necessary for the lesser-included offenses." He asserts that, based on the evidence, there was a jury question as to whether his mental state was diminished by mental disease or defect so that, while not constituting an affirmative defense, it could have shown that his mental state was less than that required for a first-degree murder conviction. He also claims that if the jury had been properly instructed in this case, then they could have convicted him of murder in the second degree or manslaughter.

In *Robinson v. State*, 269 Ark. 90, 95, 598 S.W.2d 421, 425 (1980), our supreme court rejected a similar argument, stating as follows:

> Appellant also contends that he was entitled to a specific instruction informing the jury that he had placed in issue his mental capacity to form the kind of mental state necessary to establish the commission of the alleged offense. Appellant grounds his contention on Ark. Stat. Ann. § 41-602 (Repl. 1977) [now codified as Ark. Code Ann. § 5-2-303] which permits the introduction of evidence of mental disease or defect to determine whether the defendant possessed the kind of culpable mental state required for the commission of the crime charged. However, we do not construe Ark. Stat. Ann. § 41-602 (Repl. 1977) as requiring an instruction of this nature. The statute simply clarifies any issue concerning the admissibility of mental disease evidence when it is less than persuasive in connection with an affirmative defense of insanity. Moreover, the essence of appellant's proffered instruction is effectively given when the court instructs the jury on the burden of the state to prove beyond a reasonable doubt each element of the offense, especially when such instruction is accompanied by an instruction on lesser included offenses.

In this case, as the State points out, the jury was instructed that the State had the burden of proof beyond a reasonable doubt on every element of every charge that it considered. The jury was also instructed on first-degree murder, second-degree murder, and manslaughter. In light of *Robinson, supra*, we reject Ross's argument and affirm on this point.

Prior Bad Acts

Ross next contends that the trial court erred in permitting certain prior bad acts to be admitted into evidence. Specifically, he argues that "evidence of possessing firearms prior to and after the

night in question and evidence that he was involved in a confrontation resulting in a cut to his finger was offered to prove that he was of bad character and it was not independently relevant to the case." Ross claims that this evidence was introduced in order to make him "look bad in front of the jury" and, thus, should not have been admitted.

Trial courts have broad discretion in deciding evidentiary issues, and their decisions are not reversed absent an abuse of discretion. *Shields v. State*, 357 Ark. 283, 166 S.W.3d 28 (2004). In *Cook v. State*, 345 Ark. 264, 270, 45 S.W.3d 820, 823-24 (2001), our supreme court discussed Ark. R. Evid. 404(b), as follows:

> Arkansas Rule of Evidence 404(b) states:
>
> > (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> Evidence offered under Rule 404(b) must be independently relevant, thus having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999). The list of exceptions to inadmissibility in Rule 404(b) is not an exclusive list, but instead, it is representative of the types of circumstances under which evidence of other crimes or wrongs or acts would be relevant and admissible. *Williams v. State*, 343 Ark. 591, 602, 36 S.W.3d 324, 331 (2001).

In *Spohn v. State*, 310 Ark. 500, 503, 837 S.W.2d 873, 874-75 (1992), our supreme court further discussed Rule 404(b):

> It is true as a general rule that proof of other crimes or bad acts is never admitted when its only relevancy is to show that the accused is a person of bad character. Ark. R. Evid. 404(b); *see also Sweatt v. State*, 251 Ark. 650, 473 S.W.2d 913 (1971); *Alford v. State*, 223 Ark. 330, 266 S.W.2d 804 (1954). However, in *McCormack on Evidence*, the following statement of the law is made relative to character testimony:
>
> > Ordinarily, if the defendant chooses to inject his character into the trial in this sense, he does so by producing witnesses who

> testify to his good character. By relating a personal history supportive of good character, however, the defendant may achieve the same result. Whatever the method, once the defendant gives evidence of pertinent character traits to show that he is not guilty, his claim of possession of these traits-but only these traits-is open to rebuttal by cross-examination or direct testimony of prosecution witnesses.

McCormack, Vol. I, § 190, p. 816 (1992).

Here, Ross's testimony that his wife requested the gun that he possessed and the pocket knife that he "always" carried opened the door to cross-examination by the State regarding whether he habitually possessed a weapon. Furthermore, Ross's testimony concerning his lack of intent to commit a violent act, together with the testimony by two of Ross's witnesses that he was not a violent person, invited inquiry into whether Ross cut his finger during an angry outburst shortly before the murder during which he slashed a vehicle's tire and injured himself. We affirm on this point.

Rule 505 privilege

As his third point, Ross contends that the trial court erred in ruling that communications between him and his pastor were not privileged under Ark. R. Evid. 505. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor. Ark. R. Evid. 505(b); *Bonds v. State,* 310 Ark. 541, 837 S.W.2d 881 (1992). In reviewing a trial court's ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances and reverse only if the decision is clearly against the preponderance of the evidence. *Bonds, supra.*

Here, Ross's friend Steve Long, an ordained minister,[3] testified that Ross was at Lucky's Bar around 6:00 p.m. on the evening of the shooting. Long said that Ross left around 9:30 p.m., then returned thirty to forty minutes later and told Long that "there was an accident and a gentleman had smashed the back of

[3] According to testimony, Long obtained an honorary degree from the Universal Life Church via the Internet in March 2003.

his car and that [Ross] had shot him." Long said that Ross mentioned that the man he had shot might be the "Antichrist."

It is the State's position that Long was not acting in the role of a spiritual counselor when Ross communicated with him, but was instead acting as a friend at a bar. In *Bonds*, *supra*, our supreme court addressed the issue of whether certain communications between a defendant and a witness — who was defendant's employer, brother-in-law, and friend — were subject to the religious privilege under Ark. R. Evid. 505. The court in *Bonds* found that there was no evidence of ongoing counseling between the witness and the defendant that the witness had agreed to keep confidential and concluded that the communications were not made to the witness in his capacity as a spiritual advisor. *Id.* Similarly, here, although Long was an ordained minister, he was also Ross's friend, and there was no evidence that Ross had communicated to Long with the expectation that Long would keep the communication confidential. We therefore hold that the trial court's decision concerning Ark. R. Evid. 505 was not clearly against the preponderance of the evidence.

Ross additionally argues that the admission of his communication to Long led to his (Ross's) testifying at trial; however, he offers no supporting authority as to why this would require reversal. We therefore will not address this argument on appeal. *See Hanks v. Sneed*, 366 Ark. 371, 235 S.W.3d 833 (2006) (refusing to consider appellant's argument where appellant offered no convincing argument or convincing authority to support his claim). Moreover, any error in admitting the testimony was harmless, because Ross himself testified about what he said to Long. We therefore affirm on this point.

Rule 504 privilege

Ross's final point is that the trial court erred in permitting marital communications to be admitted into evidence in contravention of Ark. R. Evid. 504. Specifically, Ross claims that the State should not have been permitted to cross-examine him about a statement to his wife on the night of the shooting that he was "going to take money from a Mexican," because he did not specifically testify to this.

Rule 504(b) states that an accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the

spouse. However, as the State points out, Ark. R. Evid. 510 states that a person waives this privilege if he "voluntarily discloses or consents to disclosure of any significant part of the privileged matter." At trial, Ross testified extensively about what he said to his wife on the night of the shooting. This was clearly a voluntary disclosure of a "significant part of the privileged matter" under Rule 504. We therefore agree with the State that Ross's testimony constituted a waiver of the Rule 504 privilege in this case. Furthermore, Ross could not use the trial court's initial ruling to exclude the marital communications as a means to commit perjury by way of a defense. The State was certainly entitled to cross-examine Ross as to his version of what he disclosed to his wife on the night of the shooting. *See Rooks v. State*, 250 Ark. 561, 466 S.W.2d 478 (1971) (holding that it was permissible for the State to test the credibility of appellant's trial testimony by cross-examination). We therefore affirm on this point.

As for Ross's argument that the trial court erred in ruling that his handing of the gun and knife to his wife was not protected by the Rule 504 privilege, we hold that Ross has failed to demonstrate any prejudice as a result of this. There was other overwhelming evidence of Ross's guilt in this case, including eyewitness testimony that Ross committed the murder and evidence that Ross admitted to both his wife and his friend Steve Long that he committed the murder. Because we cannot see how Ross was prejudiced by the trial court's decision on this matter, we will not reverse. *See Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000) (recognizing that no prejudice results where the evidence erroneously admitted was merely cumulative, and an appellate court will not reverse for harmless error in the admission of evidence).

For these reasons, we affirm.

GLADWIN and ROAF, JJ., agree.

Lyla BENEDICT *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 05-1373 242 S.W.3d 305

Court of Appeals of Arkansas
Opinion delivered November 1, 2006

[Rehearing denied December 6, 2006.]

Dale Casto, for appellant.

Diane Warren, attorney ad litem for the minor children.

No response from Arkansas Dep't of Human Servs.

WENDELL L. GRIFFEN, Judge. In an order filed May 25, 2005, the Washington County Circuit Court terminated Lyla Benedict's parental rights to her children: G.B. (born August 31, 1998), T.B. (born November 23, 2001), and D.B. (born March 26, 2004). Appellant appeals from the termination order, contending that the circuit court erred in finding that it was in the children's best interests to terminate her parental rights. She also argues that the circuit court erroneously allowed hearsay testimony.

We hold that the circuit court clearly erred in finding that termination of appellant's parental rights was in her children's best interests. Accordingly, we reverse the order terminating her parental rights.[1]

Standard of Revew

An order terminating parental rights must be based upon a finding by clear and convincing evidence that termination of a parent's rights is in the best interest of the children, considering the likelihood that the children will be adopted if the parent's rights are terminated and the potential harm caused by returning the children to the custody of the parent. Ark. Code Ann. § 9-27-341(b)(3)(A) (Supp. 2005). The court must also find one of the grounds outlined in § 9-27-341(b)(3)(B). In this case, the court based its termination order on subsections (b)(3)(B)(i) and (vii):[2]

> (i)(*a*) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.
>
> . . . .
>
> (vii)(*a*) That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity . . . to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody of the parent.
>
> (*b*) The department shall make reasonable accommodations in accordance with the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., to parents with disabilities in order to allow them meaningful access to reunification and family preservation services.

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[1] The circuit court also terminated the parental rights to G.B.'s father and D.B.'s putative father. Those dispositions are not relevant to this appeal. Accordingly, information about those two individuals are not recounted here.

[2] The circuit court did not cite the Arkansas Code provisions in its order, and appellant only cites subsection (b)(3)(B)(i) in her argument.

> (*c*) For the purposes of this subdivision (b)(3)(B)(vii), the ability or incapacity to remedy or rehabilitate includes, but is not limited to, mental illness, emotional illness, or mental deficiencies[.]

Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Causer v. Arkansas Dep't of Human Servs.*, 93 Ark. App. 483, 220 S.W.3d 270 (2005). It is not a challenge to find a case stating that "a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment." *Troxel v. Granville*, 530 U.S. 57, 77 (2000) (Souter, J., concurring) (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Parham v. J.R.*, 442 U.S. 584 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

However, courts are not to enforce parental rights to the detriment or destruction of the health and well-being of a child. *Causer v. Arkansas Dep't of Human Servs.*, *supra*. A heavy burden is placed upon a party seeking to terminate the parental relationship, and the facts warranting termination must be proven by clear and convincing evidence. *Id.* Clear and convincing evidence is that degree of proof which will produce in the fact finder a firm conviction regarding the allegation sought to be established. *Id.* This standard of proof reduces the possibility that a parent's rights are terminated based on "a few isolated instances of unusual conduct or idiosyncratic behavior" and "impresses the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate terminations will be ordered." *Santosky*, 455 U.S. at 764-65 (internal quotations omitted).

We do not reverse the circuit court's finding of clear and convincing evidence unless that finding is clearly erroneous. *Causer v. Arkansas Dep't of Human Servs.*, *supra*. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Yarbrough v. Arkansas Dep't of Human Servs.*, 96 Ark. App. 247, 240 S.W.3d 626 (2006). This, however, does not mean that the appellate court is to act as a "super factfinder," substituting its own judgment or second guessing the credibility determinations of the court; we only reverse in those cases where a definite mistake has occurred.

The law presumes that a fit parent acts in the best interests of his or her children. *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002). While there is still reason to believe there can be a positive, nurturing parent-child relationship, the law favors preservation, not severance, of natural familial bonds. *Santosky v. Kramer, supra.* When DHS and the courts become involved in a child's life, the purpose is not to sever the familial bonds but to assure that the child receives the guidance, care, and control necessary to serve his or her physical, emotional, and mental welfare. Ark. Code Ann. § 9-27-302(2) (Repl. 2002). Once a child has been adjudicated dependent-neglected, there is a presumption that DHS will provide services to preserve and strengthen the family unit. *See* Ark. Code Ann. § 9-27-327(a)(2) (Supp. 2005) (noting that a party recommending no reunification services has the burden of proving that such services should not be provided).

Termination of parental rights should only be the goal when "the return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare and it appears from the evidence that a return to the family home cannot be accomplished in a reasonable period of time as viewed from the juvenile's perspective." Ark. Code Ann. § 9-27-341(a)(3) (Supp. 2005). "Few consequences of judicial action are so grave as the severance of natural family ties. Even the convict committed to prison and thereby deprived of his physical liberty often retains the love and support of family members." *Santosky*, 455 U.S. at 788 (Rhenquist, J., dissenting). Once the decision is made to terminate a parent's rights, many resources that originally went to preserving the family unit go to making the separation of parent and child permanent. *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18 (1981) (Blackmun, J., concurring). For these reasons, termination proceedings are not meant to be taken lightly.

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.

Santosky, 455 U.S. at 753.

Background Facts

On March 25, 2004, the Fayetteville Police Department called the Arkansas Child Abuse Hotline and reported that appellant had called 911 but had hung up. The officers sent to appellant's home reported feces on the bathroom floor, urine on the kitchen floor, clothes piled throughout the house, and no food in the house. There were no burners on the stove to prepare food, and gas was leaking into the home. G.B. had several scars on his chest. The next day, Investigator Amber Collins of the Arkansas State Police and DHS Investigator Monika Isenhower visited the home, where they found appellant crying and unresponsive to questions. Appellant's home was untidy, with clothing piled on the furniture and beds. The one usable bed had no sheets or pillows. Dirty dishes were on the counter and in the sink. Appellant stated in an exasperated tone that she did not know how the house got so dirty and demanded to know how it happened. She also had trouble keeping track of the children in the home. Specifically, she was unaware of G.B.'s whereabouts until friends of appellant showed up with him after a trip to the park. DHS took custody of appellant's three children.

On March 30, 2004, appellant voluntarily admitted herself to Washington Regional Medical Center; she was later placed in inpatient treatment at Vista Health, with a preliminary diagnosis of postpartum psychotic depression. The circuit court found probable cause for DHS to exercise custody of the children on March 31, 2004, and the parties stipulated to an adjudication that the children were dependent-neglected on April 23, 2004. In the subsequent adjudication order, appellant was ordered to take her prescribed medications, follow all discharge recommendations of Vista Health, participate in counseling, obtain a drug screen, and follow the DHS case plan.

The record of the review hearing on August 18, 2004, shows that appellant moved into a new, three-bedroom home and that DHS family service worker Trisha Burks had no concerns about the appropriateness of the home. Appellant regularly attended visitations, only missing a couple after she started working a late shift. She had been taking all of her prescribed medications and attending weekly counseling sessions at Ozark Guidance Center (OGC). Appellant also attended parenting classes on her own, but DHS was concerned that the classes were not age appropriate. Burks testified about the favorable impression she received concerning an incident that occurred while she was doing a home

visit. During that visit, a neighbor came over and demanded that appellant let her use her van to pick up her husband from work. Appellant told the neighbor that she would be finished doing what she was doing and would then pick him up. The neighbor continued to push the issue, and appellant stood her ground. Burks testified that appellant showed assertiveness in that situation. Burks noted that appellant had done everything DHS had asked her to do and recommended a trial placement at home.

Christina Gupton, G.B. and T.B.'s foster mother, testified that the two children moved into her home on May 5, 2004. At that time, G.B. was withdrawn, distrusting, and spoke in two-word sentences. T.B. was very active and did not sleep through the night. Since that time, G.B. began speaking in full sentences, making eye contact, and initiating conversation. T.B. had calmed down and started sleeping through the night. The court also heard testimony from CASA volunteer Dick Fulton, who had visited Gupton's home and recommended that the children not be returned to appellant. He wanted more information about appellant's abilities to cope with the children.

The circuit court did not place the children back into the home, stating that it was not in their best interests. The court noted that the children had made great strides while out of the mother's care. It recognized that the two older children had special needs and opined that it was inappropriate to place the children in the home to determine whether appellant could care for the children. The court ordered appellant to attend twelve hours of age-appropriate parenting classes, transfer her SSI benefits to the children for support of the children, and follow the other orders of the court.

By the November 4, 2004, review hearing, some of the visitations were taking place at DHS offices, while others were at McDonald's. Burks testified that there was some concern during a visit at McDonald's when appellant was letting an aide take care of the children; however, the visits were going well. Appellant had been in compliance with court orders, including completing parenting classes and maintaining a stable household. Burks recommended that John Benedict, appellant's father, be allowed to supervise visitation. She also had no objection to the children visiting appellant at appellant's home as long as appellant's father was there to supervise.

John Benedict testified that he had observed two of the McDonald's visits and that appellant interacted with her children.

He stated that he was willing to supervise the visits. He testified that he visited appellant's home a couple of days before the hearing and that the home was clean and physically safe.

Appellant testified that she had taken her medications, followed Vista Health's discharge recommendations, participated in counseling, taken a drug screen, followed the case plan, took twelve hours of parenting classes, received a psychiatric evaluation and followed the recommendations, and called SSI to get the benefits transferred to the children. She opined that her decision-making abilities had improved.

Fulton testified that he visited appellant's home on October 10, 2004, and that her home was a mess, with many things stacked up. He noted that there was some evidence of dishes being washed but that there was a lot of dirt. He opined that the condition of the home posed a threat to a small child. However, Fulton thought it could be appropriate if appellant's father supervised the visits at home.

The court ordered that the children remain in DHS custody. It acknowledged that appellant was compliant with the court's orders; however, it did not believe that appellant reached a point where she could meet the basic needs of her three children. It also ordered an additional nine hours of parenting classes. In the subsequent order, the court allowed appellant's father to supervise visitations on Sunday afternoons and authorized additional visitation after school on Thursdays if those visits went well.

A permanency planning hearing was held on January 28, 2005. Fulton stated that he visited appellant's home the previous day and testified that appellant had made tremendous progress since his last visit. While he was concerned that there were a lot of things stacked in closets, he opined that appellant's home, if maintained, was appropriate for children. He was unsure if appellant could maintain the progress.

Appellant testified that she had attended nine additional hours of parenting classes and had continued counseling. She believed that she could handle her children. On cross-examination, appellant admitted that she had not kept her house clean but that she had been trying to keep it up. She stated that the unsupervised visits had been going well.

Dale Gupton, G.B. and T.B.'s foster father, testified that when he first met G.B., G.B. was a loner, but that G.B. grew out of it. G.B. had been struggling with reading at school, but his

teachers had given positive comments about him. T.B. had not been exhibiting any unusual behaviors. He was receiving occupational and developmental therapy at the Richardson Center. Gupton stated that the visits with appellant had gone well, and he had not had any concerns about the children's behavior when they returned from the visits. Otis Robinson, D.B.'s foster father, testified that D.B. was adjusting to his home and bonding with his foster family. He stated that D.B. does not go to appellant willingly when he is taken to visits and that D.B. is happy to see him when he is picked up from visits.

The court also considered a letter from Joshua Newman, a therapist at OGC, dated January 27, 2005:

> In considering the progress of Lyla Benedict during the past seven months of counseling, there are several factors that I am looking at. Objectively, Ms. Benedict has kept her appointments with punctuality and has consistently verbalized an earnest love for her children. On several occasions she has reported the ways in which she is fulfilling the court's requirements and is following the instructions from the Department of Human Services.
>
> Many of the therapeutic goals developed on the day of her treatment plan have been met. Her acute symptoms are stabilized and she has increased her functioning level. Intellectual functioning appears to be stable, with some cognitive deficits. She has made mixed progress with some of her short-term goals, as evidenced by a limited ability to tie insights from different sessions together. She has shown willingness to process emotional and relational stressors in session, and has vocalized an interest in continuing counseling on a voluntary basis after her court requirements are over.
>
> Subjectively, I have felt a difficulty communicating with Lyla at times and have wondered how well she makes connections between past events and present choices. We have explored relationship issues and she appears to have some defensiveness about her son's fathers, while also recognizing some of the risky behavior that they have engaged in. Overall, she has become more open and more stable in mood, while making mixed progress on an interpersonal level.

At the end of the hearing, the court changed the goal of the case from reunification to adoption of the children and termination of appellant's parental rights. The court found that appellant

still lacked the ability to maintain a safe home and properly supervise her children. While the court acknowledged that appellant had made progress in obtaining short-term goals, it believed that appellant would be unable to achieve the long-term goals.

DHS and the attorney ad litem filed a joint petition for termination of appellant's parental rights on February 8, 2005, and the termination hearing was held on April 27, 2005. DHS moved to dismiss the termination petition; however, the ad litem wished to continue with the termination proceeding. The court denied the motion, but it noted that DHS recommended reunification as the goal at the permanency planning hearing and that it was not recommending termination of appellant's parental rights at that time.

Fulton testified that he continued to monitor visitation between appellant and the children since the permanency planning hearing. He noted that appellant's home had vacillated between being clean and having a lot of "stuff" everywhere. He did not observe any serious problems with the children, but he noted that G.C. tended to act out more when appellant was present. Fulton opined that G.C. simply wanted attention. He stated that he was recommending that appellant's parental rights be terminated, although that was not his recommendation at the permanency planning hearing. He stated that, with appellant only having the children eight hours during the week, he had not seen enough evidence during those periods to justify returning them to her. On cross-examination, Fulton stated that he did not think that G.C. wanting more attention from appellant was a serious problem. He also stated his concern about appellant having custody of the children for a trial period, opining that appellant would need a lot of support in her home to do it. Fulton stated in his recommendations that appellant had not demonstrated the emotional or physical stamina to be a single parent to three boys and that the children play as if they are with "Aunt Lyla" rather than with their mother.

Brian Manire, counselor at Jefferson Elementary, noted that G.B. attended Jefferson from August 18, 2003, until March 29, 2004. He referenced a letter he wrote dated April 22, 2004, wherein he recommended that G.B. repeat kindergarten. He noted that G.B.'s academic skills were slow to develop and that G.B. had experienced difficulty in the area of social development and work skills. Manire stated that, from the first week of kindergarten, G.B. was unable to attend to tasks and sit still. G.B. would

spit, flip off teachers and other children, and hit people. He called one of the adult aides "the b-word." Manire recounted several instances where G.B. would stick his hands down other student's pants and other instances where he would lick other student's ears. Manire stated that appellant always responded to any requests to come talk to school officials; however, he had concerns about appellant's ability to meet G.B.'s behavioral and academic needs.

Joshua Newman testified that he had been providing appellant with counseling for the previous two months. When he first started counseling her, appellant was going through an adjustment disorder, which Newman described as symptoms of an unstable mood and some disorientation. He also noted high levels of stress. Newman testified that appellant saw possible problems in interpersonal relationships. He noted that appellant would sometimes not answer the questions he asked and that she would have difficulty staying on track with the topic. Newman recalled the letter that he wrote to the court in January 2005. Regarding his statement about appellant's mixed progress with short-term goals, Newman stated that appellant was growing in her sense of stability; however, there were some areas in boundaries and relationships where he did not see appellant gain awareness of some of the problems she was having. He opined that her severe symptoms in March 2004 were triggered by a combination of things, including a physical illness that occurred surrounding birth complications and the stress of D.B.'s birth. Newman estimated appellant's GAF score to be 68.[3] Her initial score was 55. Newman believed that appellant had the necessary skills and abilities to function as an independent adult, but he did not know if she had the skills and abilities to be an effective parent.

On cross-examination, Newman noted that he did not continue with Vista Health's diagnosis of postpartum depression. He also no longer felt that appellant met the criteria for an adjustment disorder. Newman opined that appellant's ability to handle herself socially depended upon the situation, but that her behavior for the most part was stable and improving. He stated that

[3] Newman explained that the GAF, or global axis of functioning, is a scale from the DSM-IV. The scale ranges from 0 to 100, with 100 being excellent and a level at which few people function. As one goes down the scale, one will have a decreased ability to function on a daily level. Newman stated that a person in need of residential treatment would have a GAF of about 50.

appellant was at borderline intellectual functioning and that her level of functioning was the same as it was when he first met her.

Richard Back, a clinical psychologist, testified that he met appellant on three different occasions: once for an evaluation of her social security and twice for the present litigation. The first time he saw her, he performed a WAIS intelligence test, which yielded a verbal IQ of 71, a performance IQ of 84, and a full scale IQ of 75.[4] Back saw the results of an IQ test administered earlier that month at OGC, and the results were essentially the same as the one he administered two years prior. Back noted that his review of clinical literature indicated that a surprising number of borderline intelligent people who receive proper parenting training and counseling are capable of improving and providing appropriate parenting to their children. In other words, for people like appellant, Back stated that one should "give her training and then see what happens." He stated that it was "time to find out if she can do it or not — if she can be an appropriate parent."

Back stated that psychosis means "losing contact with reality and doing all sorts of bizarre and odd things." He said that it is important to look at why that person is psychotic, and that psychosis results for one of three reasons: schizophrenia, bipolar disorders, and major depression. Back opined that appellant's psychosis came from major depression. He stated that when he saw appellant, he saw no evidence of psychotic symptoms and no evidence of depression. He stated that it had been a year since appellant had an acute episode and that appellant had recovered from it. Back acknowledged that removing the children from foster care would be a disruption in their lives, but that the disruption would pay off if the natural parent can do the job. On cross-examination, Back acknowledged that he had never seen appellant with the children and that he could not form an opinion on her parenting without actually seeing her with the children. However, he reiterated his recommendation that the children be placed in the home for a trial period.

Nancy Webb testified that she began treating G.B. on September 17, 2004. She noted that G.B. was under control but a

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[4] Back explained that the verbal IQ tests a person's ability to utilize language, define words, understand spoken sentences, do arithmetic problems in his or her head, and understand the connection between similar words; whereas, the performance IQ has more to do with coordination.

little hyper and anxious when she first saw him. During the diagnostic interview, she learned that G.B. had been oppositional, aggressive, and depressed. While in counseling, they worked on some of the anxieties and stress reduction. Webb opined that, if appellant's parental rights were terminated, G.B. would be adoptable. However, she stated that she could not make a recommendation as to what is in G.B.'s best interest because she did not know appellant. Regardless of the result, however, Webb recommended that he needed to stay with mental health care, as he could easily slip back into oppositional, aggressive behavior.

Diane Krutcher, a case manager at the Richardson Center, testified that T.B. first entered the Richardson Center in August 2004. She stated that according to a developmental evaluation from the summer of 2004, T.B. had developmental delays and would require rehabilitation. She stated that she had seen problems in T.B.'s speech, problem-solving skills, and fine-motor skills. T.B. was also calmer and was able to ask for what he needed.[5] Krutcher noted that the change could have also been attributable to age; however, she attributed the changes to having a stable environment.

Christina Gupton stated that, after the permanency planning hearing, G.B. had some sleeplessness and regression issues; however, those problems worked themselves out. Gupton stated that some of the behaviors manifested after visits with appellant, although they usually did not happen immediately after the visit. She believed that G.B. anticipated visits with appellant and that his emotional condition was good. T.B.'s behavior had not changed since the previous meeting. Gupton stated that appellant is consistently at McDonald's to pick up the children for the visits, although recently she had been ten to fifteen minutes late. Occasionally, there would be behavior problems with G.B. during the visits, and one time, he wanted to come "home."[6]

Otis Robinson testified that, since the permanency planning hearing, D.B. had learned to walk. He noted that D.B. receives physical therapy, and there had been talk about speech therapy down the road. Robinson also noted that D.B. sings a lot, although no one knows what he is singing. Robinson noted that he had been

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[5] For example, rather than hitting someone and saying, "Read me this book," he would come up to a person and say, "Would you please read me this book?"

[6] We do not know whether "home" referred to the foster home or elsewhere.

in appellant's house and that the house is cluttered. He noted that D.B. would often be dirty when he picked D.B. up from the visits. He opined that the home would not be good for D.B. because D.B. could get lost under something while playing with his brothers. Robinson was also concerned because there were people at appellant's house that he did not know. He noted that D.B. had warmed up to appellant; however, he was still shy about the visits. D.B. had become more familiar with appellant, but he still looks forward to going back with Robinson when Robinson picks him up. On cross-examination, Robinson stated that he and his wife would try to adopt D.B. if appellant's parental rights were terminated.

Patricia Burks testified that she visited appellant's home once after the permanency planning hearing. When she saw the home, the condition was appropriate. There were no health or safety concerns, and while the house was cluttered, it looked better than it did originally. She testified that she had never seen the home when it was inappropriate or with any health or safety hazards. She noted that appellant was working two part-time jobs: one at Dollar General, where she worked twelve hours a week; and the other at the Arkansas Democrat-Gazette, where she worked one night a week for three hours. Burks recommended that the children be returned to appellant on a permanent basis and that, if that occurred, appellant's father would babysit whenever appellant had to work nights and that appellant would quit the night job if necessary. On cross-examination, Burks testified that on the occasion where she visited appellant's home, the children were well behaved.

Mark Owen, store manager at Dollar General, stated that he had no concerns about appellant's intellectual functioning ability. He stated that appellant is always punctual for work and always does her tasks. He stated that he had also met appellant's children and that appellant's interaction with them is appropriate. He noted one instance where one of the children was about to go to another aisle on their own, to which appellant demonstrated control of that child while holding one of the other children.

John Benedict testified that he had observed all of the supervised visits from the previous November to the termination hearing. He believed that appellant was appropriate with the children. Benedict recalled the FINS petition filed in 2001. He noted that he filed the petition because he was concerned about

appellant's safety and the effect of others being around G.C., who was the only child at that time. He stated that the petition was filed for appellant's safety and not because of her mental condition. Benedict noted that he owns appellant's home and that he thought it was appropriate for raising three children. He also stated that he had made provisions for providing housekeeping and day care services for appellant if she received custody of the children. On cross-examination, Benedict testified that, when he filed the FINS petition, he was concerned that appellant would lose her housing. He was also concerned about appellant being influenced by others and appellant not providing regular meals to G.C. Benedict stated that he has continued to be concerned but that he has tried to provide enough support for her and believed that appellant could care for the children long-term.

Appellant testified that she had been going to counseling and following her counselor's recommendations. She noted that she was taking Klonopin and Piroxican, an anti-inflammatory for her asthma, and stated that her medication helps with her stability and ability to cope. She stated that she had maintained a safe and clean home, although she does get behind on the laundry. She was willing to accept her father's offer to have someone help her with the house. Appellant testified that she was ready to take her children home and that, if she needed help, she knew where to get it.

On May 25, 2005, the circuit court entered an order terminating appellant's parental rights to her three children. It found that, despite reasonable efforts by DHS, appellant had not rehabilitated the conditions that caused the children to come into DHS care and that appellant had manifested an incapacity to meet the needs of the children. After noting the circumstances under which the children came into DHS care and recounting the testimony at the termination hearing, the circuit court concluded that appellant had not shown that she could put into daily practice what she learned from her parenting classes and from her counseling; that she could not make proper choices in dealing with interpersonal relationships, social skills, and parenting skills to keep the children safe; and that she continued to struggle financially. The court also found all three children to be highly adoptable.

Discussion

Unfortunately, appellant's brief is unclear as to her specific arguments. Nowhere in her brief does appellant discuss the specific

grounds under subsection (b)(3)(B) that must be proven in order to terminate an appellant's parental rights. She cites subsection (b)(3)(B)(i), but does not explain how the circuit court erred in finding that despite a meaningful effort by DHS to rehabilitate the home and correct the conditions which caused removal, those conditions had not been remedied. She completely fails to address the circuit court's ruling that appellant was incapable of remedying the conditions that caused removal of the children from her home. Further, in her main brief, appellant only states regarding the statutory bases for termination: "The ad-litem failed to prove by a clear and convincing standard that all three of the children were adoptable and the potential harm of the health and safety of the three children by continuing contact with their mother." No specific argument is made in her main brief regarding the factors outlined in subsection (b)(3)(B); therefore, we consider any argument pertaining to those factors abandoned on appeal.[7] *See Marshall v. Madison County*, 81 Ark. App. 57, 98 S.W.3d 452 (2003). Even if appellant's citation to subsection (b)(3)(B)(i) constituted discussion of the subject sufficient for this court to rule upon it, appellant failed to address the court's finding that she was incapable of remedying the conditions that caused removal. Appellant's failure to address that ruling makes it unnecessary to consider the grounds under (b)(3)(B). *See Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001) (holding that error in the circuit court's finding that termination was warranted by the mother's failure to support the children was harmless in light of the record supporting the finding that she failed to remedy the conditions that caused the children to be removed from the home). Therefore, the only preserved argument regarding the circuit court's decision to

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[7] In her reply brief, appellant states:

> The plain language of the statute provides that the court must find by clear and convincing evidence that termination is in the child's best interest, and that despite meaningful efforts by DHS to rehabilitate the home and correct the conditions which caused removal, the conditions have not been remedied. In this case, neither the mother was proven unfit or was it proven that it in [sic] was in the children's best interests to terminate the parental rights. In fact overwhelmingly the evidence showed the mother had remedied the conditions which caused removal.

Appellant's Reply Brief at Arg. 2-3. This is the first place on appeal that appellant has argued that she had remedied the conditions which caused removal. This court does not address arguments made for the first time in a reply brief. *Ayala v. State*, 365 Ark. 192, 226 S.W.3d 766 (2006); *Maddox v. City of Ft. Smith*, 346 Ark. 209, 56 S.W.3d 375 (2001).

terminate appellant's parental rights is whether that decision was in the best interests of the children.[8]

Nevertheless, we reverse the order terminating appellant's parental rights. An overwhelming majority of the termination cases that come before this court involve parents who could not sustain efforts to remedy those problems that caused DHS to be involved in their cases or parents who manifest extreme indifference to the health, safety, and welfare of their children until the termination of their rights becomes imminent. Appellant does not fit either category. The evidence shows that she was having a psychotic episode when DHS took the children into their custody. Yet, the record shows that since that time, appellant has made consistent efforts to improve her parenting skills and get to a point where she can raise her children despite her mental deficiencies.

The Arkansas Code instructs that when considering the best interests of the children, the circuit court shall consider the likelihood that the children will be adopted and the potential harm that may arise from returning the children into the parent's custody. *See* Ark. Code Ann. § 9-27-341(b)(3)(A). The circuit court heard testimony that two of the three children were adoptable.[9] However, both DHS and Back recommended that the court place the children in appellant's home before making conclusions about appellant's parenting ability. Fulton was the only person at the termination hearing who explicitly recommended that appellant's rights be terminated; however, he based his opinion on simply not seeing enough evidence to justify returning the children to appellant's custody. Meanwhile, appellant's mental health-care providers testified that appellant was overcoming her mental deficiencies to the point where she deserved a chance to be a parent to her children. Back opined that appellant needed to at least be given a chance to demonstrate her parenting abilities

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[8] We can reverse the termination of appellant's parental rights without addressing the grounds under subsection (b)(3)(B). In *Conn v. Arkansas Department of Human Services*, 79 Ark. App. 195, 85 S.W.3d 558 (2002), the circuit court terminated the appellants' parental rights solely based on the ground that their parental rights had been terminated to other children, a ground for termination under subsection (b)(3)(B)(ix)(*a*)(*4*). This court reversed because the circuit court failed to consider the child's best interest, as required by subsection (b)(3)(A).

[9] Webb testified that G.B. was adoptable, and Robinson testified that, if appellant's parental rights were terminated, he and his wife would like to adopt D.B. No testimony was heard regarding whether T.B. was adoptable.

before the circuit court reached a decision regarding her parental rights. Finally, appellant made sincere efforts to comply with every order of the court. The only evidence of appellant's failure to comply with the court's orders was the evidence that appellant would sometimes neglect her housekeeping duties. However, there was no evidence that the condition of her home reached the dangerous level that warranted DHS intervention in March 2004.

The ad litem relies on several cases to support her argument that the circuit court's ruling should be affirmed; however, none of them are persuasive. First, she cites *Crawford v. Arkansas Department of Human Services*, 330 Ark. 152, 951 S.W.2d 310 (1997), and *Malone v. Arkansas Department of Human Services*, 71 Ark. App. 441, 30 S.W.3d 758 (2000), for the proposition that a court can properly consider improvement in the children while in foster care in its decision to terminate parental rights. Indeed, appellant's children showed improvement while in foster care. However, in both *Crawford* and *Malone*, the parents were incarcerated for significant periods of time and did little to comply with the orders of the court. That is not the case here. In addition, the circuit court never had an opportunity to see if appellant could maintain the progress made while the children were in foster care once they were returned to her care. If the ad litem's reliance on these cases is followed, then a parent's rights could be terminated simply because others can take better care of the children.

Next, the ad litem notes our decision in *S. v. Arkansas Department of Human Services*, 61 Ark. App. 235, 966 S.W.2d 919 (1998). Like appellant here, the mother in *S.* had an IQ in the mid-70s, and DHS was involved in the case due to environmental neglect. However, the parent in *S.* was resistant to the attempts to instruct her on meeting her children's needs. Appellant has been nothing but willing to learn.

The ad litem cites *Cassidy v. Arkansas Department of Human Services*, 76 Ark. App. 190, 61 S.W.3d 880 (2001), where the lower court found the parent to be unwilling and unable to care for her children. The court in that case also heard testimony that the parent's efforts to complete the case plan were insincere. Here, the evidence did not show that appellant was unable and unwilling; it only showed that she would need help in caring for the children — help that many others, including DHS, were willing to provide. Further, there is no evidence that appellant's efforts to comply with the case plan were insincere.

Finally, the ad litem cites *J.T. v. Arkansas Department of Human Services*, 329 Ark. 243, 947 S.W.2d 761 (1997). There, the child testified that she did not feel comfortable around the mother, who was bipolar and had a drinking problem. The mother candidly admitted at the termination hearing that she was not ready to care for her child. Finally, the therapist could only recommend gradual integration of the child into the parent's home. The present case is clearly distinguishable. The children were comfortable with appellant, and appellant testified that she was ready to take the children into her home and that if she needed help, she knew where to go. Further, while the lower court in *J.T.* was unwilling to allow for the gradual integration of the child into the parent's home, there had been two years between DHS filing the petition for emergency custody and the order terminating the parent's rights. Here, the length of time was only fourteen months. While fourteen months is more than the requisite time before a termination order can be entered, we do not interpret our statutes to mandate termination of parental rights as soon as the children have been out of their parent's custody for over twelve months.[10]

Clearly, the record shows that appellant was initially incapable of caring for her children and that her children were at risk. Throughout DHS's involvement, appellant showed marked progress in her ability to provide a stable home. We hold that on this record, where appellant has by all accounts cooperated with the orders of the court, benefitted from the services provided by DHS, and shown objective improvement to the benefit of the children, the circuit court clearly erred in terminating appellant's parental rights. Therefore, we reverse the order terminating appellant's parental rights and order the circuit court to continue reunification services.[11]

We conclude with a comment about the performance of the attorneys in this case. As previously stated, the brief filed on

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[10] The circuit court seemed to also rely on the prior FINS petition filed in the case; however, we note that G.B. was never removed from the home (contrary to the circuit court's assertions) and the FINS case was eventually closed.

[11] While we do not address appellant's hearsay arguments, we note that we only review errors that occur at the termination proceeding. *See Lewis v. Arkansas Dep't of Human Servs.*, 364 Ark. 243, 217 S.W.3d 788 (2005) (explaining in the context of a no-merit appeal that this court is precluded from reviewing adverse rulings from the adjudication, review, or permanency-planning hearings).

appellant's behalf has not been helpful. Much of the argument reads more like a legal commentary on the proceedings rather than an argument supporting reversal.

We are even more disappointed with the attorneys for DHS and for the children. "A termination of parental rights is both total and irrevocable. . . . [I]t leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development." *Lassiter*, 452 U.S. at 39 (Blackmun, J., dissenting) (footnote citation omitted); *see also* Ark. Code Ann. § 9-27-341(c)(1). Despite the seriousness of a termination proceeding, DHS's attorney and the attorney ad litem treated the proceedings casually. Both DHS and the ad litem filed a termination petition, then counsel for DHS stood on the sideline while the ad litem carried the ball, despite the fact that DHS maintained the position that termination of appellant's rights was not warranted in this case. Once termination proceedings were complete and appellant filed her appeal, counsel for DHS continued to distance themselves from the proceeding by opting not to file a brief in this case. This raises the impression that counsel for DHS did not view her role as advocate with the gravity that a termination of parental rights would seem to indicate.

Reversed and remanded.

VAUGHT and ROAF, JJ., agree.

[redacted]